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UNITED STATES COURTS.

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Southard Hoffman..Dist. Ct., Cal.
E. F. Bishop. Cir. and Dist. Ct., Col.
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J. A. Stratton.....Oregon.
E. T. Sprague..... .. ....Utah.
Ross G. O'Brien.....Washington.
J. W. Bruner..... ....Wyoming.

EDITORIAL CONTENTS.

Community Property 305, 357, 389, 445, 541
Husband's Separate Estate 193
Riparian Rights 225
True Method of Interpreting Civil Code (Concluded) .. 1, 49, 109, 145

Book Reviews—

Boone's Law of Mortgages 387
Pierce's Fraudulent Mortgages of Merchandise 388
Peeler's Law and Equity 386
Sedgwick and Wait on Trial of Title to Land 441
Taylor on Private Corporations 442

Notes 224

TABLE OF CASES REPORTED.

		PAGE
Ah Kee, *In re* (U. S. Cir. Ct.)	Cal.	19
Ah Moy, *In re* (U. S. Cir. Ct.)	Cal.	25, 75
Alexander v Municipal Court of Appeals	Cal.	299
Alt v Cal. Fig Syrup Co	Nev.	255
Ambrose v. Evans	Cal.	297
Andrews v Runyon	Cal.	81
Bailey v Supervisors	Cal.	185
Bangs v Dunn	Cal.	352
Bank of California v Dunn	Cal.	223
Barth v Jones	Col.	214
Beach v Hodgdon	Cal.	610
Bean v Gregg	Cal.	241
Bland v S. P. R. R. Co	Cal.	78
Board of Education v Franklin	Cal.	608
Brady v Page	Cal.	695
Brandenberg v. Miles	Col.	336
Brobach v Huff	Or.	339
Brooks v Bates	Cal.	463
Brown, *In re*	Wy.	495
Brown v Denver (U. S. Cir. Ct.)	Col.	210
Brown v Dexter	Cal.	275
Bruckman v Taussig	Col.	670
Bull v Ford	Cal.	527
Calkins v Steinbach	Cal.	433
Carrillo, *In re*	Cal.	104
Carter v Allen	Cal.	385
Chadwick v Earhart	Or.	601
Chaffey v Dexter	Cal.	354
Cheen Heong, *In re* (U. S. Cir. Ct.)	Cal.	53
Clark v Childs	Cal.	376
Clark v Smith	Cal.	90
Clawson's Case	Utah	416
Cogswell v Wilson	Or.	489
Colorado Central R. R. Co. v Martin	Col.	563
Colton v Colton (U. S. Cir. Ct.)	Cal.	11, 18
Comm'rs v Owen	Col.	157
Cook v Territory	Wy.	340
Cothrin v Taber	Cal.	295
Denver &c. R. R. v Riley	Col.	238
Denver &c. R. R. Co. v Conway	Col.	672
DeWalt v Hartzell	Col.	572
Donohoe v Mariposa L. & M. Co	Cal.	192
Doolan v Cunningham	Cal.	613
Dore v Dougherty	Cal.	420
Dorland v Bernal	Cal.	381
Dorland v Dorland	Cal.	611
Dunne v Dunne	Cal.	523
Dunphy v Potrero Co	Cal.	526
Dyer v Heydenfeldt	Cal.	585
Eastin v Bank of Stockton	Cal.	436
Ehrlich v Ewald	Cal.	380
Erenbirg v Peters	Cal.	426
Estudillo v Aguirre	Cal.	694
Evans v Bailey	Cal.	427
Finley, *Ex parte*	Cal.	192
First Nat. B'k of Helena v McAndrews	Mont.	478
Ganahl v Soher	Cal.	609
Garlick v Bowers	Cal.	501
Garvey, *In re*	Col.	247
Gillette v Denver (U. S. Cir. Ct.)	Col.	206
Gilman v Curtis	Cal.	429
Gladding v Insurance Ass'n	Cal.	106
Goldsmith v Smith (U. S. Cir. Ct.)	Or.	7
Grange v Gough	Cal.	604
Gray v Noon	Cal.	588
Hambleton v Duham (U. S. Cir. Ct.)	Cal.	589
Hardy v Sexton	Cal.	702
Harley v G. S. &c. I. W'ks	Cal.	696
Harney v McLeran	Cal.	218
Harris v Hillegass	Cal.	355
Harris v More	Cal.	696
Hart v Western U. T. Co	Cal.	37
Helbing, *Ex parte*	Cal.	687
Herefort v Cramer	Col.	229
Hickox v Elliott (U. S. Cir. Ct.)	Or.	397
Hill v Wall	Cal.	501
Hobart v Tillson	Cal.	629
Hobbs v Amador & S. C. Co	Cal.	523
Hoffman v Bosch	Nev.	36
Hogan v Black	Cal.	290
Home &c. Loan Ass. v Wilkins	Cal.	108

PAGE
Hooper v Powers.....Cal... 525
Hopper, Estate of.....Cal... 368
Hughes v Brewer.....Cal... 450
Iron Silver Min. Co. v Reynolds (U S. Cir. Ct.).....Col... 449
Irving v Cunningham.....Cal.. 136
Irwin v Wood.....Col... 212
Irwin v Strait.....Nev.. 582
James v Leport.....Nev.. 584
Jessen v Sweigert.....Cal... 586
Johnston v Hancock.....Cal... 418
Kelleher v Kenney.....Cal... 432
Kew Ock, *In re* (U. S. Cir. Ct.).....Cal... 29
Kimple v Superior Court.....Cal... 509
Lake v Lake.....Nev.. 159
Lake County v Sulphur Bank &c. M. Co.....Cal... 186
Laswell, *In re*.....Cal... 220
Le Breton v Superior Court...Cal... 142
Lehn v San Francisco.....Cal... 353
Lewis v S. P. C. R. R. Co....Cal... 615
Livingston v State.....Nev.. 31
Look Tin Sing, *In re* (U. S. Cir. Ct.).....Cal. 71, 363
Lukes v Logan.....Cal... 218
Lundy v Central P. R. R. Co..Cal... 613
Lux v Haggin.....Cal...206, 275
Lyons v Cunningham.....Cal... 294
Mackey v Fullerton.....Col... 569
Madsen v Kenner.....Utah.. 415
Mansfield v Stern.....Cal... 141
Marshall v Levy.....Cal... 698
Marshall v Livermore S. W. Co.....Cal... 631
Martin v Hill.....Cal... 430
McCloskey v San Francisco...Cal... 419
McCloskey v Sweeney.....Cal... 290
McCormick v Fitzpatrick.....Cal... 614
McFadden v Robinson (U. S. Cir. Ct.).....Cal... 201
McKay v Riley.....Cal... 47
McNeil v First Congregational Soc.....Cal.. 421
Merced County v Regents.....Cal... 186
Merrifield, Estate of.....Cal... 526
Miliken v Houghton.....Cal.. 221
Muller v Jewett.....Cal... 638
Murphy v Helmrich.....Cal... 301
Murphy v Hobbs.....Col... 653
Necklin v Nelson.....Or.... 682
Nicoll v Nicoll.....Cal... 219
Oakland Bank of Savings v Applegarth.....Cal... 605
Odd Fellows' Sav. B'k v Deuprey.....Cal... 533
Oregonian R'y Co. v Oregon R R. & N. Co. (U. S. Cir. Ct.)Or.... 548
O'Rorke v U. P. R'y Co. (U. S. Cir. Ct.).....Col... 203
Owen v McCormick.....Mont.. 479
Paige v Rocky Ford C. & I. Co.Cal... 522
Parker v Bernal.....Cal... 428
Parkhurst v Hosford (U. S. Cir. Ct.).....Or.... 311
Pellier v Gillespie.....Cal... 500
Peltret v Frank.....Cal... 221
People v Abbott.....Cal.. 132
People v Carlton.....Cal... 108
People v Cunningham.....Cal... 506
People v Gold Run D. & M. Co.....Cal...511, 521
People v Hagar.....Cal... 287
People v Hicks.....Cal... 420
People v Jobs.....Col...236, 561
People v Jordan.....Cal....84, 138
People v Lyle.....Cal... 349
People v Oiler.....Cal... 383
People v Osborne.....Cal... 457
People v Righetti.....Cal...380, 606
People v Samuels.....Cal... 382
People v Schenick.....Cal... 77
People v Soto.....Cal... 46
People v Villarino.....Cal... 693
People v Wong Chow.....Cal.. 131
People *ex rel.* v Larue.....Cal... 697
People *ex rel.* Barnes v District Court.....Col... 216
People *ex rel.* Glover v Becker.Cal... 303
People *ex rel.* Hoy v Alvord...Cal... 78
Pereira v C. P. R. R. Co.....Cal... 372
Poire v Rocky Mt. T. Co.....Col... 557
Rathgeb v Tiscornia.....Cal... 375
Reclamation District v Goldman.....Cal... 97
Reclamation District v Hagar Cal.....283, 288, 289
Reclamation District v Martin.Cal... 289
Reitteman v Brandenburg.....Col... 246
Reynolds v Robertson.....Cal... 609
Rickards v Hutchinson.....Nev.. 35
Roller v S. S. R. R. Co.....Cal... 691
Salisbury v Shirley.....Cal... 688
Samuels v Younger.....Cal... 614
Sanders v Barlow (U. S. Cir. Ct.).....Col... 227
San Francisco v Mackey (U. S. Cir. Ct.).....Cal... 407
Savings & L. Soc. v Durkin...Cal... 534
Saxonia Min. &c. Co. v Cook.Cal... 453
Schroeder v Grady.....Cal... 627
Schwegerle v Mundell.....Cal... 525
Schwenke v Union Depot &c. Co.....Col... 321
Scrivner v Oakland Gas Co. (U. S. Cir. Ct.).....Cal... 197
Sharon v Hill (U. S. Cir. Ct.).Cal... 199
Sharp v Miller.....Cal... 384
Simpson v Williams.....Nev.. 580
Small v Bischelberger.....Col... 558
Smith v Fairchild.....Col... 211
Southern P. R. R. Co. v Dull (U. S. Cir. Ct.).....Cal... 639

PAGE
Speigelberg v Hersch.....N. M. 129
Sperry v Ins. Co. of N. A. (U. S. Cir. Ct.).....Col... 650
State v Angelo.....Nev.. 482
State v Drake.....Or.... 574
State *ex rel.* Esmeralda Co. v. Third Dist. Ct.....Nev.. 597
State *ex rel.* Perry v Comm'rs..Nev.. 121
Stebbins v Savage.....Mont. 477
Stein v Howard.....Cal... 43
Stepy v Stark.....Col... 663
Stone v O'Brien.....Col... 243
Stout v Hastings.....Cal... 588
Strait v Williams.....Nev.. 480
Sutter-street R. R. v Baum...Cal... 291
Sweet v Ronk.....Col... 116
Sweetland v Shattuck.....Cal... 223
Swim v Bernhard.....Cal... 525
Territory v Adolphson.....Mont. 474
Territory v Hanna.....Mont..470, 471
Territory v Young.....Mont. 468
Tischler v Cal. Farmers' M. Ins. Co.....Cal... 535
Tolnniges v Drake.....Col... 253

PAGE
Tompkins v Clackamas Co....Or.... 598
Tompkins v Clay-street Hill R. R. Co.....Cal... 537
Treadwell, *In re*.....Cal... 608
Truett v Adams.....Cal... 633
Tuebner v California-street R. R. Co.....Cal... 529
Twomey v People's Ice Co....Cal... 700
United States v Barnhart (U. S. Cir. Ct.).....Or.... 590
United States v Kie.....Alaska 553
Vogt v Cope.....Cal... 222
Watt v Wright.....Cal... 622
Webb v Nickerson.....Or.... 485
Wheeler v Bolton.....Cal... 370
Whittier v Dietz.....Cal... 356
Wilcox v Jackson.....Col... 326
Williams v Santa Clara Min. Co.....Cal... 616
Winans v Sierra Lumber Co...Cal... 277
Wright v Dubois (U. S. Cir. Ct.).....Col... 153
Yik Hon v Spring V. W. W...Cal... 45

TABLE OF CASES CITED.

PAGE

Abbey v. Deyo, 44 N. Y., 348.....176, 177
Adams Express Co. v. Haynes, 42 Ill., 89..... 375
Ah Quan, *In re*, 21 Fed. Rep., 182...22, 62
Alexander v. Knox, 6 Sawy., 54..... 506
Allen v. Culver, 3 Denio, 290..... 689
Anaheim W. Co. v. Semi-Tropic W. Co., 12 Pac. C. L. J., 158..... 269
Angel v. Delmas, 60 Cal., 254..... 221
Argente v. City, 30 Cal., 464..... 164
Arm v. Shallenbarger, 42 Cal., 275.... 471
Armstrong v. Tuttle, 34 Mo..... 131
Ashurst v. Gibson, 57 Ala., 584..... 144
Atchison v. Peterson, 20 Wall., 507. .....260, 269, 271
Atkinson v. A. & P. R. R. Co., 63 Mo., 367..... 682
Att'y General v. Colney-Hatch Lun., Asy. L. R., 4 Ch. App., 146..... 522
Bailey v. Taaffe, 29 Cal., 422..... 220
Baird v. People, 83 Ill., 387..... 159
Baker v. Snyder, 58 Cal., 617..... 221
Bamdoller v. Patten, 5 Col., 46..... 452
Bank v. Reese, 2 Casey, 143..... 48
Bank Mort. Co.'s Appeal, 36 Pa. St., 172..... 686
Barker v. Knickerbocker Life Ins. Co., 24 Wis., 630..... 455
Barrow v. Mayor, 7 Pet., 247..... 594
Barstow v. Savage Min. Co., 1 W. C. R., 116..... 526
Bartlett v. W. U. T. Co., 62 Me., 218. 40
Basey v. Gallagher, 20 Wall., 682.... 269
Bates v. Ryberg, 40 Cal., 463..... 527
Bawcom v. State, 41 Tex., 191..... 484
Beene v. State, 22 Ark., 149..... 499
Belk v. Meagher, 104 U. S., 284..... 120
Bell v. Knowles, 45 Cal., 192..... 46
Berhrens v. K. P. R'y Co., 5 Col., 400 567
Berly v. Taylor, 5 Hill, 579..... 576
Berner v. Frazier, 8 Iowa, 77..... 168
Berrington's Case, 3 Salk., 362..... 166
Berry v. Hale, 1 How., 318..... 576
Bicknell v. Dorion, 16 Pick., 483..... 166
Bilansky v. State, 3 Minn., 427..... 345
Billings v. Everett, 52 Cal., 663..... 164
Bissell v. Henshaw, 1 Saw., 583..... 646
Black v. Black, 27 Ga., 40..... 144
Blain v. Bailey, 25 Ind., 165..... 324
Bland v. S. P. R. R. Co., 55 Cal., 570. 79
Blatner v. Davis, 32 Cal., 328..... 188
Bliss v. Lawrence, 58 N. Y., 442..... 352

PAGE

Blum v. Brownstone, 50 Cal., 273..... 89
Boggs v. Mining Co., 14 Cal., 271..... 154
Bollman, *Ex parte*, 4 Cranch, 75..... 250
Bond v. Spark, 12 Mod., 275..... 166
Bongard v. Core, 82 Ill., 19..... 176
Boston Rolling Mills v. Cambridge, 117 Mass., 396..... 518
Bowen v. Clark, 1 Biss., 128..... 335
Bowie v. Napier, 1 McCord, 1..... 333
Boyce v. Cal. Stage Co., 25 Cal., 460.. 46
Brace v. Yale, 10 Allen, 441..... 258
Bradley v. Fisher, 13 Wall., 333..... 499
Brady v. Reese, 51 Cal., 477..... 46
Brainard v. Peck, 34 Vt., 496..... 329
Bray v. State, 41 Tex., 561..... 484
Breen v. Richardson, 6 Col., 605..... 557
Breese v. U. S. T. Co., 48 N. Y., 132. 41
Brenham v. Story, 39 Cal., 179..... 424
Brewer v. Blougher, 14 Peb., 198..... 61
Brimmer v. Sohier, 1 Cush., 132..... 369
Bristol v. R. & S. R'y Co., 9 Barb. 158 457
Broder v. Natoma W. Co., 11 Otto, 277.....263, 271
Brooks v. People, 88 Ill., 327..... 251
Brown v. County Comm'rs, 21 Pa. St., 43..... 324
Brown v. Keifer, 71 N. Y., 610..... 686
Brown v. Swinefield, 44 Wis., 282.654, 655
Bruck v. Tucker, 32 Cal., 425..... 372
Buckingham v. Orr, 6 Col., 387..... 463
Buckley v. Wells, 33 N. Y., 520..... 177
Bull v. Harris, 18 B. Monroe, 195..... 336
Burke v. Badlam, 57 Cal., 594..... 409
Caddington v. Etheredge, 12 Gratt.... 131
Calderwood v. Brooks, 28 Cal., 153... 500
Calderwood v. Peyser, 42 Cal., 110... 534
Calvert v. Peebles, 80 N. C., 334..... 467
Calvin v. Buckle, 8 M. & W., 680.... 93
Cameron v. Marvin, 26 Kan., 612..... 329
Candee v. W. U. T. Co., 34 Wis., 477. 40
Capacia v. Phœnix Ins. Co., 28 Cal., 628..... 652
Carey v Brown, 92 U. S., 172..... 404
Carney v. Ariz. M. Co., 1 W. C. Rep., 851..... 118
Case v. Young, 3 Minn., 209..... 372
Cassacia v. Phœnix Ins. Co., 28 Cal., 620..... 536
Central P. R. R. Co. v. Dyer, 1 Saw., 641..... 643
Chapman v. Palmer, 77 N. Y., 51.515, 517
Chapman v. Toy Long, 4 Sawy., 33... 119

PAGE

Chicago v. Allcock, 86 Ill., 384..... 682
Chin Ah Sooey, *In re*, 3 W. C. Rep., 603..... 24
Chon Goo Pooi, *In re*, 1 W. C. Rep., 535..... 24
Christy v. Supervisors, 39 Cal., 11.... 128
City v. Goodrich, 3 Cal., 139..... 328
Clark v. Porter, 53 Cal., 409..... 586
Clarke v. Irwin, 5 Nev., 121..125, 126, 127
Clary v. Hoagland, 6 Cal., 685..... 98
Classon v. Staples, 42 Vt., 209..... 439
Cohen v. R. R. Co., 69 N. Y., 170.... 677
Cohn v. Mulford, 15 Cal., 50..... 501
Cole v. Supervisors, 11 Iowa, 552..... 243
Coleman v. Tennessee, 97 U. S., 514.. 594
Collinson v. Jackson, 8 Saw., 365..... 404
Colorado C. R. R. Co. v. Holmes, 5 Col., 197..... 569
Commercial Bank v. Cunningham, 35 Am. Dec., 325..... 686
Commissioners v. Babcock, 5 Or., 472. 685
Commonwealth v. Adcock, 8 Gratt., 661..... 251
Commonwealth v. Caldwell, 1 Dall, 150 514
Commonwealth v. Costley, 118 Mass., 1 468
Commissioners v. Crawford, 3 Wall., 396..... 506
Commonwealth v. Drew, 19 Pick., 182.....139, 140
Commonwealth v. King, 13 Met., 115. 514
Commonwealth v. March, 10 Pick., 57 578
Commonwealth v. Norfolk, 5 Mass., 435..... 600
Commonwealth v. Norton, 11 Allen, 267..... 140
Commonwealth v. Richards, 18 Pick., 434..... 384
Commonwealth v. Stevenson, 127 Mass., 449..... 141
Commonwealth v. Stone, 4 Metc., 43. 140
Condon v. South Side R. R., 27 Vt., 130..... 239
Conger v. Weaver, 6 Cal., 555..... 270
Conley v. Supervisors, 2 West Va., 416..... 324
Connecticut M. L. Ins. Co. v. Lathrop, 111 U. S., 612..... 317
Cook v. Mann, 6 Col., 21..... 329
Cook v. State, 24 N. J., 843..... 345
Coombs v. Hibberd, 43 Cal., 453..165, 534
Coon v. Rigdon, 4 Col., 283..... 176
Cooper v. Ash, 76 Ill.. 17..... 159
Cooper v. Brock, 41 Mich., 491..... 685
Coppinger v. Rice, 33 Cal., 408....423, 426
Corness v. Fessler, 39 Cal., 336..... 233
Courtright v. Bear River D. Co., 30 Cal., 57..... 524
Courtwright v. Berhin, 2 Mont., 404.. 471
Cornell v. Springs Co., 100 U. S., 61.. 551
Crandall v. Woods, 8 Cal., 136....260, 263
Crane v. Chandler, 5 Col., 21,..... 328
Crane v. Waymouth, 54 Cal., 476...92, 96
Crawford v. Schmidt, 47 Cal., 618.... 188

PAGE

Creighton v. Evans, 53 Cal., 55..... 263
Crites v. Muller, 3 West Coast Rep., 649..... 638
Crompton v. Platt, 105 Mass., 255.... 571
Crosby v. Dowd, 61 Cal., 557..503, 506, 632
Crosby v. Smith, 19 Wis., 472..... 323
Crosby v. Lightowler, L. R., 8 Eq. Cas., 729..... 517
Crow Dog, *In re*, 109 U. S., 556..... 591
Curtis v. Richards, 9 Cal., 38..... 549
Dalton v. Bowker, 8 Nev., 190..... 36
Darrenberger v. Haupt, 10 Nev., 46... 171
Davidson v. Dallas, 15 Cal., 75..... 98
Davidson v. New Orleans, 96 U. S., 97.....207, 284
Davis v. Randall, 26 Ill., 243..... 560
Davis v. Ransom, 18 Ill., ... 131
Davis v. Zimmerman, 40 Mich., 27.... 173
Dawson v. Wisner, 11 Iowa, 8..... 168
Dayton v. Walsh, 47 Wis., 117..... 176
Dayton v. Waren, 43 N. J. L. R., 659. 302
De Castro v. Clarke, 29 Cal., 11.....92, 96
Decker v. Trilling, 24 Wis., 610...213, 214
DeGody v. Gody, 39 Cal., 157..... 162
Deitz v. Central, 1 Col., 323..... 562
De La Guerra v. Packard, 17 Cal., 193 .....423, 426
Denver v. Hobart, 10 Nev., 28....126, 128
Derringer v. Plate, 29 Cal., 292..... 356
Desmond v. Dunn, 55 Cal., 242..... 105
Detroit & M. R. R. Co. v. San Steinburg, 17 Mich., 122..... 567
Dewhurst v. Coulthand, 3 Dallas, 409. 88
DeWolf v. Johnson, 10 Wheat., 443... 407
Dexter v. Hall, 15 Wall., 9..... 317
Dickson v. Moffat, 5 Col., 114..... 247
Diggins v. Reay, 54 Cal., 525..... 221
Dinges v. Becher, 9 B. Reg., 508..... 465
Doll v. Anderson, 27 Cal., 248..... 291
Donaldson v. Wood, 22 Wend., 309... 61
Downer v. Palmer, 51 Cal., 636..... 98
Doughtry v. Am. U. T. Co., 46 Am. Rep., 731..... 39
Dowell v. Griswold, 5 Saw., 39..... 589
Downer v. Smith, 24 Cal., 114....423, 426
Doyle v. Sturla, 38 Cal., 456..... 433
Dunne v. Dunne, 3 W. C. R., 426..... 523
Dutton v. Warschauer, 21 Cal., 609... 621
Dyson v. Baker, 54 Miss., 24..... 254
Earl v. Champion, 65 Pa. St., 195..... 173
Eaton v. Avery, 83 N. Y., 31..... 236
Edgett v. Hart, 13 Barb. (S. C.)..... 131
Edwards v. Kearney, 13 Neb., 532.... 577
Edwards v. State, 49 Ala., 336..... 484
Elliott v. Fitchburg R. R. Co., 10 Cush., 193..... 257
Ellis v. Tone, 58 Cal., 289..... 263
Ellison v. Jackson Water Co., 12 Cal., 542..... 323
Emeric v. Alvarado, 1 W. C. R., 708.. 695
English v. Johnson, 17 Cal., 108..... 668
Erst v. H. R. R. Co., 35 N. Y., 41.... 567
Estee, *In re*, 6 Saw., 459..... 404

PAGE

Evans v. Jacob, 59 Cal., 628..... 164
Faith v. State, 32 Tex., 374..... 484
Falkingburg v. Lucy, 35 Cal., 52..... 356
Farmers' Bank v. Mut. Ass. Soc., 4 Leigh., 84..... 689
Farmers' Co-operative Union v. Thresher, 62 Cal., 407..... 630
Farmers' Loan &c. Co. v. 11 Wis., 207, 15 Id., 424..... 329
Faust v. State, 8 Ohio St., 119..... 469
Fay v. Parker, 53 N. H., 342 ....657, 661
Feller v. Alden, 23 Wis., 303..... 176
Fernandez v. Sacramento City R. R. Co., 52 Cal., 45..... 83
Fero v. Buffalo R. R. Co., 22 N. Y., 209..... 46
Ferrea v. Knipe, 28 Cal., 340.....258, 263
Ferris v. N. A. F. Ins. Co., 1 Hill, 71. 536
Ferris v. Pitcher, 10 Cal., 465.....423, 426
Field v. Mayor, 6 N. Y., 179..... 403
Filkins v. O'Sullivan, 79 Ill., 524..... 254
Fielden v. Stephens, 2 Phil., 142..... 15
Findon v. Parker, 11 Mes. & Welsb, 679..... 406
Finnerty v. Fritz, 5 Cal., 179..... 561
Fisher v. Webster, 13 Cal., 58..... 501
Fitzgerald v. People, 37 N. Y., 413... 345
Fitzsimmons v. Fire Ins. Co., 18 Wis., 246..... 487
Fletcher v. Oliver, 25 Ark., 289..... 158
Ford v. Williams, 3 Kern., 577..... 131
Fox v. Moyer, 54 N. Y., 128..... 404
Fox v. Ohio, 5 How., 432..... 594
Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md., 100..... 107
Freeman v. Rawson, 5 Ohio, 1..... 131
French v. People, 77 Ill., 532..... 89
Fuller v. Parish, 3 Mich., 211..... 685
Gage v. Douchy, 34 N. Y., 295..... 176
Galvin, Estate of, 51 Cal., 215..... 612
Gamber v. Gamber, 18 Pa. St., 363... 173
Garrique v. Loescher, 3 Bosw., 578... 403
Garrish v. Brown, 51 Me., 262..... 515
Garvey, *In re*, 3 W. C. Rep., 1..... 249
Garvin v. Gaebe, 72 Ill., 448.....176, 182
Gaylords v. Kelshaw, 1 Wall., 81.... 405
Gelston v. Hoyt, 3 Wheat., 246..... 488
George v. Ransom, 15 Cal., 323..171, 172
Gilmore v. Lycoming F. I. Co., 55 Cal., 123..... 535
Glasscock v. Ashman, 52 Cal., 422.... 164
Glidden v. Taylor, 16 Ohio St., 509 .....178, 182
Glover's Case, 109 Mass., 340..... 251
Glover v. Alcott, 11 Mich., 482..... .....172, 173, 178
Gold Washing Co. v. Keyes, 96 U. S., 199.....203, 589
Golden Fleece Co. v. Cable Co., 12 Nev., 312..... 668
Golden Gate C. M. Co. v. Superior Court, 2 W. C. R., 736..... 524
Goodwin v. Hammond, 13 Cal., 168.. 528

PAGE

Goodwin v. Morris, 9 Or., 322..... 401
Gordon v. Gilfoil, 99 U. S., 169..... 200
Grant v. Moore, 29 Cal., 652..... 438
Green v. Comm'th, 1 Rob., 731..... 251
Gremwald v. Appell, 3 Col., 552..... 464
Griffin v. Kinsley, 75 Ill., 41..... 247
Grimes v. Norris, 6 Cal., 624.....423, 426
Grimm v. People, 14 Mich., 306..... 578
Guerin v. San Francisco, Cal., No. 6090..... 353
Gurnee v. Superior Court, 58 Cal., 88.. 624
Hackett v. Bailey, 86 Ill., 77..... 175
Hagar v. Reclamation District, 111 U. S., 708,.....98, 207, 284
Hagar v. Supervisors, 47 Cal., 222.... 285
Hale v. Trout, 35 Cal., 220..... 282
Hall v. Polack, 42 Cal., 218..... 534
Hall v. Russell, 4 Saw., 515..... 402
Hall v. Unger, 4 Saw., 680..... 317
Hamilton v. Booth, 55 Miss., 62...176, 182
Hamilton v. McPherson, 28 N. Y., 72. 280
Hamilton v. Smith, 21 Cal., 129..... 89
Hance v. Rumming, 2 E. D. Smith, 48. 549
Hannen v. Ewalt, 6 Harris, 11..... 689
Hanson v. Millett, 55 Me., 188..... 176
Hardy v. Harbin, 1 Saw., 203..... 319
Hare v. State, 4 How., 369..... 351
Harlan v. Peck, 33 Cal., 515..... 425
Harney v. Applegate, 57 Cal., 205.... 221
Harney v. Corcoran, 60 Cal., 318..... 219
Harriman v. State, 2 J. Green, 285.... 484
Harrison v. Harrison, 2 Grat., 1.....13, 14
Hartman v. Woehr, 18 N. J. Eq., 383. 495
Hawley v. Barker, 5 Col., 118..... 681
Heatherly v. Hadley, 2 Or., 275..... 549
Henderson v. Mayor, etc., 92 N. Y., 268..... 61
Hendrix v. Gore, 8 Or., 409..... 686
Henshaw v. Bissell, 18 Wall., 268..... 646
Hibbard v. W. U. T. Co., 33 Wis., 558. 41
Higgins, Estate of, 3 W. C. R., 358.... 179
Higgins v. Higgins, 46 Cal., 259..... 173
Higgins v. Holligan, 46 Ill., 173..... 247
Hill v. Finnigan, 54 Cal., 495..... 141
Hill v. King, 8 Cal., 338..... 270
Hill v. Newman, 5 Cal., 445..... 266
Hill v. Robbins, 22 Mich., 475..... 571
Hill v. Smith, 27 Cal., 276.....260, 263
Hillman v. Newington, 57 Cal., 62, 516, 520
Hills v. Houston, 4 Saw., 198..... 203
Hodapp v. Sharp, 40 Cal., 69..... 168
Hogan v. State, 40 Wis., 428..... 344
Hoff v. Baum, 21 Cal., 121..... 247
Hoffman v. Vallejo, 45 Cal., 566..... 406
Holcomb v. Savings Bank, 92 Pa. St., 342..... 176
Holcomb v. State, 8 Lea., 426..... 580
Holland v. Drake, 29 Ohio St., 441.... 335
Holmes v. Goodwin, 71 N. C., 309.... 168
Holmes v. Holmes, 1 Saw., 103..... 319
Holmes v. U. I. Co., Johns's Cas., 329.. 491
Homestead Ass'n v. Willard, 48 Cal., 614..... 263

PAGE

Hopkins v. Noyes, 4 Mont., 550..... 120
Hopwood v. Patterson, 2 Or., 49..... 550
Horner v. Stout, 5 Col., 166..... 328
Houghton's Appeal, 42 Cal., 58..... 88
Howard v. Alleghany V. R. R., 69 Pa. St., 489..... 239
Howard v. Carusi, 109 U. S., 733..... 13
Howard v. Daly, 61 N. Y., 362....455, 456
Howard v. Galloway, 60 Cal., 10..... 294
Hubbell v. Bissell, 2 Allen, 201..... 168
Hubener v. State, 3 Tex. Ct. App., 459 580
Huddleston v. State, 7 Baxter, 56..... 576
Hume v. Duff, 5 Col., 574..... 452
Hunsbrit v. Howland, 5 Den., 68..... 491
Hunt v. Bailey, 39 Mo., 257..... 247
Hunter v. Lester, 18 How. Pr., 347... 255
Hurd v. Brown, 37 Mich., 484..... 685
Hurd v. People, 25 Mich., 415..... 472
Hutchins v. Castle, 48 Cal., 153..... 501
Ill. C. R. R. Co. v. Cobb, 72 Ill., 148. 682
Ill. C. R. R. Co. v. Frankenberg, 54 Ill., 88..... 375
Irwin v. Phillips, 5 Cal., 140..260, 270, 271
Jackson v. Roby, 109 U. S., 440..... 118
Jaffe v. Skae, 48 Cal., 540..... 98
James v. Campbell, 104 U. S., 357.... 197
Jefferis v. Phil., etc., R. R. Co., 3 Houst., 447..... 46
Jessup v. San Francisco, Cal., No. 6,842..... 353
Johnson v. Lynch, 15 How. Pr., 199.. 220
Johnson v. S. F. Sav. Union, 11 Pac. C. L. J., 481..... 290
Johnson v. Towaley, 13 Wal., 86..... 649
Johnson v. Sail, 14 N. J. Eq., 459..... 183
Johnson v. Commonwealth, 24 Pa. St., 386..... 345
Jones v. Morey, 14 Am. Dec., 513.... 685
Jones v. Morse, 36 Cal., 205..... 501
Jungerman v. Bovee, 19 Cal., 364..... 164
Jutte v. Hughes, 67 N. Y., 268. 235
Kansas P. Ry. Co. v. Lundin, 3 Col., 94..... 661
Kansas P. Ry. Co. v. Miller, 2 Col., 442..... 661
Kelsey v. Abbott, 13 Cal., 609..... 188
Kennedy v. People, 39 N. Y., 245.... 345
Kenney v. H. & St. J. R. R. Co., 63 Mo., 99..... 682
Kent v. Whitney, 9 Allen, 65..... 168
Kentucky L. M. Ins. Co. v. Southard, 8 B. Mon., 634..... 536
Kerr v. Watts, 6 Wheat., 550..... 405
Ketchum v. Superior Court, 3 W. C. R., 488..... 416
Keyes v. Little York, etc., Co., 53 Cal., 724.....515, 519, 520
Keys v. Marin Co., 42 Cal., 252..... 510
Khun v. Graves, 9 Iowa, 305..... 685
Kiler v. Kimball, 10 Cal., 267..... 46
King v. Trafford, 1 Barn. & A., 874... 516
Kinney v. Williams, 1 Col., 191..... 661
Kirby v. Ingersol, Harr. Ch., 172..... 336

PAGE

Kirby v. Studebacker, 45 Ind., 45.... 93
Kitchell v. Berguin, 21 Ill., 45..... 576
Knapp v. Smith, 27 N. Y., 279..... 176
Knevals v. Hyde, 20 Alb. L. J., 370... 643
Knight v. Boughton, 11 C. L. & Fin., 548..... 14
Knight v. Knight, 3 Beav., 173..... 13
Laggett v. Ward, 23 Mo., 127..... 369
Lake v. Lake, 17 Nev., 336..... 166
Lake Shore Ry. Co. v. Roach, 80 N. Y., 339..... 61
Langhoff v. M. & P. du C. Ry. Co., 19 Wis., 515..... 567
Larab v. McConnel, 14 Minn., 513.... 480
Law v. Brinker, 6 Col. 555.....241, 557
Learned v. Tangeman, 3 W. C. Rep., 153..... 263
Leavenworth, etc., R. R. Co. v. U. S., 92 U. S., 741.....
Lebanon M. Co. v. Con. Rep. M. Co, 6 Col., 371..... 668
Le Clert v. Oullahan, 52 Cal., 254..... 164
Le Conte v. Berkeley, 57 Cal., 269.... 631
Leigh Co. v. Independent Ditch Co., 8 Cal., 323..... 263
Leong Yick Dew., *In re*, 2 W. C. Rep., 83.....22, 58, 59, 63
Leschi v. Territory, 1 Wash. Ter., 13.. 345
Lewis v. Chard, 24 Cal., 100..... 175
Lewis v. Lewis, 18 Cal., 659..... 172
Lilly v. Randall, 3 Col., 298..... 233
Lockhart v. Lichtenthaler, 10 Wright, 151..... 537
Logan v. Driscoll, 19 Cal., 623..... 524
Look Tin Sing, 4 W. C. Rep., 71..... 276
Lord v. Graham, 4 Wash. C. C., 232.. 335
Lowell v. Kier, 50 Cal., 647..... 36
Lowery v. Gridley 30 Conn., 458..... 123
Lyles v. State, 41 Tex., 172..... 577
Lynch v. Clark, 1 Sauf. Ch..... 366
Lynes v. State, 5 Port., 236..... 90
Lytle Creek W. Co. v. Perdew, 1 W. C. Rep., 866..... 263
Mack v. Burt, 5 Hun., 28..... 247
Mack v. Wetzlar, 39 Cal., 256..... 621
Maher v. People, 10 Mich., 226..... 472
Maher v. State, 3 Minn, 447..... 484
Main v. Tappener, 43 Cal., 206..... 627
Manchester, Earl of v. Vale, 1 Sannd., 24..... 92
Manderbach v. Mock, 29 Pa. St., 46.. .....176, 177
Manning v. Hayden, 5 Saw., 379..... 402
Mansfield v. Dorland, 2 Cal., 507..... 291
Marijou v. Pioche, 10 Cal., 545..... 164
Marrey, Estate of, 3 W. C. R., 49..... 527
Martin v. Aston, 60 Cal., 63 159
Martin v. Force, 3 Cal., 199..... 557
Martin v. Wade, 13 Pet., 410..... 518
Mason v. Hill, 5 B. & A., 1..... 258
Music v. Watts, 6 Cranch, 160..... 144
Mathewson v. Fitch, 22 Cal., 93..... 406
Maurer v. Mitchell, 53 Cal., 289..... 681

PAGE

Maynard v. MacCrellish, 57 Cal., 355. 294
McClintock v. Bryden, 5 Cal., 100.... 268
McClure v. Roman, 52 Pa. St., 460.... 686
McCormick v. Barnum, 10 Wend., 104. 637
McDonald v. Bear River Co., 13 Cal., 232..... 270
McGehan, *Ex parte*, 22 Ohio St., 444.. 251
McHose v. Fulmer, 73 Pa. St..... 367
McIntyre v. Knowlton, 6 Allen, 566... 176
McKay v. Campbell, 2 Saw., 118..... 366
McKinney v. Smith, 21 Cal., 381..... 270
McLean v. Lafayette Bk., 3 McLean.. 131
McMalone v. N. Y. & E. R. R., 20 N. Y., 463..... 238
McMillan v. Richards, 9 Cal., 365..... 621
McNeil v. Polk, 57 Cal., 323..... 425
McStay v. Friedman, 92 U. S., 723... 203
Medburg, *In re*, 48 Cal., 83..... 618
Menony v. McIntire, 82 N. C., 106.... 168
Merriam v. Clinch, 6 Blatch., 9..... 602
Meyer v. Kinzer, 12 Cal., 251..... 184
Mich. Cen. R. R. Co. v. Hale, 6 Mich., 244..... 375
Middleton v. Gould, 5 Cal., 190..... 89
Miller v. Barber, 66 N. Y., 558. 233, 234, 235
Miller v. Brass Co., 104 U. S., 350.... 197
Mills v. Hall, 9 Wend., 315..... 518
Miners' Ditch Co. v. Zullerbach, 37 Cal., 578..... 428
Moore v. Bresse, 30 Cal., 570..... 456
Moore v. People, 14 How., 17..... 595
Moore v. Robbins, 96 U. S., 535..... 650
Morey v. Lockwood, 8 Wal., 240..... 197
Morgan v. Burrows, 45 Wis., 211..... 372
Morgan v. State, 42 Tex., 224..... 484
Morris v. De Celis, 41 Cal., 331..... 534
Morse v. Hutchins, 102 Mas., 439..... 233
Moss v. Shear, 25 Cal., 46..... 188
Mulford v. Estudillo, 32 Cal., 131..... 98
Mulford v. Le France, 26 Cal., 88..... 637
Myer v. Beal, 5 Or., 130..... 401
Myer v. Overton, 4 E. D. Smith, 428.. 255
Nachtrieb v. Stoner, 1 Col., 423..... 661
Nashville & C. R. R. Co. v. Elliott, 1 Cold., 611..... 677
National B'k v. Taylor, 120 Mass., 124. 467
Natoma Water Co. v. Parker, 16 Cal., 84..... 165
Nelson v. Murray, 23 Cal., 338..... 549
Nevada Co., etc., Co. v. Kidd, 37 Cal., 314..... 270
Nichols v. Dunphy, 10 P. C. L. J., 193 534
Nickerson v. Cal. Raisin Co., 61 Cal., 268..... 698
Noe v. Card, 14 Cal., 607..... 176
O'Connor v. State, 9 Fla., 215..... 345
Ogden v. Astor, 4 Sandf., 311..... 491
O'Kane v. Daly, 63 Cal., 317..... 618
O'Kane v. Treat, 25 Ill., 557..... 158
Oregon Cen. Ry. Co. v. Wait., 3 Or., 91..... 550
Or. & W. T. & I. Co. v. Rathbun, 5 Saw., 32..... 552

PAGE

O'Reilly v. Kerns, 52 Pa. St., 214..... 239
Ortman v. Dixon, 13 Cal., 38..... 270
Osgood v. E. D. W. Co., 56 Cal., 571 .....263, 272
Ottawa v. La Salla Co., 12 Ill., 339 .....324, 326
Owen v. Frink, 24 Cal., 171..... 46
Page v. Wells, 37 Mich., 415..... 234
Paige v. O'Neil, 12 Cal., 496..... 501
Parker v. Duff, 47 Cal., 554..... 322
Parker v. Godin, 2 Strange, 814..... 166
Parker v. Jackson, 16 Barb., 33..... 214
Parsall v. Thayer, 39 Mich., 467..... 685
Passenger R. R. Co. v. Donahue, 10 Pa. St., 119..... 677
Patten v. Springfield, 99 Mass., 635... 168
Patterson v. Blanchard, 5 N. Y., 186.. 491
Patterson v. Winn, 11 Wheat., 380.... 323
Paty v. Smith, 50 Cal., 173..... 424
Peck v. Brummagin, 31 Cal., 447..... 173
Peck v. Vandeburg, 39 Cal., 11..... 173
People v. Alameda Co., 26 Cal., 248... 598
People v. Batchelor, 22 N. Y., 135.... 128
People v. Board of Education, 54 Cal., 377..... 598
People v. Booth, 32 N. Y., 397..... 518
People v. Bull, 46 N. Y., 59..... 128
People v. Burgess, 35 Cal., 115..... 694
People v. Bush, 40 Cal.; 345..... 598
People v. Canal Appraisers, 33 N. Y., 482..... 268
People v. Comm'rs of Grand Co., 6 Col., 202..... 236
People v. Congleton, 44 Cal., 93..... 693
People v. Cunningham, 1 Den., 524.... 518
People v. De la Guerra, 40 Cal., 311... 294
People v. Draper, 15 N. Y., 543..... 123
People v. Dunn, 59 Cal., 328..... 628
People v. Eastman, 25 Cal., 603..... 414
People v. Edwards, 9 Cal., 286..... 214
People v. Election Comm'rs, 54 Cal., 404..... 631
People v. Fair, 43 Cal., 137..... 382
People v. Fisher, 24 Wend., 129..... 127
People v. Gray, 61 Cal., 164..... 351
People v. Hagar, 52 Cal., 171.... 285, 286
People v. Haggin, 57 Cal.. 579.... 285, 286
People v. Haggin, 57 Cal., 387..... 98
People v. Harris, 29 Cal., 682..... 135
People v. Hartman, 62 Cal., 562..... 508
People v. Hastings, 34 Cal., 574..... 689
People v. Hodgdon, 55 Cal., 72..... 133
People v. Hurlbut, 24 Mich, 98..... 123
People v. Jacobs, 29 Cal., 579..... 693
People v. Jim Tie, 32 Cal., 60..... 694
People v. Lewis, 61 Cal., 366..... 693
People v. Lightner, 49 Cal., 228..... 693
People v. Love, 25 Cal., 520..... 214
People v. Mahoney, 55 Cal., 288..... 188
People v. Marsh, 6 Cal., 543..... 345
People v. McCauley, 45 Cal., 146..... 433
People v. McCreery, 41 Cal., 458..... 694
People v. McDonald, 39 Cal., 697..... 78

PAGE

People v. McKinney, 52 N. Y., 376... 1 8
People v. Oiler, 4 W. C. R., 383..... 509
People v. Poggi, 19 Cal., 600..... 607
People v. Reinhart, 39 Cal., 449..... 78
People v. Restell, 3 Hill, 289..... 384
People v. Rucker, 5 Col., 455..... 459
People v. Sanchez, 24 Cal., 17..... 134
People v. S. F. Sav. Union, 31 Cal., 132. 689
People v. Senter, 28 Cal., 502.... 423, 426
People v. Sierra Butte Q. M. Co, 39 Cal., 514..... 188
People v. Sprague, 53 Cal., 494..... 607
People v. Stratton, 25 Cal., 242..... 518
People v. Supervisors, 28 Cal., 431.... 353
People v. Supervisors, 43 Barb., 234... 598
People v. Swenson, 49 Cal., 388..... 694
People v. Taylor, 59 Cal., 640..... 133
People v. Turner, 39 Cal., 370..... 694
People v. Vermilyea, 7 Cow., 383..... 579
People v. Whartenby, 38 Cal., 466.... 414
People v. Whipple, 47 Cal. 591..... 188
People v. Williams, 24 Cal., 31..... 350
People v. Wood, 12 P. C. L. J., 146.. 508
People, *Ex rel.* Bernard v. Cheeseman, 2 W. C. R., 870. 321
People, *Ex rel.* Coulter v. New York C. P., 19 Wend., 118..... 168
People, *Ex rel.* v. Curley, 5 Col., 412.. 562
People, *Ex rel.* Elliott v. Greene, 2 W. C. R., 311, 521..... 499
People, *Ex rel.* v. Hopkins, 35 N. Y., 74 602
People, *Ex rel.* Parkinson v. Bissell, 49 Cal., 407..... 462
Phelps v. Selleck, 8 B. Reg., 390..... 466
Phila. & R. R. R. Co. v. Boyer, 97 Pa. St., 100..... 537
Phillips v. Welch, 12 Nev., 158..... 482
Phipps v. Harlan, 53 Cal., 87..... 164
Picquet v. Swan, 4 Mason, 455..... 177
Piper v. Centinelli L. Co., 56 Cal., 173. 87
Pittsburg & C. R. R. Co. v. McClurg, 56 Pa. St., 297..... 569
Pope v. Kinman, 54 Cal., 3..... 263
Porter v. Muller, 53 Cal., 680..... 632
Portland v. Denny, 5 Or., 160..... 603
Post v. Kearney, 2 Com., 394..... 689
Post v. Kimborly, 9 John., 470..... 491
Potter v. Fremont, 47 Cal., 465..... 524
Price v. Harris, 25 Eng. C L., 160.... 168
Quantoch v. England, 5 Burr, 2628... 401
Quidorb v. Persgeaux, 18 N. J. Eq., 480..... 183
Quinn v. Hardenburg, 54 N. Y., 87.. 369
Railroad Co., *Ex parte*, 95 U. S., 226.. 402
Railroad Co. v. Pratt, 22 Wal., 131... 374
Railroad Co. v. Smith, 9 Wal., 95....
Ramsdell v. Fuller, 28 Cal., 37..... 173
Reclamation Dist. v. Evans, 61 Cal., 104..... 99
Reclamation District v. Goldman, 4 W. C. Rep., 97..... 284
Reclamation District v. Hagar, 6 Pac. C. L. J., 499..... 285

PAGE

Reclamation District v. Howell, (unreported)..... 853
Reed v. Allison, 61 Cal., 461..... 618
Reed v. Pelletiur, 28 Mo., 173..... 131
Reg. v. Evans, 8 Cox's C. C., 257.... 140
Reis, *Ex parte*, 12 Pac. C. L. J., 222.. 304
Rettis v. Johnson, 56 Ind., 139..... 518
Rex v. Chapmad, 8 C. & P., 559..... 473
Rex v. Holden, 8 C. & P., 609..... 473
Rex v. Mawbey, 6 T. R., 640..... 166
Rex v. Orchard, 8 C. & P., 47..... 473
Rex v. Storner, 1 C. & P., 650..... 473
Reynolds v. Brumagin, 54 Cal., 254... 219
Reynolds v. Caldwell, 51 Pa. St., 298.. 239
Rice v. Coolidge, 121 Mass., 393..... 235
Rich v. State, 1 Tex. Ct. App., 206... 579
Richardson v. Kier, 34 Cal., 63..... 524
Richardson v. McNulty, 24 Cal., 339. 668
Richardson v. Rowland, 40 Conn., 570..... 406
Ricketson v. Richardson, 26 Cal., 155.. 164
Rittenhouse v. Independent Tel., 1 Daly, 474..... 39
Robecke v. Anderson, 26 Wis., 311... 244
Roberts v. Graham, 6 Wall., 578.... 235
Roberts v. Howard, 14 E. C. L. R., 648..... 247
Robinson v. Black Diamond C. M. Co., 57 Cal., 412..... 524
Robinson v. Elliott, 22 Wall., 513..130, 131
Robinson v. W. P. R. Co., 47 Cal., 46..... 45
Roby v. Jackson, 109 U. S., 440..... 118
Rodgers v. Hatch, 44 Cal., 280..... 624
Romie v. Casanova, 91 U. S., 379.... 203
Rosenstock v. Swift, 11 Nev., 128, 126, 127
Rounds v. D. L. & W. R. Co., 64 N. Y., 129..... 677
Rowland v. Coyne, 55 Cal., 1..... 698
Rupley, v. Welch, 23 Cal., 455..... 270
Rush v. Sought, 54 Pa. St., 442..176, 181
Russell v. Conway, 14 Cal., 603..... 291
Russell v. Dodge, 93 U. S., 461..... 197
Russell v. Long, 52 Iowa, 250..... 176
Rutland v. County Comm'rs, 20 Pick, 71..... 560
Ryan v. C. P. R. R. Co., 5 Saw., 262, 99 U. S., 383.....643, 644
Ryder v. Cohn, 37 Cal., 87.....422, 426
Sacramento v. C. P. R. R. Co., 61 Cal., 250..... 518
Sacramento v. C. P. R. R. Co., 10 Pac. C. L. J., 315..... 191
Sacramento v. Harlan, 24 Cal., 334... 89
Sale v. Moore, 1 Sim., 540..... 17
Salino Co. v. Petitioners, 45 Mo., 55.. 598
Salmon v. Wilson, 41 Cal., 595..... 173
San Francisco v. Flood, 1 W. C. R., 567..... 410
San Francisco v. Foy, 11 Pa. C. L. J., 393..... 410
San Francisco v. Phelan, 61 Cal., 617. 689
San Jose v. Uridias, 37 Cal., 339..... 634

PAGE

Savings & L. Soc. v. Bateman, 10 P. C. L. J., 795 535
Sawyer v. Merrill, 10 Pick, 18 579
Scales v. Parrie, 13 Neb., 521 456
Schmultz v. Garey, 49 Tex., 60 184
Schulenberg v. Harriman, 21 Wall., 60
Schuylkill Nav. Co. v. Richards, 57 Pa. St., 142 515
Schwartz, *In re*, 14 Blatchf., 196 466
Scovill v. Barney, 4 Or., 291 319
Searles v. Thompson, 18 Minn., 316 .. 480
Seavern v. Gerke, 3 Saw., 363 423
Sedgwick v. Stanton, 14 N. Y., 291 .. 406
Seeds v. Kahler, 76 Pa. St., 267 173
Sellick v. Hale, 47 Conn., 260 515
Senter v. DeBernal, 38 Cal., 637 617
Seymour v. Delancey, 6 John. Ch., 222 314
Sharp v. Baird, 43 Cal., 577 627
Shaw v. Hoffman, 21 Mich., 151 235
Shepley v. Cowan, 91 U. S., 340 650
Sherman v. Buick, 93 U. S., 209 322
Shirras v. Craig, 7 Cranch, 34 686
Shong Toon *In re*, 3 W. C. Rep., 597 .22, 63
Siker v. Chicago &c. Ry., 21 Wis., 375 323
Silvur's Ex'rs v. Porter, 74 Pa. St., 451 176
Simmons v. Cal. Powder Co., 2 W. C. Rep., 517 230
Skillman v. Skillman, 13 N. Y. Ch. R., 409 175
Slomer v. People, 25 Ill., 70 659
Small v. Mott, 22 Wend, 405 406
Smelting Co. v. Kemp, 104 U. S., 636 ..... 118, 154
Smiley v. Frier, 104 Ill., 416 505
Smith, *Ex parte*, 2 Nev., 340 483
Smith v. Briggs, 3 Den., 73 238
Smith v. Davis, 30 Cal., 537 188
Smith v. Flournoy, 47 Ala., 360 506
Smith v. George, 52 Cal., 344 438
Smith v. Hall, 19 Cal., 86 35
Smith v. O'Hare, 43 Cal, 374 270
Smith v. Yule, 31 Cal., 180 425
Sneed v. Osborne, 25 Cal., 619 637
Sonoma Bank v. Hill, 59 Cal., 107 381
Soto v. Kroder, 19 Cal., 97 ..... 423, 426
Soule v. Dawes, 14 Cal., 247 164
Soule v. Ritter, 20 Cal., 522 164
South v. Cutter, 10 Wend., 590 600
Southern P. R. R. Co. v. Garcia, 1 W. C. R., 587 647
Southern P. R. R. Co., v. Orton, 6 Saw., 198 .....
Sparks v. Pico, 1 McAll., 497 401
Spring V. W. W. v. Bryant, 52 Cal., 138. 598
Spring V. W. W. v. San Francisco, 52 Cal., 111 631
Stanly v. Green, 12 Cal., 148 372
Stanton v. Embrey, 93 U. S. 548 200
State v. Anderson, 3 Nev., 256 483
State v. Bean, 36 N. H., 128 579

PAGE

State v. Dee, 14 Minn., 42 578
State v. Dumphey, 4 Minn., 438 578
State v. Johnson, 9 Nev., 178 483
State v. Johnson, 12 Nev., 121 384
State v. McGarry, 31 Wis., 500 549
State v. Owen, 72 N. C., 611 484
State v. Rigg, 10 Nev., 288 483
State v. Roberts, 40 Ind., 452 213
State v. Rollins, 2 N. H., 532 484
State v. Stanley, 64 Me., 157 141
State v. Upton, 1 Dev., 513 345
State v. Woodward, 9 N. J. L., 21 560
State *Ex rel.* Clifford v. McMullen, 46 Ind., 307 462
State *Ex rel.* v. Maynard, 14 Ill., 419 .. 563
State Bank v. Hastings, 15 Wisc., 78 .. 352
State Brooks v. Miner, 20 Mo 131
State Railroad Tax Cases, 92 U. S., 575 209
State Tax on Foreign Bonds Case, 15 Wal., 300 410
Staude v. Election Comm'rs, 10 P. C. L. J., 29 78
Stauss v. Commonwealth, 74 Pa. St., 458 578
Stearns v. Aguirre, 7 Cal., 447 385
Stiles v. White, 11 Met., 356 234
Stocking v. State, 7 Ind., 326 462
Stoddard v. Treadwell, 26 Cal., 294 .. 95
Stone v. Clarke, 1 Met., 378 637
Stone v. Crocker, 24 Pick, 81 662
Stopplekamp v. Mangeot, 42 Cal., 316. 246
Sullivan v. Portland, 94 U. S., 811 355
Summons v. State, 5 Ohio St., 325 384
Sutton v. State, 41 Tex., 515 484
Sweatland v. Ill., &c. T. Co., 27 Iowa, 433 41
Swinford v. Rogers, 23 Cal., 236 528
Tappan v. Gray, 9 Paige, 506 462
Tartar v. Spring C. W. &c. Co., 5 Cal., 397 270
Telegraph Co. v. Griswold, 37 Ohio St., 301 41
Territory v. Flowers, 2 Mont., 292 471
Territory v. McAndrews, 8 Mont., 158 469
Territory v. Stears, 2 Mont., 326 469
Terry v. Mulvaney, 8 Or., 520 577
Thalhimer, Brinkerhoff, 3 Cow., 643 .. 406
Thistleton, *Ex parte*, 52 Cal., 220 89
Thompson v. Ellsworth, 1 Barb. Ch., 627 617
Thompson v. Johnson, 60 Cal., 295 221
Thompson v. Morrow, 2 Cal., 99 418
Thorpe v. Rutland & B. R. R. Co., 27 Vt., 140 459
Tilton v. Larimer Co., Ag. Ass., 6 Col., 288 560
Trafton v. Nougues, 4 Saw., 179 .. 203, 589
Treadwell v. Semple, 28 Cal., 655 646
Trecothick v. Austin, 4 Mass., 44 405
Tripner, v. Abrahams, 47 P. St., 229 .. 173
Tripple v. Overacker, 4 Col., 405 .. 159, 237

PAGE

Turner v. Hitchcock, 20 Iowa, 314... 540
Twichell v. Commonwealth, 7 Wall., 325 594
Tyler v. W. U. T. Co., 68 Ill., 421; 74 Il., 170.....40, 42
Tyler v. W. U. T. Co., 60 Ill., 431... 375
United States v. Bassett, 2 Story, 404.. 602
United States v. Bridleman, 7 Saw., 243..... 590
United States v. Cruikshank, 92 U. S., 542..... 595
U. S. v. Freeman, 3 How., 564..... 61
United States v. Kirby, 7 Wall., 486.. 61
United States v. Marigold, 9 How., 565..... 594
United States v. Martin, 8 Saw., 473.. .....590, 593
United States v. More. 3 Cranch, 159.. 88
U. S. v. Osborne, 6 Saw., 406..... 366
United States v. Pirates, 5 Wheat., 197..... 593
United States v. Reese, 92 U. S.,217... 595
U. S. v. Robeson, 9 Pet., 371.. 238
U. S. Tel. Co. v. Gildersleeve, 29 Md., 232..... 41
Upstone v. Weir, 54 Cal., 124..... 282
Urton v. Price, 57 Cal., 272..... 539
Utter v. Chapman, 43 Cal., 283..... 282
Van Schaick v. Winne, 16 Barb., 90... 456
Van Wyck v. Knevals, 106 U. S., 360.....643, 650
Van Zandt v. Argentine M. Co., 2 McCrary, 159..... 666
Vassault v. Edwards, 43 Cal., 463.... 631
Veazie v. Dwinell, 50 Me., 479..... 515
Waggenheim v. Hook, 35 Cal., 216... 534
Walkers Case, 1 Leigh., 574..... 508
Wall, *Ex parte*, 107 U. S., 265.... ... 499
Wall v. Cameron, 6 Col., 275..... 661
Walsh v. Hutchings, 60 Cal., 228..... 221
Warner v. Hall, 1 Cal., 90..... 88
Warren v. McCarthy, 25 Ill., 95..... 672
Watkins v. Degener, 63 Cal., 500..... 698
Watson v. Cornell, 52 Cal., 91..... 164
Webster v. Hildreth, 33 Vt., 457... . 175
Wedel v. Herman, 59 Cal., 516. 173
Weise v. Bennet, 9 Pac. C. L. J., 626..... 294
Wellar v. People, 30 Mich., 23..... 473
Wells v. March, 80 N. Y., 350 335
Werdner v. Foster, 5 Barr., 1..... 689
Western U. T. Co., v. Blanchard, 45 Am. Rep., 486..... 40
Western U. T. Co. v. Buchanan, 35 Ind., 429..... 41
Western U. T. Co. v. Eyser, 2 Col., 141..... 661
Western U. T. Co. v. Reynolds, 77 Va., 173..... 39
Wilson v. Davis, 1 Mont., 98..... 477
Whalen v. Gloucester, 4 Hun., 24.... 587
Whedon v. Champlin, 59 Barb., 65... 176
Wheeler v. Bolton, 54 Cal., 302..... 371
Whelan v. Lynch, 60 N. Y., 474.... 222
White v. Lighthall, 1 Cal., 347..... 88
White v. Longmire, 11 Pac. C. L. J., 154..... 221
White v. Smith, 54 Iowa, 233..... 234
Whitney v. Allaire, 4 Den., 556..... 233
Whitney v. Durkin, 48 Cal., 462..... 501
Wick v. O'Neale, 2 Nev., 303..... 36
Wieman v. Anderson. 42 Pa. St., 317.. .....176, 177
Wilde v. Haycraft, 2 Duvall, 309..... 213
Williams v. Ingersoll, 89 N. Y., 508.. 403
Williams v. Lerch, 56 Cal., 334..... 501
Williams v. McGrade, 13 Minn., 51 .....172, 182
Williams v. Pritchard, 4 Term R., 2.. 324
Williams v. State, 4 Tex. Ct. App., 5.. 579
Wilson v. Castro, 31 Cal., 420....423, 425
Wilson v. Loomis, 55 Ill., 355....175, 182
Wilson v. Supervisors, 47 Cal., 91.... 158
Wilson v. York & M. L. R. R., G. & J., 73 238
Winchester v. Forster, 3 Cush., 369... 369
Winter v. Walker, 37 Pa. St., 156.... 184
Winton v. Spring, 18 Cal., 452.... .. 216
Wiscart v. D'Auchy, 3 Dallas, 321.... 88
Witherell v. Wilberg, 4 Saw., 233.... 552
Wittenbrock v. Bellmer, 62 Cal., 558.. 618
Wixon v. Bear River Co., 24 Cal., 367..... 263
Wolf v. W. U. T. Co., 62 Pa. St., 83.. 41
Wolff v. Archibald, 14 F. R., 369.... 589
Wood v. Election Comm'rs, 58 Cal., 561..... 105
Wood v. Goodfellow, 43 Cal., 185.... 625
Wood v. Hustis, 17 Wis., 429..... 323
Woodward v. Horst, 10 Iowa, 120.... 167
Woodyear v. Schaeffer, 57 Md., 9..... 517
Worcester v. Georgia, 6 Pet., 515.... 366
Wortman v. Price, 47 Ill., 23..... 182
Wright v. Howard, 1 Sim. & S., 190.. 258
Wright v. Moore, 38 Ala., 593..... 518
Wright v. Parks, 10 Iowa, 342..... 403
Wright v. Roach, 57 Me., 600..... 234
Wright v. Semple, 32 Cal., 659.... .. 646
Wright v. Tibbitts, 1 Otto, 252, 6 Id., 416..... 406
Wright v. Ware, 50 Ala., 559..... 505
Yolo Co. v. Sacramento, 36 Cal., 193.. 518
Young v. Pearson, 1 Cal., 448..... 95
Zollars &c. Co. v. Evans, 2 McCrary, 39. 666

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THE TRUE METHOD OF INTERPRETING THE CIVIL CODE.

(*Continued.*)

It will be proper to add a few illustrations to those given at the close of the preceding article. The common law rule is well settled that, where an act done by an assumed agent is of such a kind that the law requires the agent's authority to be conferred in some particular manner, as by a writing, or by a sealed instrument, the act, when done without antecedent authority can, in general, only be ratified by the same sort of proceeding or in the same kind of mode as would be necessary, by the law, to confer a previous authority. Thus, whenever antecedent authority to do a certain act can only be conferred by a writing or a deed, such act, if unauthorized, can only be ratified by a writing or by an instrument under seal. This general common law rule is subject to one most important limitation. It applies only in those cases where the ratification would operate *as an assent* by the assumed principal; that is, where the ratification was either expressed by words, or was implied from such acts as indicate assent merely without anything more. It does not apply where the ratification operates *by way of estoppel*, where the assumed principal not merely indicates his assent, but does something which estops him from denying the authority of his assumed agent. This might happen when the ratification is implied from the principal's receiving and retaining the proceeds and benefits of the assumed agent's act after full knowledge of all the facts.[1] The civil code leaves it very doubtful whether this latter most just and righteous rule of the common law is not abrogated. The whole subject of ratification is dealt with in five short sections.[2] The first of these is a striking illustration of the concise mode of expression described in the preceding article, and reads as follows: "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof."

[1] See editor's note, 1 Am. Lead. Cas. pp. 717-721.

[2] Civil Code, §§ 2,310-2,314

[3] Ibed, § 2,310. This whole section is certainly most careless in its mode of expression. Read strictly according to its grammatical construction, it says, "that where an oral author-

The sections of the code defining fraud, furnish another illustration of the uncertainty, ambiguity, and imperfection resulting from this extreme conciseness and brevity of statement, this attempt to condense several different, although related, doctrines within the limits of a single formula or proposition. Fraud is regarded from different points of view by law and by equity. In law, an actual intent to deceive, a knowledge of the falsity—the *scienter*—is an indispensable element of the conception. There is no "constructive fraud" at law. In equity such actual intent to deceive and knowledge of the falsity are not always essential. Acting upon the principle of good faith, courts of equity have determined several independent species of either actual or constructive fraud, which would not be fraud at law.[4] Actual fraud both at law and in equity consists either in representations or in concealments. It is settled in equity as well as in law, that the intentional concealment of even a material fact known to a party, is not fraud, unless there was some duty, arising either out of his prior relations or from the circumstances of the transaction itself, resting upon said party to disclose. Mere concealment, with nothing else, is not fraud.[5] The civil code draws no distinction between fraud at law and in equity; it is utterly silent upon any such distinction. Its language is universal, and ignores the existence of any difference between law and equity. In the title on contracts, in the chapter upon "Consent," it declares that fraud is either actual or constructive.[6] It then defines "actual fraud," by a very abstract and concise mode of expression, in a section containing five subdivisions, and describing five distinct species of fraud.[7]

ization would suffice, a ratification can *only* be made by accepting or retaining the benefit of the act, after notice thereof;"—since the word *only*, by a strict grammatical construction, necessarily limits the second clause of the section, as well as the first. No such absurd conclusion, however, can for a moment be permitted by the courts. They would certainly hold that the second clause simply means "that when an oral authorization would suffice, one of the modes of ratification may be by accepting or retaining the benefit of the act, after notice thereof." Of course, when an oral authority would suffice, the ratification *may* be by express *verbal* language, or by express written language, or by acts other than accepting or retaining the benefit of the act, according to the circumstances; and it cannot be possible that the legislature meant to change *this* common law rule. The first clause of the section may have abrogated the other branch of the common law doctrine concerning ratification by estoppel, mentioned in the text. There was no good reason for this alteration; on the contrary, the plainest considerations of justice require that the entire common law doctrine should be retained. The section at least shows that a strictly literal interpretation of the civil code is not always possible.

[4] Without attempting any description of these various species, I may be permitted to refer to my work on equity where they are fully described: see 2 Pomeroy on Eq., §§874, 875, 884 (at law), 885–888 (forms of actual fraud in equity); 922, 923 (nature and kinds of constructive fraud in equity).

[5] Without discussing this proposition I refer to 2 Pomeroy on Eq., §§901, 902 and cases cited.

[6] Civil code, §1,571.

[7] Ib., §1,572. I cannot refrain from making a few observations upon this section, although it is not my main purpose to criticise the actual rules of the code. In the first place, it may be noticed that the section wholly omits the most common every day form of fraud at law, namely, "the statement, as a fact, of that which is not true, by one who at the time *knows it to be false*." It is only by inference, that this most frequent form of legal fraud, which is constantly coming before the courts, can be embraced within the language of the first subdivision. In the second place, the third subdivision, if *taken literally*, must work a complete

While the authors of the code, in these subdivisions, seem to have in mind, and to be describing, the various forms of fraud as they exist *at law*, yet it is very remarkable that in none of the acts mentioned in these subdivisions, is an *intent to deceive* made essential in order to constitute the fraud. By the language of the introductory clause of the section, any of the acts described in the five subdivisions, done by a party to the contract, with intent to deceive the other party, *or* to induce him to enter into the contract, constitute actual fraud. In other words, if the act is done in order to induce the other party to enter into the contract, although without any intent to deceive him, it is declared to be fraud. As the doctrine has heretofore been fully settled concerning fraud in connection with the making of contracts, both at law and in equity the act (misrepresentation or concealment) must always be done for the purpose of inducing the other party to enter into the contract; and at law the act must also be done with what the law calls an intent to deceive. In other words, at law, the act must be done both with an intent to deceive, *and* also for the purpose of inducing the other party to enter into the contract.[8] Is it possible that the authors of the code, by merely inserting the disjunctive conjunction *or* into their definition, designed to effect such a great change in the well settled legal doctrines concerning fraud? It is plain that the true meaning and effect of this section can only be determined by an elaborate system of judicial interpretation.

But this is not all. In a subsequent title on "obligations imposed by law," fraud is again defined under the name of "deceit." The essential elements of deceit and its legal consequences are first stated.[9] In this general statement, wilful deceiving and an intent to mislead are made indispensable. Then follows a statement of the acts which may constitute such deceit, in a section containing four subdivisions, and describing four separate forms of deceit.[10] These subdivisions in some respect, correspond exactly with those of the section defining actual fraud, but differ from them in other respects in a remarkable manner.

change in the well settled doctrine of both law and equity concerning fraudulent concealments. Any suppression of a fact, by a party having knowledge of it, if done in order to induce the other party to enter into the contract, even if there is no intent to deceive that party, is declared to be a fraud; the requisite that there should be a duty resting upon the party to disclose, is entirely omitted from this section. I have already mentioned the settled doctrine of law and equity that a concealment is fraud, only when a duty rests upon the party to disclose. This doctrine the section in subdivision third *seems* to abrogate; for taken literally, it declares every concealment, even when there is no intent to deceive, to be a fraud.

[8] I may refer to 2 Pomeroy on Eq., §§879, 880, 883, 884.

[9] Civil code, §1,709.

[10] Civil code, §1,710. Subdivisions one and four of this section are identical, word for word, with the same subdivisions of §1,572. Subdivision two, although expressed in somewhat different language, is the same in meaning with the second subdivision of §1,572. Indeed, it states the same doctrine, as settled by the decisions, in a clearer and more simple manner. Subdivision three differs widely from the third subdivision of §1,572. It states the doctrine as to fraudulent concealment, as settled by courts of law and equity; the necessary requisite of a duty to disclose, is retained. It would be simply impossible to reconcile these two subdivisions if both were interpreted literally.

Finally, in the chapter on contracts, "constructive fraud" is defined in a section containing two subdivisions.[11] It cannot possibly refer to those instances which are described by text writers upon equity under the name of "constructive fraud." As it seems to me, the authors of the code intend, by the very general and vague language of this section, to include those instances which would be regarded as fraud in equity although not so at law. Without a full and accurate knowledge of the settled doctrines concerning equitable fraud, this language would convey very little definite meaning to lawyers or judges.

Another illustration of ambiguity and uncertainty is found in the title on negotiable instruments. It is a familiar common law rule that a promissory note payable on demand, either with or without interest, becomes payable at once, so that a suit may be brought upon it on the day after its date without any actual demand.[12] It was further settled with regard to such notes that they become mature on the next day after their date, with all the consequences of such maturity. Demand of payment must be made on that day or endorsers would be discharged; a transfer after that day would be a transfer after maturity; and finally, the statute of limitations began from that day.[13] Similar rules were established with respect to bills payable on sight.[14] The civil code contains the following provisions concerning such demand notes: "Apparent maturity of a promissory note payable at sight or on demand, is 1. If it bears interest, one year after its date; or 2. If it does not bear interest, six months after its date."[15] This section is a most striking illustration of the am-

[11] Ib., §1,573.

[12] Haxtun v. Bishop, 3 Wend. 13.

[13] It is true that some cases had drawn a distinction between notes on demand without interest, and those *with* interest, and had held the latter to be continuing securities, not maturing at once; but most of these cases had been overruled; and the law as stated in the text was settled by the great weight of authority. See Merritt v. Tod, 23 N. Y., 23; Payne v. Gardener, 29 Id. 146; Herrick v. Woolverton, 41 Id. 581; Hirst v. Brooks, 50 Barb. 334.

[14] See Mintman v. D'Equino, 2 H. Bl. 565; Mellish v. Rawdon, 9 Bing. 416; Brady v. Little Miami R. R., 34 Barb. 249; Benton v. Martin, 40 N. Y. 345.

[15] Civil code, §3,135. One single effect of this provision is stated in a subsequent section, namely: "§3,248—If a promissory note payable on demand or at sight, without interest, is not duly presented for payment within six months from its date, the endorsers thereof are exonerated, unless such presentment is excused." It is certainly very strange that no rule is given as to the effect upon the endorsers of a failure to present a demand note with interest for payment within a year from its date. The full meaning and legal effect of §3,135 can only be determined by a course of judicial interpretation. What is meant by the "apparent maturity" of such a note? Does it result from this section that no suit can be maintained on a demand note without interest until the six months from its date have elapsed, or on a demand note with interest until a year from its date has elapsed? The general rule is that no suit can be maintained upon a promissory note before it has matured. The same term "apparent maturity" is applied to all negotiable instruments, in stating the time when they become due, §3,132. Again, does this section prevent the statute of limitations from beginning to run on a demand note without interest, until the six months from its date have elapsed, and on a demand note with interest until the year from its date has elapsed? Finally, is a transfer of such notes, before the six months have expired, or the year has expired, as the case may be, a transfer before maturity, so that the transferee may be a *bona fide* holder; and is a transfer after these times a transfer after maturity? All these questions might easily have been settled, and should have been settled by plain and unequivocal rules of the code itself. One very curious result may *possibly* follow from the judicial interpretation of this section. If it should be held that the common law rule allowing a suit on a demand note with or without interest, to be brought at any time after the day of its date, had not been changed; and

biguity and uncertainty which must arise from such general language, when it would have been so easy to have provided for the effects of such language by a few definite rules added to the text. The same ambiguity and uncertainty arise from the corresponding provisions concerning bills payable at sight, and the same observations might be made upon them.[16]

It is wholly unnecessary to extend these articles by multiplying such examples, especially as it is not at all my main purpose to criticise the civil code as a work of legislation. It is apparent, from the illustrations already given, that there are several important sources of ambiguity, uncertainty, and possible error in the order, method, employment of legal phraseology, use of language, and concise manner of stating doctrines and rules, adopted by the authors of the code. The highest interests of the state require that these defects should be removed, and that the code should, as far as possible, be rendered clear, certain, and comprehensible, not only to judges and lawyers, but to all intelligent laymen. This result might be reached by a complete revision and reconstruction of the code itself through the labors of an able commission appointed for that purpose under the authority of the legislature. Such a reform is, at present, wholly impracticable. There is no reason to expect *any* interference by the legislature; and if it should interfere, there is no reason to anticipate any real improvement as the result. To reconstruct and perfect the civil code according to the highest type of codification, would require the uninterrupted labors, extending through a considerable period of time, of a commission composed of the very ablest lawyers in the state. The expense of such a commission the legislature would not incur, although it would be far less in amount than the necessary cost of judicially interpreting the present code through a long succession of decisions. The only practicable method, therefore, of removing ambiguity from the text of the code, of ascertaining the meaning of its provisions and determining their effect with certainty, is by the process of judicial interpretation.

We thus reach the final question, what principles should guide the courts, and especially the court of last resort, in this work of interpretation? It is possible, of course, that the courts should adopt and follow no general principle whatever. If in one case depending upon a rule of law formulated in the code, the court should rest its decision wholly upon the pre-existing common-law rule, without making any reference

if it should be further held that the statute of limitations does not begin to run on such notes until six months or a year from their date have elapsed, as the case may be; then we shall have the following strange result: A note payable *on demand* with interest is not barred until *five* years have run from its date, while a note payable *one* day after date is barred in four years and a day, a note payable in *one month* after date is barred in four years and a month. The possibility for such a strange inconsistency could easily have been obviated.

[16] Civil code, §§3,134, 3,189, 3,213.

whatever to the text of the code, and should thus virtually treat that provision as being simply declaratory of the common-law rule with all of its consequences and effects; if, in another similar case, the court should rest its decision wholly and exclusively upon the very text of the code, interpreting the provision strictly according to its very letter, making no reference to the pre-existing common-law rule on the subject, and should thus virtually treat the common-law rule as though it never had existed, and the provision of the code as being the first and only source of the rule; and if in still another similar case, the court should rest its decision both upon the text of the code and upon the pre-existing common-law rule, treating the common-law rule as the foundation, construing the code provision by its light, and enquiring how far, by a reasonable interpretation of its language it had altered, added to, or simply declared the common-law rule; then the court would plainly be guided by no principle of any kind; its work of interpretation would be conducted, if I may be permitted to use the expression, in a hap-hazard manner. In this manner, particular and isolated sections or clauses of the code might be interpreted; but there would be no interpretation of the *civil code*.

J. N. P.

(TO BE CONTINUED.)

CIRCUIT COURT, DISTRICT OF OREGON.

GOLDSMITH v. SMITH ET AL.

September 8, 1884.

EJECTMENT.—The action of ejectment as defined and regulated by the Oregon code of civil procedure (chap. IV., tit. 1), is a possessory action, and although the estate or interest of the parties in the premises may be ascertained by the verdict therein, yet the plaintiff can only have judgment for the possession wrongfully withheld from him with damages for such detention and costs; and the defendant can only have judgment for costs.

IDEM—BETWEEN TENANTS IN COMMON —A co-tenant cannot maintain this action against his co-tenant unless the possession is actually and wrongfully withheld from him or his right thereto wholly denied.

CO-TENANTS—ADVERSE CLAIM BY ONE AGAINST THE OTHER.—Where a co-tenant is in possession and another co-tenant claims an estate or interest in the premises held in common, adverse to him, his remedy is by a suit in equity for the purpose of determining such adverse claim as provided in sec. 500 of the Oregon code of civil procedure.

BEFORE FIELD, CIRCUIT JUSTICE, AND DEADY, DISTRICT JUDGE.

Motion for judgment on the pleadings.

This action is brought by the plaintiff, a citizen of New York, to recover the possession of the undivided three-eighths of the east half of the donation of Danford Balch, the same being claim fifty-eight and parts of sections twenty-eight, twenty-nine, thirty-two and thirty-three, in township one north of range one east the Wallamet meridian, and situate in the county of Multnomah, and state of Oregon.

The plaintiff alleges that he is the owner in fee of an undivided five-eighths of the premises, and as such entitled to the possession thereof; and that from October 4, 1870, to December 31, 1883, "the plaintiff, his predecessors and grantors were seized of the said premises so owned by him and in the actual and adverse possession thereof."

The action is brought against John Balch and Alexander Hamilton, citizens of Oregon, and the persons in the actual possession of the property at the time. The complaint alleges that they or those under whom they claim are the owners of one undivided eighth of the premises; and that on December 31, 1883, the said defendants, denying the right and title of the plaintiff to three of the said five-eighths, entered into and took possession of the same and ousted plaintiff from the said three-eighths, and are now in the actual possession of the same; denying the right and title of the plaintiff thereto: and unlawfully and wrongfully withhold the possession of the said undivided three-eighths of said land from the plaintiff"—wherefore they pray "judgment against the defendants for the possession of said three of said undivided five-eighths."

The defendants Balch and Hamilton answered, alleging that they were in possession of the premises in common with the plaintiff, as tenants of the above named Smith, Gilliland, Hamilton, Dickinson and Walker, and on the same day said parties applied to the court to be made defendants in the action in place of said tenants, as provided in section 314 of the code of civil procedure, which application was allowed.

Afterward these parties answered the complaint severally, setting forth the undivided interest of each in the premises, which in the aggregate amounts to four-eighths of the same. They also deny that the plaintiff is the owner of more than one-half of the premises, or that he is entitled to the exclusive possession of any part thereof, or that they ever ousted the plaintiff from three-eighths or any portion of the premises or withheld the possession thereof from him; and allege that they and the plaintiff are tenants in common of the premises and as such are in the possession thereof.

On the argument of the motion, counsel for the plaintiff contended that section 324 of the code of civil procedure, should be construed so as to allow a tenant in common to maintain an action against his cotenant when the latter has simply denied the extent of his estate or interest in the premises owned in common, while the counsel for the defendants insisted that the section was only applicable to an action at law to recover possession of real property, which could only be maintained according to it, when the right of the cotenant plaintiff, to the "possession" of the premises, was wholly denied by the defendant.

The section reads as follows: "In an action for the recovery of dower before admeasurement or by a tenant in common of real property against a cotenant, the plaintiff shall show in addition to the evidence of his right of possession that the defendant either denied the plaintiff's right or did some act amounting to such denial."

This section is derived from the revised statutes of New York (Part 3, Chap. 5, section 27), in which it is provided that in an action of ejectment between tenants in common, the plaintiff, "in addition to all other evidence which he may be bound to give," shall prove "that the defendant actually ousted" him "or did any act amounting to a total denial of his right as such cotenant."

In the draft of the New York code of civil procedure, reported, December 31, 1849, the commissioners took this section and made it, in a modified form, section 890 of such draft—placing it in a title relating to "Actions to determine conflicting claims to real property," under which it was intended that both legal and equitable rights and claims to real property might be prosecuted and determined. The modification consisted in extending the section to actions "for the recovery of dower before admeasurement," and providing that the plaintiff who claims, as a cotenant, must "show in addition to the evidence of his right, that the defendant either denied the plaintiff's right or did some act amounting to such denial."

Subsequently (1862), the section was incorporated in Oregon code of civil procedure, as section 324 thereof, and is a part of title 1 of chapter 4, relating exclusively to actions at law "to recover the possession of real property," with the addition of the words "of possession" inserted after the words "evidence of his right."

The code also provides (Chap. 5, Title 8, Section 500) for the determination of "adverse claims to real property," by a suit in equity. The section reads as follows:

"Any person in possession by himself or his tenant, of real property, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

George H. Williams and *James K. Kelly*, for the plaintiff.
P. L. Willis and *James F. Watson*, for the defendants.

The opinion of the court was delivered by FIELD, Circuit Justice.

This is a motion for judgment that the complaint be dismissed, and that the defendants recover costs and disbursements, on the ground that the complaint "does not state facts sufficient to constitute a cause of action." It is in fact an attempt to obtain by motion after answer the benefit of a demurrer to the complaint, which must be regularly presented before answer. It can only be filed subsequently upon leave of the court and a withdrawal of the answer. The motion, therefore, in the form in which it is presented must be denied.

But as by the pleadings it appears that the plaintiff has presented his case upon the theory that one cotenant of real property in possession can maintain ejectment against another cotenant also in possession, if the extent of the plaintiff's interest is denied, it may not be improper to call the attention of counsel to matters which are essential to the maintenance of the action and consequently to the allegations of the complaint.

The action of ejectment is primarily for the possession of the property in controversy, the right to which may depend upon the ownership of the property or a contract with the owner for the use of it—a letting of it by him to the plaintiff. There must be in the plaintiff a present right of possession which is withheld by the defendant: Sec. 313, code of civil procedure.

Now each tenant in common has an equal right to the possession of the whole and of every part of the common property. If a tenant in common is in possession of any interest, no matter how small, he is, in law, in possession of the whole property. Therefore, no tenant in common in possession can maintain ejectment against a cotenant also in possession. In such case he already has all that a judgment in his favor could give him. To sustain such an action the cotenant plaintiff must be entirely excluded from the possession.

The statute, section 324 of the code of civil procedure, does not change this rule of the common law; it only changes the proof of ouster, or rather makes a denial of the plaintiff's right of possession the equivalent of actual ouster, so as to authorize a recovery upon proof of such denial when his right is otherwise established.

In the case at bar the complaint alleges that the plaintiff is the owner of five undivided eighths of the premises described, and was in their actual and adverse possession for a period exceeding thirteen years—from October 4, 1870, to December 31, 1883; that on this last date the defendants entered upon three of these five-eighths and excluded him from them, and withhold them from him; and that they are the owners of one undivided eighth.

There is no allegation that the plaintiff has ever been dispossessed of the remaining two of the five undivided eighths. The necessary presumption, therefore, is that he is still in their possession. Being in possession as such owner, he is in possession of the whole premises, under the law which governs the rights of tenants in common. So as the complaint now stands, the plaintiff cannot upon its allegations recover in ejectment. The allegation of ownership of the five-eighths must be reduced to that of three-eighths, or the ouster, that is the denial of the plaintiff's right by the defendants must be alleged to extend to the whole five-eighths. If, therefore, the present action is to be continued, the complaint must be amended in this form.

But if the fact be as stated that the plaintiff's right to three of the five-eighths is only denied, and he continues in possession as the owner of two-eighths, whilst the defendants are admitted to be the owners of one-eighth, the plaintiff's remedy to determine the validity of the defendant's right to the disputed three-eighths, is in equity, under the statute (code of civil procedure, sec. 500), authorizing suits for the determination of estates claimed adversely to the owner.

Being in possession by his cotenancy, the plaintiff can insist that the defendants disclose their alleged adverse interest, and call upon the court to pass upon its validity. In this way the claims and rights of the defendants, as against the plaintiff can be fully determined.

Whilst the motion, as presented, is denied, the plaintiff can have leave to amend his complaint as suggested, the defendants having the right to answer anew, or he can withdraw the present action and institute a suit in equity. Motion denied.

DEADY, D. J. I concur with the circuit justice, but wish to add that this motion is anomalous and will not lie under any circumstances.

It is made by the defendant and is for "judgment on the pleadings"—the pleadings being the complaint and answer. But as a judgment on the pleadings cannot be given on the pleading of the party moving for it, unless the truth of the allegations therein is admitted by the subsequent pleading or silence of the adverse party, this is really a motion by the defendant for a judgment on the complaint. Now there can be no judgment for the defendant on the complaint, except upon the ground that it does not state facts sufficient to constitute a cause of action, and that objection or question can only be made by demurrer. So that if the defendant had made this motion before answer, still it would not lie.

But the motion is also singular in the nature of the judgment it asks—"that the plaintiff's complaint be dismissed."

A bill or suit in equity is said to be "dismissed" when finally disposed of, adversely to the plaintiff therein; and unless the decree

of dismissal is declared to be "without prejudice," it is a bar to any further litigation of the matter between the parties. But an action at law is disposed of, either by a judgment for the plaintiff or in bar of its maintenance or of nonsuit. By either the first or second one the cause of action is determined and the action brought to an end; but by the third, the action only is ended or disposed of, and another may be brought upon the same cause.

This judgment of nonsuit can only be obtained on motion of the defendant before trial, because of the failure of the plaintiff to appear for trial, or by consent. The form of it is, "that the plaintiff take nothing by his suit or action and the defendant go hence without day," and the effect of it, under the code, is to dismiss the action: See code of civil procedure, chap. ii, title xi.

But a "motion" to dismiss "a complaint," whether at law or in equity, will not lie under any circumstances and it proceeds upon a total misconception of the nature of legal procedure, both under the code and at common law.

CIRCUIT COURT. DISTRICT OF CALIFORNIA.

September 22, 1884.

ABIGAIL R. COLTON v. ELLEN M. COLTON.

WILL CONSTRUED—TRUSTS—RECOMMENDATION AND REQUEST.—The will of David D. Colton, contains this provision: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seized, or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them, as in her judgment will be best." *Held*: That this provision is not an absolute gift, or bequest in trust for the mother and sister of the testator—that it is not an imperative command, to make the provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of his surviving wife.

TRUSTS ARISING FROM PRECATORY WORDS IN WILLS.—The conditions necessary to raise a trust from words of recommendation and request in a will discussed.

RULES FOR CONSTRUCTION OF WILLS under the civil code of California stated and applied.

The opinion states the facts.

W. W. & H. S. Foote and *Grove L. Johnson*, for the complainant.

Crittenden Thornton and *Stanly, Stoney & Hayes*, for the defendant.

SAWYER, CIRCUIT JUDGE. This is a bill in equity to establish a trust in favor of complainant in the estate of the late David D. Colton, deceased, in the hands of his devisee and legatee, Ellen M. Colton; and to obtain a decree against the defendant, requiring her to make a suitable provision out of the estate devised and bequeathed to defendant, for the maintenance of complainant.

The will out of which the suit arises is as follows, to wit: "I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die pos-

sessed is community property, and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate real and personal, of which I shall die seized, or possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them, as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms, and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of anyone in the settlement of my estate, I hereby appoint my friend S. M. Wilson of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen, to be her co-executors. And in case she shall so unite either, or both of them with her, the same provisions are hereby made applicable to them, as I have before made for her in reference to bonds, and duties, and powers."

The question is, does this will create a trust in favor of complainant? Do the recommendations and requests, found in the will, give an absolute legacy to the complainant out of the estate, and do they constitute an imperative command to make the provision, or is the matter left to the discretion of the surviving wife, as sole devisee and legatee, to act in the matter as her judgment and feelings shall dictate? It cannot be denied that the earlier English decisions, and a few of the earlier cases in this country, go a long way toward sustaining the claim set up by the complainant. But later cases, both in England and the United States, considerably limit the construction given by the earlier decisions to precatory words of a will, or words of request or recommendation, and some of them, especially in this country, fall little short of repudiating and altogether overruling the earlier cases. Says Story, on this subject: "In the interpretation of the language of wills also, courts of equity have gone great lengths, by creating implied, or constructive trusts, from mere recommendatory and precatory words of the testator:" 2 Story's Eq. Jur., sec. 1,068.

After considering the English cases, he adds: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire, into positive and peremtpory commands, is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can, scarcely, be presumed, that every testator should not clearly understand the difference between such expressions, and words of positive direction and

command; and that, in using the one, and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that, where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor; and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not, absolutely, to control, or govern it, there the language cannot, and ought not, to be held to create a trust. Now, words of recommendation, and other words, precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and, therefore, ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear, that they are designed to be used in a peremptory sense:" 2 Story Eq., sec. 1,070.

The most favorable rule for complainant, now recognized, that can be deduced from the body of the English authorities, is, doubtless, that stated by Lord Langdale in Knight v. Knight, 3 Beav., 173, where he said: "As a general rule, it has been laid down, that where property has been given absolutely to any person, and the same person is, by the giver, who has power to command, been recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty, or wish, should be held to create a trust: 1. If the words are so used, that upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation, or wish be certain; and 3. If the objects, or persons intended to have the benefit of the recommendation, or wish, be, also, certain:" See 44 Am. Dec., 372, note to Harrison v. Harrison's Adm'r, 2 Grat., 1. On the contrary in the language of Story: "Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the *property to which it is to attach is not certain or definite;* wherever a clear discretion or choice to act, or not to act, is given; *wherever the prior dispositions of the property import absolute and uncontrollable ownership;* in all such cases courts of equity will not create a trust from words of this character:" 2 Story's Eq. Jur., Sec. 1,070; see also, Howard v. Carusi, 109 U. S., 733-4, citing and recognizing the rule as stated by Story, and 2 Pomeroy's Eq. Jur., Sec. 1,014 to 1,017, where the subject is well discussed.

Upon a careful consideration of the language of the will, giving the words their usual natural signification, as they would, doubtless, be understood, almost, if not quite, uuiversally, by ordinarily intelligent English speaking people, without reference to any strained, artificial, or technical rules of construction, it appears to me, that two, at least, if not three of these requisite conditions negatively stated are found in the will. The "objects of the supposed recom-

mendatory trusts" are, undoubtedly, "certain and definite"—they are the mother and sister of the testator. But "the property to which it [the trust] is to attach is not certain, or definite." "The *subject*, of the recommendation, or wish" is, surely, not "certain." No specific property, or amount, is indicated, as the subject of the asserted legacy or trust. The testator only "requests," his general legatee, and devisee, "to make *such gift and provision for them as in her judgment will be best*," apparently leaving the whole matter to her judgment, and discretion. How is the court to determine to what property, or to what amount of money, the trust is to attach? Neither the property, nor the amount of money, is indicated; and the testator has not left the matter to the judgment of the court to determine, but in express terms to the judgment of his surviving wife—his sole devisee and legatee. The subject is, therefore, not certain, or definite. The testator has neither indicated the particular property, nor the particular amount of money, out of the million of dollars in value claimed to have been left, to which the legacy, or trust, is to attach, nor has he indicated any rule by which the property, or amount, can be ascertained, other than the judgment of his surviving wife; which judgment she appears to have exercised, for she made gifts from time to time in small sums, amounting in the aggregate to fifteen hundred dollars. Certainly, the property, or amount of money to which the trust, if any there be, is to attach—the subject of the recommendation, or request, or the subject of the trust—could not well be more uncertain, or more indefinite. In the absence of words expressly creating a trust, this indefiniteness and uncertainty, constitute strong evidence, that the testator did not intend to create a trust. In language quoted from 10 Ves., 536: "And wherever the subject to be administered, as trust property, and the objects for whose benefit it is to be administered, are not to be found in the will, not *expressly* creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court, as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court, to say what should be so applied, or to what objects, has been the foundation of the argument, that no trust was intended; or, as Lord Eldon expresses it in another case: Turn. & Russ., 159, 'where a trust is to be raised, characterized by uncertainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say, it is not sufficiently clear what the testator intended:' See also, Knight v. Boughton, 11 Clark & Finnel, R. 548;" note to Sec. 1,070, Sto. Eq. Jur., p. 284–5. In the notes to Harrison v. Harrison's Adm'x, 2 Grat., 1, reported in 44 Am. Dec., 375, and in 2 Sto. Eq. Jur., Sec. 1,073, *et. seq.*, notes, the cases are cited illustrating certainty, and uncertainty, in a will within the meaning of the condition of the rule, adopted by the courts, as to the subject of the recommendation, or request; and, as it appears to me, few of those provisions held to be too uncertain to create a trust, are more

uncertain or indefinite, than the provision in the will in question. And in the language of Lord Cottenham, in Finden v. Stephens, 2 Phil., 142: "Words of recommendation are never construed as trusts, unless the subject be certain:" 44 Am. Dec., 376. The will in question, therefore, fails in this condition of certainty, as to the subject, essential to the creation of a trust by precatory words, even under the English rule most favorable to such trusts now recognized.

Again, under that branch of the rule stated by Story, that wherever "the prior dispositions of the property import absolute uncontrollable ownership, courts of equity will not create a trust from words of this character:" 2 Sto. Eq. Jr., Sec. 1,070, this will is deficient in this one of the elements from which the intention to create a trust may be inferred. No language can, more clearly, and unmistakably, "dispose of property," absolutely, or "import absolute uncontrollable ownership" in the devisee, or legatee, than the language of this will, making "the prior disposition of the property of the testator," which is, "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized, or possessed, or entitled to." And further on in his will, the testator adds, "I authorize and empower her to sell, dispose of, and convey, any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms, and in such manner, with, or without, notice, as to her shall seem best." If this language of gift, and devise, and this power to dispose of, and control, does not constitute "a prior disposition of the property," which "imports absolute and uncontrollable ownership," then, I am at a loss to know what would express that idea, or effect such a purpose. In this respect, also, the will is deficient in one of the elements suggested by Story, as necessary to create a trust from mere precatory words, or words of recommendation, or expressing a desire.

Again, are the words considered by themselves "so used as upon the whole, they ought to be construed as imperative," or is there "a clear discretion, or choice to act or not to act," given, irrespective of other elements to be considered. The language, and all the language, to be consdered on this point, is, "*I recommend to her the care* and protection of my mother and sister, *and request her to make such gift and provision* for them, *as in her judgment will be best.*" Or, in effect, I do not, myself, make any gift, or any provision for them, according to my judgment, or determine how much they ought to have, but I recommend them "to her care and protection;" and I "request *her* to make *such* gift, and provision for them as in *her* judgment will be best."

By the express terms of the civil code of California, "a will is to be construed according to the intention of the testator," and the "testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it is made, exclusive of his oral declarations." "All parts of the will are to be construed in relation to each other, and, so as, if possible, to form a consistent

whole." *A clear* and *distinct devise or bequest cannot be affected* * * * *by any other words not equally clear, and distinct, or by inference or argument* * * * *from other parts of the will.*" "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained:" Civil Code, Sections 1,317–18, 1,321–2, 1,324. It seems to me, that, under these rules, it is impossible to hold it to have been the intention of the testator, himself, to give, absolutely, any portion of his estate to be held in trust for complainant. The language is plain, and readily understood, taking the words in their ordinary and grammatical sense. The testator, manifestly, appreciated the difference, which every one must recognize, between words of absolute devise, or bequest, and mere words of recommendation or request. To construe these latter words of recommendation and request as meaning precisely the same thing, as words of absolute bequest, would be to give them a meaning entirely different from the sense in which they are, ordinarily, used, and, ordinarily, understood. The "clear, and distinct," prior absolute "devise, and bequest," to the defendant of all his estate, in language which it is impossible to misunderstand, would be materially "affected" by converting an indefinite and unascertainable part of the absolute estate given to defendant into a trust, by "*words not equally clear and distinct,*" by "inference, or argument from other parts of the will," contrary to the rule expressly laid down by the code. Had the testator intended to give any part of his estate, absolutely, in trust for the complainant, he would, certainly, have so stated, and would have declared what part, or how much money, he intended to set apart for her. He would have made the extent of his bequest "clear and distinct,"—as clear and distinct as the devise to the defendant—and not left it to the sole judgment of the defendant, to determine the amount, or character, or value, of the bequest or the extent of his bounty.

The language of the will cited seems to be plain and intelligible. It is not the language of gift, or devise, or the language of command.

It is, clearly, language of recommendation and request, leaving the matter to the discretion and judgment of his surviving wife to carry out his suggestion, or not, or to such extent, as seems to her best,—according to the dictates of her own discretion and judgment. Such is the plain import of the words, as they would, ordinarily, be understood, when taken by themselves, and considered by the great mass of English speaking people, without reference to strained, artificial or technical rules of construction. They are, as it seems to me, so plain to the common mind as not to need interpretation. But when we come to call in other elements recognized by the rules of construction heretofore adopted by the courts, for the purpose of aiding in converting the recommendation and request into a command or gift, we still find that all these elements except one—the certainty as to the objects—are wanting. The testator, manifestly, understood the

force of language. He knew well what language to use to express his intention to make a devise or bequest. There is no uncertain sound in "I give and bequeath to my wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed." If he had intended to make a gift, bequest or devise to his mother and sister, he, certainly, knew in what language to express that intent, and he would have said so, and how much. He has expressed, in specific language, no intention to give to them directly, or to any one, in trust, for them, any portion of his estate; or if any portion what particular portion, or how much. He has simply used words of recommendation, and request, to his sole devisee and legatee, and left the whole matter, in express terms, to her judgment. This is the plain natural meaning of his language, when taken by itself, or when considered in connection with all the other language of the will. When we consider the concise, clear and specific language of this brief will, in all its other parts, it seems impossible that the testator should have used words of mere recommendation, and request to his wife, committing the whole matter, as to the gifts and provisions for them, in express terms, to her judgment; that he should have requested her to make the gift, when he intended to make a gift, legacy or devise to them himself—when he intended to command.

It is urged on the part of the claimant, that in this class of cases, a wish expressed, or a simple request, to the devoted and obedient wife, is equivalent to a command. This when, voluntarily, recognized as an obligation by the wife, in the affairs of married life, may be a very proper and salutary principle and practice in marital polity and domestic etiquette; but it is too romantic, too largely deficient in the sanctions of the obligations of positive law,—too loose and uncertain, to be adopted by the courts, as a rule of law, by which large estates are to be distributed in opposition to the plain, ordinary, actual matter of fact sense of the words of a will. As to myself, I fully concur with vice-chancellor Hart, in his observations in Sale v. Moore, 1 Sim. 540, "that the first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them." He further adds; that "the current authorities of late years has been against converting the legatee into a trustee:" See 44 Am. Dec., 378, note. In my judgment, to hold, that the precatory words, and words of recommendation, found in the will of the late General Colton, creates an indefinite trust in an unascertained and uncertain *quantum* of the estate of the deceased in the hands of Mrs. Colton, for the benefit of the mother and sister of the testator, would be to make a will for the deceased; and not to execute the will made by him.

An argument is sought to be derived in favor of a construction creating a trust, from the last two clauses in the will, relating to co-executors. In case the executrix should desire assistance in the execution of the will, the testator, provisionally, appoints two other gentlemen as executors, and authorizes the executrix to associate

either one, or both, as co-executor, or co-executors; "and in case she shall so unite either, or both with her, the same provisions are hereby made applicable to them, as I have before made for her, *in reference to bonds and duties and powers.*" It is argued, that under this provision, the recommendation and request, as to care and provision for the testator's mother and sister, would impose the same trust on them, as is imposed upon Mrs. Colton; and, that certainly, as to them the request is equivalent to a command, and being so as to them, they must have the same construction with respect to Mrs. Colton. But the character of Mrs. Colton, as executrix, and as devisee and legatee, are wholly different, and distinct. These words of recommendation and request, were addressed to her as the wife of the testator, and his devisee and legatee, and not as the executrix of his will,—as owner, and not administratrix of his estate. She has performed all her trusts as executrix; the estate has been settled, and distributed to her, as devisee and legatee; and she has been discharged from her trust as executrix. So it appears from the bill.

This suit is brougt against her to enforce a trust vested in her as legatee, for the benefit of complainant, and not against her in her representative character of executrix. So the closing passage of the will, making the same provision applicable to her co-executor, or co-executors, in the contingency provided for, "as I have before made for her in reference to bonds, and duties and powers," has sole reference to the bonds waived, and to the "duties and powers," conferred on her as executrix. It confers no rights, or powers, or duties upon these co-executors in the character of devisees or legatees; and no argument can be derived from this passage to support the creation by the court of a trust.

Upon the views thus taken upon the construction of the will, it is unnecessary to notice the other points argued under the demurrer. The demurrer is sustained, and as the whole case depends upon the construction of the will, no amendment can be made to the bill that will obviate the objection taken by the demurrer. The bill must, therefore, be dismissed. And it is so ordered.

MARTHA COLTON *v.* ELLEN M. COLTON.

September 22, 1884.

Bill dismissed on authority of Colton v. Colton, *ante.*

W. W. & H. S. Foote and *Grove L. Johnson,* for the complainant.

Crittenden Thornton and *Stanly, Stoney & Hayes,* for the defendant.

SAWYER, CIRCUIT JUDGE. This is a bill in equity, seeking a decree declaring and enforcing a trust in favor of the sister of the late

David D. Colton, deceased, claimed to arise out of the same clause of the will, considered in the preceding case of Abigail R. Colton v. Ellen M. Colton. The same construction must, of course, be given to the clause in this case as was adopted in the other. For reasons in that case stated, the demurrer to the bill must be sustained, and the bill dismissed, and it is so ordered.

THE CASE OF THE UNUSED TAG.

[IN RE AH KEE, ON HABEAS CORPUS.]

September 22, 1884.

CHINESE RESTRICTION ACTS CONSTRUED—CERTIFICATE OF COLLECTOR ESSENTIAL—CUSTOM HOUSE TAG.—A Chinese laborer, who left the United States after the restriction act of May 6, 1882, went into operation, without obtaining the certificate provided for in such act, can not be permitted to re-enter after the amendatory act of 1884 went into operation, upon the presentation of a tag given to him by the custom house officials, prior to his departure, authorizing the issue of such certificate to him.

THE SAME—NOTHING ELSE TAKEN AS A SUBSTITUTE FOR CERTIFICATE.—The provision of the amendatory act of 1884, that such "certificate shall be the only evidence permissible to establish" the right of re-entry, is as applicable to the certificate issued under the act of 1882, as to that issued under the act of 1884. No evidence can be taken as an equivalent or substitute for the certificate.

THE SAME—REMOVAL OF CHINESE UNLAWFULLY IN UNITED STATES.—Parties unlawfully bringing Chinese persons to the United States, who are prohibited by such acts from landing, must take them back to the country from which they are brought, or at least beyond the jurisdiction of the United States. A steamship company which brings such persons cannot escape from this duty by the departure of the vessel on which they are brought, or by any change in its officers or management.

HABEAS CORPUS—CUSTODY OF COURT.—Where a return is made to a writ of *habeas corpus*, accompanied by a production of the petitioner, the court, pending the proceedings on the writ, may, if deemed proper, continue him in the custody of the party detaining him, commit him to the custody of the marshal, or admit him to bail.—SAWYER, J.

RESTRICTION ACT—CUSTODY OF COURT.—Where a party, detained on board a steamship, and not permitted to land, under the provisions of the Chinese restriction act, has been produced in court, on *habeas corpus*, and admitted to bail, pending the proceedings, he is in the custody of the law, and in contemplation of law he has not been landed.—SAWYER, J.

REMANDING PRISONERS.—In such case, if, pending the proceeding, the steamship on which he came departs, he may be remanded to the custody of the master, when she returns to port, whether the master be the same one who produced him, or another; and a refusal to receive the party so remanded, would, in law, constitute a permitting, or aiding and abetting an unlawful landing, within the meaning of the restriction act.—SAWYER, J.

APPLICATION for a writ of *habeas corpus*.

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and HOFFMAN and SABIN, District Judges.

T. D. Riordan and *L. I. Mowry*, for the petitioner.
S. G. Hilborn and *Carroll Cook*, for the United States.

FIELD, Circuit Justice. The petitioner is a Chinese laborer and a subject of the Empire of China. He resided in the United States on the seventeenth of November, 1880, and until September 3, 1883. He then went back to China without the certificate required under the restriction act of 1882, which would have enabled him to return to this country. Previous to his departure he applied to the collector of customs at the port of San Francisco for such certificate,

and, as he alleges, the provisions of the law for the registration of a description of his occupation, residence and age, and of the physical marks and peculiarities necessary to his identification, were complied with by the collector, and from him the petitioner received a white tag, which entitled him to the desired certificate.

The act of congress appears to contemplate the presence of the collector in person or by deputy on board of a vessel cleared, or about to sail to a foreign port with Chinese laborers, and his making while on the vessel a list of them, with the particulars mentioned of each one for his identification, such particulars to be entered in proper books to be kept for that purpose. To carry out these provisions on board of the vessel was found to be impracticable. Passengers are not generally expected or even allowed to be on board of a vessel many hours before its departure, and the time consumed in the examination of each laborer, if such examination were had on board, would necessarily greatly limit the number to whom a certificate could be furnished—a small portion of those who would desire to depart by each vessel of the line of steamers now plying between this port and China. To obviate the delays which would otherwise arise, the officers of customs at San Francisco have prescribed rules requiring Chinese laborers intending to leave, and yet desirous of returning to the United States, to attend at the custom house in advance of the departure of the vessel and undergo the preparatory examination. That being satisfactory, a white tag is given to the laborer, in exchange for which a certificate is issued to him on board of the steamer. These regulations are designed to facilitate the departure of laborers without unnecessary delay on board of the vessel, and being reasonable, may properly be insisted upon. The essential requirement of the law is the registry of the particulars respecting each laborer, so as to identify him. The place where the examination is had is not an indispensable part of the requirement.

The petitioner having, as he alleges, secured his white tag, went aboard of the steamer City of Peking at San Francisco, when about to depart for China, expecting there to receive in exchange for it a certificate entitling him to return, and was informed that the officer charged to deliver such certificate had already been aboard of the vessel and left. The petitioner accordingly went among his countrymen on the vessel, without further enquiry for the officer and left without his certificate. In August, 1884, he returned to the port of San Francisco in the steamship City of New York, and sought to land by virtue of his tag, which he presented to the collector. Upon examination of the records in the collector's office, it appears that the certificate intended for him had been presented by another person, who had arrived on a previous steamer, and by virtue of it had been allowed to land. The certificate was, upon such landing, canceled. The petitioner was accordingly not allowed by the collector to land, and he now seeks to secure a right to land from the Court.

It is by no means clear that the petitioner would not have found the officer having his certificate, had proper enquiry been made. His willingness to depart without effort for that purpose tends to create a suspicion as to his conduct. But assuming that there was no purpose to facilitate the use of the certificate by another, whilst he retained the tag, no relief can be afforded him on this application.

The restriction act of May 6, 1882, suspended after ninety days from its passage, and for the period of ten years from its date, the right of Chinese laborers to come to the United States, or, if already come, to remain unless they were within the United States on the seventeenth of November, 1880, or should come before the expiration of ninety days after the passage of the act. For the purpose of identifying the laborers in the United States on the seventeenth of November, or coming within the ninety days mentioned, and in order to furnish them with proper evidence to depart from and return to the United States, the act provided that a certificate as already described, after registration of the particulars mentioned, should be issued to the laborer; and the amendatory act of 1884 declares that "*said certificate shall be the only evidence permissible to establish his right of re-entry.*" This declaration is as applicable to the certificate issued under the act of 1882, as to that issued under the act of 1884. In the face of its clear and emphatic direction nothing can be taken as an equivalent or substitute for the certificate. It matters not that the petitioner was entitled to have a certificate from the collector. If he has not got it, the court cannot help him. That is the "only evidence permissible," says the statute, and the court has no power to dispense with its requirement in any case, however great its hardship. The court is itself but the servant of the law, and equally bound with others to follow and obey it. If the collector refuses to the Chinese laborer any rights to which, under the restriction act, he is entitled, he should apply to the superior of the collector at Washington, the head of the treasury department, for proper instructions to him. The court has no supervising jurisdiction over the manner in which he discharges his duty.

The writ must therefore be discharged and the petitioner be remanded. If, as stated by counsel, the vessel on which the petitioner arrived has left the port of San Francisco since his arrival, the marshal can place him on any other vessel of the steamship company when it is about to depart for China, to be deported, and for the expenses attending the charge of the party and his removal, the company will be liable: Act of 1884, sec. 12. The acts of congress, both original and amendatory, contemplate that parties unlawfully bringing here laborers prohibited from landing, shall take them back to the country from which they are brought, or at least beyond the jurisdiction of the United States, and the steamship company cannot escape from this duty by the departure of the vessel on which they are brought, or any change in its officers or management.

Writ dismissed and petitioner remanded.

tion has been determined against the petitioner, I have no doubt of the power of the court, to remand him on board the ship to the custody of the master, whether it be the same master, or another, who has in the meantime taken his place; and if the ship has departed pending the proceeding, that the petitioner can be detained by the marshal, by order of the court, till the return of the ship, to be then placed on board by the marshal, in the custody of the master; and that it is the duty of the master to receive him, and not, thereafter, to permit him to land. In such case the party has only been, provisionally, taken from the ship, out of the custody of the master, who detains him in his character, *as master*, controling the ship; and not in his individual, personal, character. He is taken into the custody of the law, solely, for the purpose of securing his discharge in case his detention proves to be unlawful. He has not, in contemplation of law, been landed at all. He is still under control.

It has been suggested that the master might refuse to receive him after his departure, and subsequent return to port. So he might refuse to receive him before his departure. But in either event, as the petitioner has been only, provisionally, in the custody of the law, and not landed in contemplation of law, such refusal would, in my judgment, constitute an aiding and abetting, or permitting the landing of a person not lawfully entitled to enter the United States, within the meaning of the provisions of sections 1, and 2, of the restriction act; and, both the master, so aiding and abetting, or permitting the unlawful landing, and the ship, under his command, would incur the penalties denounced by sections 10, 11 and 12, of said act. The vessel—the instrument, or the *res*—employed in unlawfully bringing the party into the United States, as well as its master, is held responsible, as a participant in the unlawful act. In case it is made to appear by the return of the marshal, that the vessel has departed, I have no doubt of the authority of the court, under the provisions of section 12, of the act, by its writ, or order, to empower the marshal to remove the petitioner remanded, to the country, whence he came, by any other vessel conveniently available for the purpose, at the expense of the United States, as being a person "found to be one not lawfully entitled to be, or remain, in the United States." The direction contained in the statute, "cause to be removed," involves the power to use the necessary means to accomplish the required object. We so, substantially, held in Chon Goo Pooi: 1 W. C. Rep., 535. And the district judge, also, so held in the case of Chin Ah Sooey: 3 W. C. Rep., 603. This power, existing in the court, I can perceive no good reason why the order remanding the petitioner may not, in the first instance, be in the alternative, commanding the marshal to return him to the custody of the master of the vessel on which he came; and in case it shall be found by the marshal that the vessel has gone, that he place him on board on the return of the vessel, or on the direction of the court, that he remove him to the country whence he came, upon any other vessel, conveniently available for the purpose, at the expense of the

United States, to be afterwards recovered from the parties liable therefor under the statute.

In my judgment, the petitioner must be remanded, and in case it shall prove to be impracticable to return him on board the vessel on which he came, by reason of the departure, and probable non-return of the vessel at an early day, that the marshal be directed to return him to China, whence he came, on some other vessel, available for the purpose, at the expense of the United States, which expense may be recovered, under section 12, from the parties responsibe for bringing him hither.

THE CASE OF THE CHINESE WIFE.

[IN RE AH MOY, ON HABEAS CORPUS.]

September 22, 1884.

CHINESE RESTRICTION ACT—WIFE OF LABORER—CERTIFICATE.—The wife of a Chinese laborer, who left China after the restriction act of 1884 went into operation, cannot enter the United States without furnishing the certificate required by section 6 of that act. She cannot enter upon the certificate of her husband authorizing his entry.

CHINESE LABORER'S WIFE.—The wife of a Chinese laborer, she being herself a Chinese laborer, in fact, who has never before been in the United States, cannot now lawfully enter the United States on her own personal right, under the provisions of the restriction act; nor can she be introduced by the husband, who is himself entitled to enter, upon any right pertaining to him, under the provisions of the treaty, and the said restriction act.—SAWYER, J.

STATUS OF WIFE.—A Chinese wife, who was not a Chinese laborer, in fact, prior to her marriage, upon her marriage, takes the *status* of the husband, as one of a *class* whose entry into the United States is prohibited by the restriction act, and she cannot lawfully enter.—SAWYER, J.

APPLICATION for a writ of *habeas corpus*

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and HOFFMAN and SABIN, District Judges.

T. D. Riordan and *L. I. Mowry*, for the petitioner.

S. G. Hilborn and *Carroll Cook*, for the United States.

FIELD, Circuit Justice.—Too Cheong is a Chinese laborer and resided in the United States November 17, 1880, and until September, 1883, when he made a visit to China. Whilst there he married a Chinese woman, who, from her appearance in Court, must be a mere child. He returned in September of the present year, bringing his wife with him. Before his departure he obtained from the collector of the port the necessary certificate to enable him to return to the United States. It, however, gave him no authority to bring another person with him. The fiction of the law as to the unity of the two spouses does not apply under the restriction act. As a distinct person she must be regarded, and, therefore, must furnish the certificate required, either by section 4 or by section 6 of the act of 1884.

It is contended by the district attorney that the status of the petitioner is that of her husband, and, therefore, she must be regarded

as a laborer, and as such required to furnish a laborer's certificate to establish her right to enter the United States. This position might, in some instances, be tenable; but there are many callings of a man which the wife would not, from her relationship to him, be deemed to follow—such as that of a lawyer, or physician, or a merchant, or a manufacturer.

We think the case of a wife falls under the 6th section of the act. She is to be regarded as a person other than a laborer, and as such required to present the certificate from her government there designated. The language of the section, it is true, is involved and somewhat contradictory, but its meaning plainly is that every Chinese person other than a laborer entitled to enter the United States under the treaty shall obtain from the Chinese government, or the government of which he is a subject, its permission to come within the United States, authenticated by its certificate containing various particulars of himself and family so as to clearly identify him; and, whilst such certificate is only *prima facie* evidence against our government, it is made the only evidence permissible on the part of the person seeking to enter the United States. It is only by this construction to the 6th section that consistency can be given to its somewhat confused language, and the manifest purpose of the act be carried out. It disposes of the application of the petitioner. She cannot land without the certificate there designated. The form prescribed by the section shows that the certificate is to be obtained by women as well as by men.

We are not insensible to the earnest remarks of counsel as to the hardship of separating man and wife. With our notions of the sacredness of that relation, they appeal with striking force. But here the relation was voluntarily assumed in the face of the law forbidding her coming to the United States without the required certificate. And they need not now be separated. He can return with, and protect his child wife in the Celestial Empire. Writ discharged and petitioner remanded.

SAWYER, CIRCUIT JUDGE. In my judgment, this case presents one of the most important questions, that can arise under the Chinese restriction act. It is, whether a Chinese laborer, who was residing in the United States on November 17, 1880, or who subsequently, came to the country before August 4, 1882, and who has since returned to China under such conditions as entitle him to re-enter the United States, is entitled to bring into the United States with him, on his return, his wife, who has never before been in the country; and who, therefore, has no other right to enter, than that derived from her *status* as wife of a Chinese laborer entitled to enter—that is to say, a right to enter by virtue of a right pertaining to the husband, alone, and not as an independent individual personal right of her own. If such Chinese laborer has a right to bring into the country with him, a wife, who has never been here before, he must,

upon similar grounds, be entitled to bring with him all his minor children; and under this right the number of Chinese laborers, who are entitled to come to the United States, will be, greatly, extended beyond the number, who can enter by virtue of their own individual rights. The question is, also, presented, whether the wife of a Chinese laborer, who was not herself a Chinese laborer, *in fact*, before and down to the time of her marriage, by the act of marriage, takes the *status* of the husband, and becomes in contemplation of law, one of the class intended to be excluded, and as such, is excluded, unless she can enter by virtue of the right pertaining to her husband. The construction of the statute, upon the points stated, is more doubtful, to my mind, than that of any other point raised under the act upon which I have been called to pass. As there is no appeal from the decision of this court, and as the question is one of the greatest importance, both to the Chinese laborers entitled to be in the United States, and to the people of this country, the case was, also, reserved, and ordered to be reargued before the circuit justice.

Upon the first argument, the conclusion I reached, after considerable reflection, was, that the husband is not entitled to bring his wife into the country, she being, in fact, a Chinese laborer, and never having been here before; and that, upon the marriage of the petitioner, in this case, with a Chinese laborer, she took upon herself the *status* of the husband, as one of the *class*, who are not now permitted to enter the United States, without reference to her former *status*. Upon further argument and consideration, the view before taken is confirmed.

Article II, of the amended treaty, provides that, "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body, and household servants, and *Chinese laborers who are now in the United States*, shall be allowed to go and come of their own free will and accord, and *shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations*."

The argument in favor of petitioner's husband's right to land his wife, is that the restriction act purports to be "an act to *execute* certain treaty stipulations relating to Chinese"—*not to abrogate* them; that all the provisions of the act, scrupulously, avoid everything that *expressly* conflicts with the treaty; that the treaty expressly provides, that all "Chinese laborers, who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions, which are accorded to the citizens and subjects of the most favored nations;" that among the "rights and privileges," accorded to citizens of all other nations, are, to come of their own free will and accord, and to bring their wives and children with them; that the treaty, therefore, in clear, express and unmistakable terms, secures these same rights and privileges to returning Chinese laborers, of bringing their wives and children with them, as rights be-

longing and pertaining to the husband and father; that congress has not excluded their wives and children by name, or in express terms; and, that, it is not to be presumed, from any general language used in the act, that congress intended to over-ride and abrogate the rights thus specifically, and expressly, secured by the treaty, thereby, to that extent repealing, or abrogating the treaty.

The policy of the act, manifestly, is, to exclude the entire *class* of Chinese laborers, *as a class*. The wife of a Chinese laborer is, it seems to me, one of the class—that her *status* partakes of, and must follow, the *status* of the husband, as one of his class—whether she, in fact, labors, or not—and as one of the class, I think the petitioner is excluded by the act, so far as any individual personal right of her own is concerned.

Must the right of the husband to bring his wife with him, be regarded as one of the rights accorded to the citizens of the most favored nations, within the meaning of the treaty cited? And, if so, must the language of the restriction act, be construed in view of, and in subordination to, that of the treaty; and being so construed, can it, reasonably, be so limited in construction, as not to make it conflict with the treaty? The language of the act is very broad. It is provided that "the coming of Chinese laborers to the United States, be and the same is hereby suspended; and during such suspension it shall not be lawful for *any Chinese* laborer, to come," etc., (sec. 1). "The master of any vessel, who shall, knowingly, bring within the United States, on such vessel, and land, or *permit to be landed, any Chinese laborer* from any foreign port or place, shall be guilty," etc., (sec. 2). "Any Chinese laborer," must mean all and every individual of the entire class. It certainly embraces the wife, who is, herself, in fact, a laborer, irrespective of her status as the wife of a Chinese laborer. It is impossible not to apply the language to such a laborer though a wife. And if I am right in the view I have taken, that the wife must be regarded as taking the *status* of the husband as one of the class excluded, then it must be equally applicable to the wife of any Chinese laborer, without regard to her *status*, or actual occupation before marriage. So, also, the provision for the certificate to be produced on the return, as the only evidence of their right to re-enter the United States, can only be given to those who have been in the country before, and it must be given at the time of their departure. There is no exception, in terms, in any of the language used in the act, of the wives, or minor children of Chinese laborers, and, none can be fairly inferred from any language found in the act. We are not authorized to interpolate the exception into the act. If a Chinese man of the laboring class, can bring his wife into the country, as a right attaching and pertaining to himself, secured by the treaty, the converse of this rule must be true, and a Chinese woman, residing in this country, of the laboring class, or a laborer, in fact, upon loss of her husband, or having no husband, may return to China with her laborer's certificate, marry and return with her husband, who has

never been in the country before. Upon the whole, after careful consideration, I am of the opinion, that even conceding the right to the Chinese laborer entitled to return, to bring his family with him to be fairly covered by the language of the treaty, yet, the provisions of the restriction act are inconsistent, and in conflict, with the provision of the treaty, so construed, and the statute, being later than the treaty, annuls or repeals it. The result is, the petitioner must be remanded. But if a wife, in the situation of the petitioner, does not take the *status* of her husband, and if the restriction act, as amended in 1884, is applicable to her case, then she has an individual, personal, right to enter the United States, as not being a Chinese laborer, without regard to her husband, but in that case, the certificate prescribed by section 6 is the only evidence upon which she can enter. The certificate she has not got, and the result is the same. I think the former the proper view.

It is greatly to be regretted, that every question fairly arising upon the rights of the Chinese under the treaties with China, and the restriction acts, cannot be taken to the supreme court for an authoritative determination. These questions are of the highest international importance, and ought not to be finally adjudged by the local courts of original jurisdiction. It is, earnestly, hoped by us, that congress will provide for writs of error, or appeals, in this class of cases.

THE CASE OF THE LIMITED TAG.

[IN RE KEW OCK, ON HABEAS CORPUS.]

September 22, 1884.

CHINESE RESTRICTIVE ACT—CERTIFICATE—PRIOR RESIDENCE.—A Chinese laborer, who left the United States after the passage of the restriction act of 1882, cannot re-enter the same without producing the certificate required by such act. Such certificate is the only evidence permissible to establish his right of re-entry. He cannot re-enter upon proof of having received a custom house tag, entitling him to a certificate, if he left without obtaining it.

APPLICATION for a writ of *habeas corpus.*

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and HOFFMAN and SABIN, District Judges.

T. D. Riordan and *L. I. Mowry*, for the petitioner.

S. G. Hilborn and *Carroll Cook*, for the United States.

FIELD, CIRCUIT JUSTICE. The petitioner in this case is also a Chinese laborer, who was a resident of the United States on the seventeenth of November, 1880, and until the twenty-first of June, 1883, when he departed for China. Previous to his departure, he applied to the collector of the port of San Francisco for a certificate under the restriction act to enable him to return to the United States, stating that he wished to leave on the City of Tokio.

After the usual examination and registry, he received from the collector the white tag generally given in such cases, entitling him to a certificate stating that he was to leave on the steamer named, which sailed on the thirty-first of May, 1883. Subsequently, but prior to the leaving of the steamer, he concluded to delay his departure until the next steamer, which left on the fifteenth of June. On that day he went on board this last steamer, and demanded of the collector present a certificate in exchange for his tag The collector refused the certificate, as the tag called for one stating that he was to leave on the City of Tokio, and not on the one then about to depart. He also took from the petitioner the tag given to him. The petitioner accordingly left on the steamer City of New York without any certificate, and now claims a right to re-enter the United States by virtue of his old tag, and the certificate to which that entitled him, and invokes the order of the court for his relief.

The court cannot help the petitioner. As the tag received only called for a certificate stating that he was to leave on the steamer City of Tokio, he could not, by virtue of it, claim a certificate stating that he was to leave by another steamer. He should have returned the tag to the collector, and asked for one giving him a right to a new certificate, stating his intention to leave by a different steamer. Not having done so, and having left without any certificate, he is in the same position he would have been had he departed without any attempt to obtain one.

The law of 1884 makes the certificate to the Chinese laborer "*the only evidence permissible to establish his right of re-entry,*" and the court cannot, therefore, listen to any tale of his supposed grievances. As stated in the case of *the unused tag*, the remedy, if he have any, must come from the officers in Washington who have control over the collector. The court has no jurisdiction to supervise his action towards the petitioner, and direct the specific performance of any neglected duty to him.

Writ discharged and petitioner remanded.

SAWYER, CIRCUIT JUDGE. In this case, in my judgment, the rights of the petitioner must be determined by the restriction act of 1882, which was in force at the time of his departure. But whether governed by the original act, or the act as amended in 1884, the result is the same; for under either, the certificate provided for in the act is the only evidence permissible to establish his right of re-entry, and he had neither certificate. There is no dispensing power conferred upon the courts: See my views on this point expressed in the case of Ah Kee, just decided, and, also, the views of Mr. Justice Field upon the point in the same case.

I concur in the order remanding him.

SUPREME COURT OF NEVADA.

LIVINGSTON ET AL. v. THE STATE.

Filed September 8, 1884.

PURCHASE OF BONDS FOR SCHOOL FUND—HOW TO BE PAID, HOW DETERMINED.—In determining the amount to be paid by the commissioners for the purchase of territorial bonds for the benefit of the school fund, (under the statute of 1979, 15, section 3,) the method of computation is, to take the bonds at the date of delivery, calculate the interest thereon at nine and one-half per cent. per annum until March 1, 1887, when the bonds would become due; add the interest to the principal; then discount this amount by four and one-half per cent., and the balance is the amount to be paid under the statute. To ascertain the true discount, divide the amount of the principal and interest on the bonds by one dollar plus the product of the rate multiplied by the time in years, the quotient is the sum to be paid by the state for the bonds. Subtract this sum from the amount of the debt and the true discount remains. Subtract the principal sum, without interest, from the quotient and the premium remains.

APPEAL from a judgment of the second judicial district court, Ormsby county, entered in favor of the defendant. The opinion states the facts.

R. M. Clarke, for the appellants.

The Attorney General and *W. E. F. Deal,* for the respondent.

HAWLEY, C. J. The act of the legislature providing for the purchase of the territorial bonds for the benefit of the school fund, declares that the commissioners therein named are authorized to purchase the bonds, "if they can purchase the whole issue ($380,000), and not otherwise, if such purchase can be made at such rate of premium as would guarantee to the purchaser four and one-half per cent. per annum interest on the amount paid during the life of the bonds so purchased:" Stats. 1879, 15, sec. 3.

In pursuance of the provisions of this act the commissioners purchased the bonds from appellants. One hundred and sixty thousand dollars were delivered February 1, 1879, and two hundred and twenty thousand dollars were delivered April 1, 1879. At the time of the purchase there was six thousand, three hundred and thirty-three dollars and thirty-three and one-third cents interest due on the one hundred and sixty thousand dollar bonds, and one thousand, seven hundred and forty-one dollars and sixty-six and two-thirds cents on the two hundred and twenty thousand dollar bonds. The amount paid for interest to date of purchase was eight thousand and seventy-five dollars. The amount paid for the bonds was four hundred and ninety-one thousand six hundred and twenty-seven dollars and fifteen cents, making the total amount paid to appellants four hundred and ninety-nine thousand seven hundred and two dollars and fifteen cents.

The territorial bonds so purchased were issued on March 1, 1872, and were made payable in fifteen years, with interest thereon at nine and one-half per cent. per annum. Interest coupons were attached to the bonds and were made payable September 1st, and March 1st of each year. The bonds would be due March 1, 1887.

At the time of the delivery of the bonds to the commissioners, appellants claimed that there was an error in the method of computation, in arriving at the amount that should be paid, and this suit was instituted by them for the recovery of the sum of sixteen thousand one hundred and eighty-five dollars and seventeen cents, a balance alleged to be due them on the purchase of the bonds.

Accepting as correct the theory contended for by appellants, that the amount to be paid is to be ascertained by an interpretation of the statute, and waving all the preliminary and technical objections urged by respondent's counsel against the right of applicants to recover in this action, we are called upon to answer the question: "What is the sum which the state, under the terms of the law, is to pay for the bonds?"

Appellants claim that, inasmuch as the interest on the bonds is payable semi-annually, the state must settle every year with itself, and must pay interest on its bonds every six months; that the owners of the bonds were entitled to have this interest taken into the calculation at the end of each year instead of at the end of the life of the bonds; that the rule of settlement should be to "compute the interest on the principal sum from the time when the interest commenced to the time of the first payment in each case, *then settle*. Deduct the excess of interest due to Livingston from the sum due to the state. The balance will be a new principal, and so on to the end."

The authorites cited in favor of this method of computation have reference, solely, to the rule of computing interest in cases of partial payments on notes, or other evidences of indebtedness, and the rule is stated as follows: "Compute the interest on the principal sum from the time when the interest commenced to the first time when a payment was made, which exceeds, either alone or in conjunction with the preceding payments, if any, the interest at that time due; add that interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments, if any, and the remainder forms a new principal, on which compute and subtract the interest, as upon the first principal; and proceed in this manner to the time of the judgment:" 2 Parson's Notes and Bills, 425, and authorities there cited.

This rule is one of almost universal application in the class of cases referred to, and is always to be applied in such a manner as to prevent the interest forming a part of the principal so as to carry interest. It cannot, therefore, be invoked in favor of the rule, as claimed by appellants, in a case like this, because if the interest on the bonds in question is to be added to the principal each year, a settlement then made, and a new principal given, it requires no argument to show that such a computation would result in the interest drawing some interest.

Other authorities are cited to the effect that the interest coupons attached to the bonds were negotiable securities, and that the holders thereof might collect interest thereon after they became due, if the same was not paid at maturity. These principles will be ad-

mitted as correct, as they have not been questioned, and have no special application to the facts of this case.

No question is raised as to the power of the legislature to pass a law authorizing a computation to be made upon the method claimed by appellants. The question is whether the law, as passed, authorizes such a method of computation.

If the bonds had not been purchased the state would only have been required to pay the holders the amount of the principal and interest thereon at the rate of nine and one-half per cent. per annum for the life of the bonds. Of course the bonds were of greater value to the holders on account of the interest being made payable semi-annually, because the interest when paid could be invested in other securities. A banking house or capitalist engaged in the business of loaning money and discounting debts, due at a future time, would naturally take this fact into consideration in ascertaining the present value of the bonds, and would doubtless give more for the bonds than if the interest was not to be paid until the maturity of the bonds. Appellants might, therefore, have refused to sell the bonds to the state, on the ground that they were of greater value than the sum offered, and if they thought the method of computation invoked by the commissioners and other experts was not just and equitable they ought to have refused to deliver the bonds upon such terms. The law could not, and did not attempt to, compel appellants to sell the bonds. The sale was optional upon their part. They were at liberty, if they saw fit, to sell the bonds for a less amount than they received; but in no event can they recover any greater amount than the statute authorizes to be paid. Upon what method of calculation is this sum to be determined?

Whatever may be the rules of banking houses, or the methods adopted in the United States treasury deparment, as to the computation of interest on bonds, it is evident, to our minds, that the statute in question did not contemplate that the method of computation, as claimed by the appellants, should be adopted in arriving at the amount to be paid by the commissioners for the state.

The statute is clear, plain and unambiguous. The purchase was to be made at such rate of premium as would guarantee to the state four and one-half per cent. per annum interest during the life of the bonds. It is not a question as to the real marketable value of the bonds. The law itself fixes the sum which the commissioners are authorized to pay. It may be that the bonds would have commanded a greater premium in the financial markets than the state was willing to give. But the law is positive and direct in its terms that the purchase is to be made "at such rate of premium as would guarantee to the purchaser four and one-half per cent. per annum interest on the amount paid, during the life of the bonds so purchased."

The question is one of computation, to be determined by the ordinary rules of arithmetic governing the method of ascertaining the true discount on notes and bonds. Take the bonds at date of deliv-

ery, calculate the interest thereon at nine and one-half per cent. per annum until March 1, 1887, (when the bonds would become due). Add the interest to the principal; then discount this amount by four and one-half per cent. per annum for the same time, and we will have the sum that is to be paid under the provisions of the statute. By this method the state realizes four and one-half per cent. per annum interest on the amount paid, during the life of the bonds, which the statute says must be guaranteed to it.

To ascertain the true discount, divide the amount of the debt (principal and interest on the bonds) by $1 plus the product of the rate multiplied by the time in years, the quotient will be the sum that the State will pay for the bonds. Subtract this sum from the amount of the debt, and you have the true discount. Subtract the principal sum (without interest) from the quotient, and you have the premium.

Under this method, what is the result?

One hundred and sixty thousand dollars, purchased February 1, 1879, with interest at nine and one-half per cent. per annum, until March 1, 1887 (eight years and one month), amounts to $282,866.66 666⅔-1000. The interest on one dollar at four and one-half per cent. per annum for eight years and one month would be $0.36 375 100. Plus $1, under the rule above stated, makes $1.36 375-1000. Divide $282,866.66 666⅔-1000 by $1.36 375-1000, and we have the sum of $207,418.27 069-1000. This subtracted from the amount of the principal sum and interest leaves $75,448.39 596-1000 as the discount, which is equal to the interest on the sum of $207,418.27 069-1000 at four and one-half per cent. per annum for eight years and one month. The premium to be paid is $47,418.27 069-1000.

Two hundred and twenty thousand dollars, delivered April 1, 1879, with interest at nine and one-half per cent. per annum, until March 1, 1887 (seven years and eleven months), amounts to $385,-458.33 333⅓-1000. The interest on $1 at four and one-half per cent. per annum for seven years and eleven months would be $0.35 625-1000; plus $1 makes $1.35 625-1000. Divide $385,458.33 333⅓-1000 by $1.35 625 1000, and we have the quotient $284,208.90 937-1000 as the sum which the state is to pay for the bonds. This subtracted from the principal amount, with interest, leaves $101,249 42 396-1000 as discount, which is equal to the interest on the sum paid for the purchase at the rate of four and one-half per cent. per annum during the life of the bonds. The premium to be paid is $64,208.90 937-1000.

This was the method adopted by the commissioners in making the computation, and, in our opinion, it is the only method of computation that is warranted by the statute.

The judgment of the district court is affirmed.

RICKARDS v. HUTCHINSON.

Filed September 16, 1884.

STATUTES OF LIMITATIONS—TIME LIMITED FOR SUING ON DEATH OF PARTY.—A person in whose favor a cause of action has accrued, has the same length of time to bring suit thereon, notwithstanding the death of the party against whom such cause of action has accrued, as he would have had had such latter person lived. Section 23 of the act defining the time of commencing civil actions, does not limit the time in which an action can be brought to one year from the death of such party, in all instances. The object of such action is to prolong, not to curtail, the period for suing, given in other sections of such act.

APPEAL from a judgment of the seventh judicial district court, Washoe county, entered in favor of plaintiff. The opinion states the facts. The opinion on the first hearing is reported in 1 West Coast Reporter, 659.

Thomas E. Haydon, for the appellant.
Roger Johnson, for the respondent.

HAWLEY, C. J. A rehearing was granted in this case for the purpose of considering the question whether section 23 of the act defining the time of commencing civil actions (1 Comp. L., 1,038) is applicable to this case, and whether, under its provisions, this action was barred by the statute of limitations, it not having been commenced within one year after the issuing of letters testamentary on the estate of Mrs. Wheat.

Appellant claims that when a cause of action has matured, and the statute of limitations has commenced to run before the death of the party against whom such cause of action accrued, no suit can be maintained unless brought within one year from the death of the party; that the presence of the executor, or administrator, in, or his absence from, the state makes no difference with reference to the running of the statute.

We do not think this position is sustained by the authorities cited in its support.

We are of opinion that the plaintiff was entitled to have person *in esse* within this state, against whom she could bring suit, for the full period of time prescribed in section 16 (1 Comp. L., 1,031), and that the object of section 23 was to extend the time, in certain cases, within which the actions might be commenced, and was not intended —and should not be so construed—to limit the time given by other sections of the act.

If Mrs. Wheat had lived and been absent from the state for the same length of time as the administratrix was, the suit would have been commenced in time. Is the plaintiff not entitled to bring her suit within the time it could have been commenced, under similar conditions, if Mrs. Wheat had lived?

In California there is a provision in the code identical with section 23 of our statute. In Smith v. Hall, the supreme court of that state said: "That the object of the section was not to curtail, but to prolong the period for suing in the given category:" 19 Cal., 86.

In Lowell v. Kier, the action was brought within the period limited for the commencement against the deceased party, had he lived.

The court said: "It is not barred merely because it was not brought within one year after the issuance of letters to the executors of the estate; that the section of the code, while it may, under some circumstances, prolong the time originally limited, cannot operate in any case to shorten it:" 50 Cal., 647.

The views herein expressed are in accordance with the decision of this court in Wick v. O'Neale, 2 Nev., 303, instead of in opposition to it, as claimed by appellant. There the court correctly construed section 23, so as to extend the time for the commencement of the action to one year from the time of the issuing of letters testamentary, in a case where the action would, under the other sections of the act, have been barred before that time.

Our former decision was correct.

The judgment of the district court is affirmed.

HOFFMAN *v.* BOSCH.

Filed September 20, 1884.

BREACH OF WARRANTY OF TITLE—MEASURE OF DAMAGES.—The measure of damages in an action for breach of warranty of title to real estate is the value of the property at the time of sale, to be ascertained by the purchase price, with interest thereon, and reasonable costs, if any were expended in defense of the title by the plaintiff.

APPEAL from an order of the seventh judicial district court, Washoe county, granting plaintiff a new trial. The opinion states the facts.

Wm. Webster, for the appellant.

J. F. Alexander, for the respondent.

HAWLEY, C. J. Upon the trial of this action to recover damages for breach of warranty of title to real estate, the court gave the following instruction: "If the jury find that there has been a breach of warranty of the title to the real estate in question, * * * the measure of damages is the value of the property at the time of sale, to be ascertained by the purchase money, with interest thereon, and reasonable costs, if any were expended in defense of title by plaintiff."

The jury found a verdict in favor of plaintiff for the sum of one hundred and fifty dollars. The court, upon motion of plaintiff, granted a new trial upon the ground that the jury in assessing the damages failed to determine the amount, from the testimony, upon the rules announced in the instruction.

The instruction stated the measure of damages correctly: Dalton v. Bowker, 8 Nev., 190, and it was the duty of the jury to have followed this instruction in assessing the damages. The verdict, as rendered, was not justified by the law or by the evidence.

From the undisputed testimony in the case, the plaintiff, if he recovered in the action, was entitled to a larger sum than was awarded him by the jury.

The order of the district court granting a new trial is affirmed.

SUPREME COURT OF CALIFORNIA.

No. 9,087.

HART v. WESTERN UNION TELEGRAPH COMPANY.

Department One. Filed September 18, 1884.

TELEGRAPH COMPANIES—MEASURE OF DAMAGES AGAINST.—A telegraph company is liable for whatever loss naturally and in the usual course of things follows from its failure to transmit a message promptly and correctly, although such message was written in cipher or was otherwise unintelligible to the company.

THE SAME—STIPULATION LIMITING LIABILITY—NEGLIGENCE.—A stipulation printed on a blank upon which a telegraph message is sent, purporting to exempt the telegraph company from all liability for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of consideration. Such company cannot stipulate against or limit its liability for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments. Such company is exempt only for errors arising from causes beyond its control, and the burden of showing such exemption rests upon it, in an action to recover for an alleged loss.

THE SAME—EXEMPTION FROM LIABILITY—ATMOSPHERIC INFLUENCES.—A telegraph company is not liable for a loss arising from a mistake in the transmission of a message, when such mistake was occasioned by a break in the electric current, produced by atmospheric influences beyond the company's control.

APPEAL from a judgment of the superior court for San Joaquin county, entered in favor of the plaintiff, and from an order refusing the defendant a new trial. The opinion states the facts.

W. H. L. Barnes, for the appellant.

Byers & Elliott, for the respondent.

ROSS, J. On the fifteenth day of December, 1882, the plaintiff delivered to the defendant, at its Stockton office, this message:

"GEORGE W. MCNEAR, San Francisco: Buy bail barley falun; report by mail. GEORGE HART."

The message was promptly transmitted and delivered as written, except that the word "bail" was changed to the word "bain." By the private cipher code of McNear, used by the plaintiff in the message, the word "bail" means "one hundred tons," and the word "bain" means "two hundred and twenty-five tons." As the message was delivered it directed McNear to buy for the account of the plaintiff two hundred and twenty-five tons of barley, whereas as it was written by the plaintiff, McNear was directed to buy on plaintiff's account one hundred tons only. Acting on the message received McNear bought for plaintiff two hundred tons of barley. When the plaintiff discovered that fact he notified the defendant that one hundred tons had been bought in excess of that directed to be bought by the original message, and asked the defendant what he should do with the surplus so purchased. Defendant refused to give any instruction in regard to it. Plaintiff thereupon sold the barley at the highest market rate, his loss on the extra one hundred tons being four hundred and twenty-nine dollars and eighty-two cents. It is for the loss thus sustained by him that the action is brought.

At the trial, the only proof given by the plaintiff to show negligence on the part of the defendant was the admitted fact that the message was delivered in its altered form. It was also admitted that the message was written by the plaintiff, upon a printed form prepared by the defendant, underneath the words "send the following message, subject to the above terms, which are hereby agreed to," and that among the "above terms" referred to are the following: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages."

That the message in question was not "repeated," is conceded by the plaintiff. It further appears in the case that no explanation of the meaning of the dispatch was made by the plaintiff at the time he delivered it to the defendant, for which reason, and because, as is claimed, the message under consideration was in cipher, appellant contends that the measure of damages is the price paid for the transmission of the telegram—in this case, thirty cents. In support of this point it is said by counsel that "the decisions of all the courts uniformly declare that unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose."

In this, appellant's counsel is mistaken. The cases cited by him undoubtedly sustain the point he makes; and there are other cases to the same effect. Some of those decisions were based on messages which were in cipher, and others, messages which, though not in cipher, did not themselves disclose the extent or import of any transaction had in contemplation by the parties. In those cases substantial damages were refused because neither the messages nor other information given made known to the operator what was contemplated. Hence it was ruled that plaintiff could not recover of the telegraph company what, not understanding, it could not have contemplated as the effect of a miscarriage or other failure.

While not doubting the general rule that damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might be naturally expected to follow its violation, we do question and think

not sound the *application* of that rule as made in the class of cases to which allusion is above made.

Telegraph companies have conferred upon them by law certain privileges, among them the right of eminent domain, and they are charged with certain duties, among them the obligation to send promptly and correctly such messages as are intrusted to them. Of course, if illegibly written, the operator may reject a message; but if plainly written, his duty is to send it as written. Why has he the right to know what the message refers to? In what way would such knowledge aid him in the discharge of his duty to it send correctly? "One of the great attractions," say Scott and Jarnagin, in their treatise on the law of telegraphs, sec. 404, "which this mode of communication presents, is the brevity of the dispatch; such abbreviations being used in many cases as will enable the person for whom it is intended alone to understand it; and, hence, the vast amount of business the telegraph operator is capable of transacting in the transmission and delivery of messages. So that an explanation of the meaning, importance and bearing of each message would be an insufferable annoyance, and, in the multiplicity of messages delivered for transmission, could not be remembered, even if the time could be spared to listen to it; and it would rarely afford any benefit or advantage to the company after the information was communicated." Proceeding, these writers say, and say correctly, that though the company, through its agents, may not know the meaning of the particular message, they do know that messages of great value and importance, involving heavy losses in case of failure, or delay, or mistake in their transmission, are constantly sent over their wires; and they do know that they hold themselves out to the public as prepared at all times, and for all persons, to transmit messages of this description. And the rule of damages, as applied to telegraph companies, is there deduced, which we think the true rule, namely, that, although the message be unintelligible to the company, yet as its undertaking was to transmit the message promptly and correctly, both parties contemplated that, whatever loss should naturally, and in the usual course of things, follow a violation of that obligation, the company should be responsible for. The same conclusion was reached by the supreme court of Alabama, in the case entitled, Doughtry v. The American Union Telegraph Co., decided in December, 1883, a note of which will be found at page 731, 46 American Reports, and by the court of appeals of Virginia, in the case of the Western Union Telegraph Co. v. Reynolds, 77 Va., 173; see, also, Rittenhouse v. The Independent Line of Telegraph, 1 Daly, 474.

It is also contended on behalf of the defendant corporation that as the message in question was not "repeated" defendant is not responsible under any circumstances beyond the amount received for its transmission; and this because it is so declared in the conditions printed at the head of the form upon which the dispatch was written, and to which, as is claimed, the plaintiff assented. There

are numerous cases that hold that such a rule on the part of the company is reasonable, valid and binding on the sender of the message. The cases that so hold are too numerous to be here referred to in detail. They will be found collated in a note to the case of the Western Union Telegraph Company v. Blanchard, reported in 45 American Reports, page 486. But there are many cases to the contrary, and the latter class we think based on the better reason. In the first place we agree with the supreme court of Illinois in the case of Tyler v. Western Union Telegraph Company, 68 Ill., 421, and S. C. 74 Ill., 170, where it is held that the regulation requiring messages to be repeated is not a contract binding in law, for the reason that the law imposed upon the company duties to be performed, for the performance of which it was entitled to a compensation fixed by itself, and which the sender had no choice but to pay; that among those duties was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case and when the charges were paid the duty of the company began, and there was therefore no consideration for the supposed contract requiring the sender to repeat the message at an additional cost of fifty per cent. of the original charge. To the same effect is Bartlett v. Western Union Telegraph Company., 62 Me. 218, and Candee against the same company, 34 Wisconsin, 477, where the court say: "Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself had fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is, Whether it can at the same time, and as a part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it? The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing

in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create an obligation or duty, at one and the same moment and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed, and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half the usual rates of transmitting day messages, that argument ends in proving that the company does not undertake to send the message at all, and that no contract or agreement on its part is made or entered into for that purpose. If the company promises or binds itself at all for the rate or consideration named, and which it is willing to and does accept, then the smallness of such consideration cannot operate to relieve from the promise or to destroy the obligation thus created. Regarding the regulations in this light, therefore, as well as in that of correct public policy, it is seen that effect can not be given to them as a means of protection or escape on the part of the company from all liability for the performance of its contract. The regulations cannot serve to shield the company from the consequences resulting from the gross negligence or fraud of its officers or agents, or from the entire failure to perform the service, no good excuse for such failure being offered or shown."

We therefore hold that the stipulation purporting to exempt the corporation defendant from all liability for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of a consideration to support it. And further, that it is not competent for telegraph companies to stipulate against or limit their liability for mistakes happening in consequence of their own fault, such as want of proper skill or ordinary care on the part of their operators or the use of defective instruments: See authorities above cited and Sweatland v. Ill. and Miss. Tel. Co., 27 Iowa, 433; Wolf v. Western U., 62 Penn. St., 83; Breese v. U. S T. Co., 48 N. Y., 132; U. S. Tel. Co. v. Gildersleeve, 29 Md., 232; Western Union v. Buchanan, 35 Ind., 429; Hibbard v. West. Union, 33 Wisc., 558; Tel. Co. v. Griswold, 37 Ohio St., 301.

We think the true rule is, that such companies are exempt only for errors arising from causes beyond their own control. And this would seem to be the rule adopted by statute in this state; for by sec. 2,162 of the civil code it is declared: "A carrier of messages for reward must use great care and diligence in the transmis-

sion and delivery of messages. *A carrier by telegraph must use the utmost diligence therein.*"

We are further of opinion that the plaintiff having proved the mistake in the message as delivered, the *onus* was upon the defendant to show how it occurred: Tyler v. Western Union T. Co., *supra.*

If the error was caused by atmospheric disturbances, or a momentary displacement of the wires, the defendant knew it, and ought to show it. This, defendant undertook to do on the trial in the court below. There was testimony given tending to show that before and at the time the message in question was sent, trouble was experienced in the transmission of dispatches, owing to the condition of the weather; that it was foggy and stormy. It was further made to appear that in the telegraphic code the following lines and dots, when transmitted along the wire, made the word "bail":

And that the word "bain" is expressed by the following:

There was also testimony tending to show that the operators at Stockton and San Francisco were competent, and that the one at San Francisco was especially careful in the matter of this dispatch. The latter testified that she took particular pains with the message in question, "as is shown by the mark under one of the cipher words—the last word—because it was an unusual word—'falun.' I asked Mr. Dixon to repeat it, and I put a little mark, 'x,' under it to show that it was repeated. The other words being ordinary words I paid no attention to, because it is something very likely to be received in any message."

There was, also, given on behalf of the defendant, further testimony, tending to show that the error, resulting in the change of the word "bail" to "bain," was caused by a break in the electric current, and that this, in turn, was caused by atmospheric influences, prevailing at the time, and, of course, beyond the control of defendant. If such was the fact, the verdict should have been for the defendant. But it was a question of fact for the jury, under appropriate instructions from the court. The court should have told the jury that the mistake in the message, as delivered, being admitted, the presumption was that it occurred through the negligence of defendant, but that if they believed from the evidence that the mistake occurred through a cause or causes beyond defendant's control, such as a break in the electric current, produced by atmospheric influences, their verdict should be for the defendant. We think this question, which was the turning one in the case, was not fairly submitted to the jury in the court below, and we must therefore remand the case for a new trial.

Judgment and order reversed and cause remanded for a new tria .

McKINSTRY, J., and McKEE, J., concurred.

No. 9,551.

STEIN v. HOWARD ET AL.

In Bank. Filed September 23, 1884.

INCREASE OF CAPITAL STOCK—FICTITIOUS ISSUE—SPRING VALLEY WATER WORKS.—The Spring Valley Water Company is authorized to increase its capital stock and to sell the increased issue at the actual market value of the stock of the corporation, for the purpose of raising funds to extend and enlarge the capacity of the works of the corporation, so as to afford greater protection to the property of the inhabitants of the city and county of San Francisco, and to supply them with an abundance of water. Such increased issue is not "fictitious," within the meaning of article XII, section 11 of the constitution.

APPEAL from an order of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

Rosenbaum & Sheeline, for the appellant.

Fox & Kellogg, for the respondent.

MYRICK, J. The complaint in this case was filed by a stockholder for the purpose of enjoining the trustees of the Spring Valley Water Works, a corporation, from issuing and selling twenty thousand shares of stock. The capital stock of the corporation was eight million dollars, divided into eighty thousand shares of the nominal value of one hundred dollars each. At a meeting of the stockholders, duly called, held on the sixth day of July, 1876, it was resolved (more than two-thirds of the capital stock being represented, and the vote being unanimous as to all present), that the capital stock be increased to sixteen million dollars, to be divided into one hundred and sixty thousand shares of one hundred dollars each. At a regular meeting of the board of trustees, held April 1, 1884, it was resolved by the board that the president and secretary be authorized to issue and sell twenty thousand shares of the increased stock of the corporation at eighty-seven and one-half dollars per share, the stockholders to be entitled to purchase one share of stock for every four shares which they then owned. The answer of the defendants averred that the corporation had already expended and paid out, in the construction of its works, and in the purchase of property necessary therefor, a sum of money in excess of the eight million dollars, for which certificates of stock had been issued, and of two million dollars, for which the proposed certificates were to be issued, and that the increase of stock was *bona fide*, and for the purpose of selling the increased stock from time to time to raise funds for the purpose of extending and increasing the capacity of the works of the corporation; that for the protection of the property of the inhabitants of the city and county of San Francisco, and for supplying said inhabitants with an abundance of water it had become, and was necessary, that the property and capacity of the works of the corporation should be at once increased, and that the corporation had already entered into contracts involving the expenditure of more than half a million dollars for the purchase of prop-

erty necessary to construct a new aqueduct and line of pipe for more than twenty-five miles; that the contemplated expenditure would amount to two millions of dollars; that for a long time past the stock of the corporation had fluctuated in the market, some days being as low as eighty-three dollars, and other days as high as ninety dollars per share, and that on the said first day of April, 1884, the market value was eighty-seven and a half dollars per share, and no more; that the proposed sale of the increased stock was for the purpose of raising funds for the purposes aforesaid, and that the price named is the highest price which can be obtained.

The civil code of this state (sec. 359) makes provision for an increase of the capital stock of an incorporation. The constitution of this state contains the following prohibition in article XII, sec. 11: "No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." The question for decision on this appeal is, whether the stock proposed to be issued and sold will create a fictitious increase of stock. Webster's dictionary defines the word "fictitious" to mean feigned, imaginary, not real, counterfeit, false, not genuine. The circumstances under which the stock is proposed to be issued and sold, as above stated, are, that the corporation has actual need of money for the purposes of its business, that the stock is proposed to be sold at the actual market value of the stock of the corporation, and to be sold only in such quantities as may produce the requisite funds. Under such circumstances, we think, it cannot be held that the issue is fictitious. Perhaps it might be asked at what price should stock be offered for sale in order to make the issue fictitious. We apprehend that no direct and positive answer can be given. The constitution has given no definition of the word "fictitious," it has not declared what was meant by the use of that word, further than what the word itself implies, taken into connection with the context. We apprehend that in ascertaining the purport of the word, or rather its application, we must take into consideration the surrounding circumstances. Of the stock proposed to be issued, *there is no one share* upon which a person can place his finger and say that share is or will be feigned, imaginary, not real, counterfeit, false, not genuine. Each share is offered at a price equal to the price of any one of the old shares. So far from the new shares being fictitious as to the old shares, it may be that burdens which would otherwise rest on the old shares, to wit, the payment of the corporation debts, will be entirely removed by the application of the funds realized, or shared in *pro rata* by the new shares. We cannot say but that this removal of such burdens, or the sharing therein, will be of the value of the discount in the price at which the new shares are proposed to be sold, or increase the actual value of the old shares to their par value. It may very properly be said that the use of the word "fictitious" in the constitution, as above quoted, was as in contrast with the preceding sentence—as if to say, that stock issued for money paid,

labor done or property actually received (price not named) is not fictitious.

We do not think the issue or sale of the stock in question is within the prohibition of the constitution. Order affirmed.

ROSS, J., MORRISON, C. J., SHARPSTEIN, J., and MCKINSTRY, J., concurred.

No. 8,451.

YIK HON ET AL v. SPRING VALLEY WATER WORKS.

Department One. Filed September 24, 1884.

NEGLIGENCE—CONTRIBUTORY—COMPLAINT—PLEADINGS.—In an action to recover damages for negligence, the plaintiff need not aver in his complaint that he was not guilty of contributory negligence.

CONTRIBUTORY NEGLIGENCE—DAMAGE BY WATER.—In an action to recover for the damage done by a water company in negligently permitting water to escape from its street-main, and to fall on and through to the roof of an adjacent building, and damage goods therein, the fact that the scuttles of such roof were open does not constitute contributory negligence.

THE SAME—VARIANCE—FINDINGS.—In such action, when it is alleged that the goods damaged were *in* the building, proof that some of them were *on* the roof is not a material variance. A finding that such goods were on the premises of the plaintiff is sufficient.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial, in an action to recover damages for injury done to plaintiff's goods through the negligent escape of water from one of the defendant's street mains. The further facts appear in the opinion.

Fox & Kellogg, for the appellant.

Thomas D. Riordan and *William Leviston*, for the respondent.

MCKINSTRY, J. 1. Plaintiffs allege in their complaint that the water which escaped from defendant's main, by reason of the negligence of its servants, was cast and fell in great quantities on the roof of their house, and thence descending to the floors below, destroyed their drugs, etc. Appellant, demurring to the complaint, contends that, as appears therein, the injury would not have occurred if the roof of plaintiffs' house had been water-tight and the scuttles therein closed; that plaintiffs, therefore, were guilty of contributory negligence. Plaintiffs were not required to aver that they were *not* guilty of contributory negligence: Robinson v. W. P. R. Co., 47 Cal., 46. Nor does the allegation that the water passed through the roof, or through openings in the roof, establish that plaintiffs contributed to the injury. They had the right to use their own premises for any lawful purpose. If they had placed their goods in canvas tents, this would not have relieved defendant of the consequences of its wrongful act. There was no such relation between the omission to provide means by which water would be effectually excluded from their building and the tort complained of as would make plaintiffs in any degree participants in the conduct which caused the damage. As has been said: "The right of a man to make free use of his property is not to be curtailed by the fear

that his neighbor will make a negligent use of his:" 1 Thomp. Neg., 168; see, also, Fero v. Buffalo R. R. Co., 22 N. Y., 209, and Jefferis v. Phil. W. and B. R., 3 Houst., 447.

2. There was evidence to sustain the findings of negligence on the part of defendant and as to the amount of damages.

3. Evidence to prove that some of the goods injured were on the roof of the house, was introduced by plaintiff, without objection. The variance between the averment and the proof as to the location of the goods was not material: C. C. P., 470. And, no objection having been made to the evidence when offered, nor any motion made to strike out the testimony, the point as to variance cannot be taken here: Kiler v. Kimball, 10 Cal., 267; Owen v. Frink, 24 *Id.*, 171; Boyce v. California Stage Company, 25 *Id.*, 460; Bell v. Knowles, 45 *Id.*, 192, Brady v. Reese, 51 *Id.*, 477.

4. It is urged, the finding that the goods destroyed were stored *in* the building is not sustained by the evidence, which shows that some of such goods were on the roof of the building. But the material fact that the goods were on the premises of plaintiffs was alleged and found.

Judgment and order affirmed.

McKEE, J., and ROSS, J., concurred.

No. 10,992.

PEOPLE *v.* SOTO.

Department One. Filed September 24, 1884.

DISCHARGE OF JURY ON LEGAL HOLIDAY—CONSTRUCTION OF CONSTITUTION.—Section 5, Article VI, of the constitution does not prohibit all business in the superior court on a legal holiday or non-judicial day, except the issuing of injunctions and writ of prohibition. Such section is prohibitory of legislation establishing terms of court during which only judicial business can be transacted, but leaves the legislature at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays. Under section 134 of the code of civil procedure, and section 1142 of the penal code, a jury may be discharged on the twenty-second of February.

INSTRUCTIONS GIVEN IN ABSENCE OF DEFENDANT.—Giving instructions to the jury, in a prosecution for murder, in the absence of the defendant, will not warrant a reversal, if subsequently, and while the defendant is present, the court directs the jury to disregard his former instructions, and then instructs them to the same effect as previously.

APPEAL from a judgment of the superior court for Monterey county, and from an order denying the defendant a new trial. The opinion states the facts.

R. M. F. Soto, for the appellant.

Attorney-General, for the respondent.

McKINSTRY, J. To an information charging him with the crime of murder defendant pleaded *not guilty* and *once in jeopardy*. The verdict was against him as to both pleas.

At a former trial, the jury having been instructed on the twenty-first of February, 1884, the court became satisfied on the next day—the twenty-second of February—that there was no reasonable probability the jury could agree upon a verdict, and they were accord-

ingly discharged. The twenty-second day of February was a holiday: C. C. P., 10, 133, 134. A jury may be discharged on the twenty-second day of February unless the constitution prohibits it: C. C. P., 134; penal c., 1, 142. It is insisted by counsel for appellant that section 5 of article vi of the constitution prohibits all business in the superior courts on a legal holiday or non-judicial day, except the issuing of injunctions and writs of prohibition. The section of the constitution does not in terms prohibit any legal business on holidays. The last clause expressly declares that injunctions and prohibitions may be issued on such days. The phrase "they"—the superior courts—"shall always be open (legal holidays and non-judicial days excepted)," is prohibitory of legislation establishing *terms of court*, during which only judicial business can be transacted, but leaves the legislature at liberty to allow or disallow the transaction of all or any class of judicial business on legal holidays.

The jury were justified in finding against defendant upon his plea of former jeopardy.

After the jury had retired to deliberate upon their verdict, they returned and asked for further instructions, and, defendant being absent, the court re-read to the jury a portion of the previously given written instructions. After the jury had again retired they were brought into court by order of the judge, who then directed them, in the presence of defendant, to disregard what he had read to them while defendant was absent, and proceeded to read again that which he had read when they came in the first time.

It is contended that the error of the court was not and could not be rendered innoxious by the repetition of the reading in the presence of the defendant. Why not? It may be conceded that it can not be supposed the jurymen—in obedience to the admonition of the court—could entirely exclude from their minds the instructions given them while defendant was out of the court-room, but inasmuch as it was their duty to bear in mind precisely the same instructions given while defendant was in the court-room, it is manifest no injury could have been done defendant by reason of that which occurred while he was absent.

The judgment is sufficient in form.

Judgment and order affirmed.

Ross, J., and McKee, J., concurred.

No. 8,357.

McKay v. Riley et al.

Department One. Filed September 26, 1884.

Contract of Sale—Breach of Measure of Damages.—In an action by a vendee to recover for the breach of a contract of sale, where the articles contracted to be sold had no market value, the measure of damages is the actual loss sustained by the vendee by reason of his not receiving an advance or profit through agreements which he himself had made in reliance upon the fulfillment of his vendor's contract.

Objection to Evidence—Cannot be Made in Supreme Court for First Time.—An objection to evidence cannot be made in the supreme court for the first time, which might have been removed by the party offering it had the objection been made in the lower court.

APPEAL from a judgment of the superior court, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

M. B. Harrison, for the appellants.

C. E. Boyce, for the respondent.

MCKINSTRY, J. 1. There was evidence to sustain the findings as to the existence of a partnership between the defendants.

2. There was evidence tending to prove that no considerable quantity of the pipe, the subject of the contract sued on herein, was in other hands than those of defendants. If the jury were satisfied there was no market value for the articles they were justified in allowing plaintiff, as damages, the amount he lost by reason of his not being able to perform his agreement to deliver the pipe to third persons at an advanced price. Ordinarily the rule of damages in actions like the present is the difference between the price agreed to be paid and the market value, because the vendee can obtain the article contracted for at the market price. When, however, the circumstances are such that the vendee cannot thus supply himself, the rule does not apply for the reason of it ceases: Bank v. Reese, 2 Casey, 143. In such case the true measure of damages is the actual loss sustained by the vendee by reason of his not receiving an advance or profit through agreements which he himself had made in reliance upon the fulfillment of his vendor's contract: McHose v. Fulmer, 73 Penn., 367.

3. The record does not show any material variance between the allegations of the complaint and the testimony or findings.

4. Appellant contends that the judgment must be reversed because the plaintiff having attempted to prove an agreement between himself and Williams, Dimond & Co., for the sale of the flues or pipe which defendants had alleged to sell to him, showed that the price to be paid by Williams, Dimond & Co., was more than two hundred dollars, but failed to show either that any part of the purchase price was paid to him, or that the agreement was evidenced by a memorandum in writing. But even if it be conceded that the want of a writing can be objected to for the first time in this court, no objection was taken in the court below that plaintiff failed to prove that he received any portion of the price to be paid by Williams, Dimond & Co. It is well settled here that an objection to evidence cannot be made here for the first time which might have been removed by the opposite party had it been taken in the lower court. Besides, the evidence tended to prove that plaintiff could have sold to Williams, Dimond & Co., at an advanced price, just as evidence of a market price would have proved that plaintiff could have sold for the market price. It cannot be assumed on the mere suggestion of defendants that if plaintiff had received the pipe from them he would have failed to deliver it to his vendees or that the latter would have refused to pay to plaintiff part or the whole of the price by them to be paid.

Judgment and order affirmed.

MCKEE, J., and ROSS, J., concurred.

WEST COAST REPORTER.

WHOLE No. 41. OCTOBER 9, 1884. VOL. IV. No. 2.

THE TRUE METHOD OF INTERPRETING THE CIVIL CODE.

(*Continued.*)

It is evident that such a method, or rather absence of method, in construing the code, as last described, must inevitably work a serious injury to the jurisprudence of the state, to the administration of justice, to the rights of suitors, and the entire people of California. If it should become apparent that the courts are guided by *no* fixed system of interpretation, but are proceeding, as it were, in a haphazard course, that without any rule they construe one section in the loosest and most liberal manner, as though common law doctrines alone *governed* us, and another section in the most strict and literal manner, as though no common law doctrines had ever existed, and still another section in a moderate manner, by combining and comparing the original common law doctrine with the language of the text, and the like, then no member of the bar, however intelligent and learned, would be able to advise his clients, with any reasonable degree of certainty, as to their rights and liabilities arising under sections which had not yet been judicially interpreted, and their meaning completely determined. The utmost that any lawyer could do, would be to guess, to speculate, to suggest possibilities, or perhaps probabilities. Even now the ablest lawyer constantly encounters uncertainties in advising upon the meaning and effect of particular sections and clauses of the civil code, and upon the rights and liabilities arising therefrom; but this uncertainty would be increased tenfold by the condition which I am supposing. Indeed, the administration of justice, and the enforcement of civil rights, by means of litigations, would be turned very much, as to their practical results, into a mere game of chance. Furthermore, if the work of interpretation should go on, in this manner, for a number of years, until the whole, or even a considerable portion, of the civil code had thus been judicially construed, the resulting mass of actual rules would be inconsistent, incoherent, and even contradictory. All symmetry and homogeneity would have disappeared from the jurisprudence of the state. The law would be in such a condition as to imperatively demand a complete reconstruction; either an entire abrogation of the code, with all its superstruction of judicial interpre-

a return to the common law, or else the enactment of a new, more elaborate, and more nearly perfect code. Dr. Johnson has described the evil effects resulting from such an uncertain condition of the law, in strong and forcible language, which well deserves quotation. He says:[1]

"The advantage which humanity derives from law is this: that the law gives every man a rule of action, and prescribes a mode of conduct which shall entitle him to the support and protection of society. That the law may be a rule of action, it is necessary *that it be known;* it is necessary that it be permanent and stable. The law is the measure of civil right; but if the measure be changeable and unknown, the extent of the thing measured can never be settled. To permit a law to be modified at discretion, is to leave the community without law. It is to withdraw the direction of that public wisdom, by which the deficiencies of private understanding are to be supplied. It is to suffer the rash and ignorant to act at discretion, and then to depend for the legality of that action on the sentence of the judge. He that is thus governed lives not by law, but by opinion; not by a certain rule, to which he can apply his intention before he acts, but by an uncertain and variable opinion, which he can never know but after he has committed the act on which that opinion shall be passed. He lives by a law (if a law it be), which he can never know before he has offended it. To this case may be justly applied that important principle, *misera est servitus ubi jus est aut ancognitum aut vagum.*[2]

[1] Boswell's Life of Johnson, vol. 3, p. 314. (Bohn's Ed.)

[2] Two additional examples of the uncertainty of the civil code were overlooked in the former articles; and as they are such striking illustrations of my remarks I shall insert them here, although out of their proper connection. In defining marriage the civil code says: "§ 55. Consent alone will not constitute marriage; it must be followed by a solemnization, *or by a mutual assumption of marital rights, duties or obligations.*" That is, in order to constitute a valid marriage, where there is no solemnization before a clergyman, or magistrate, but only a consent (written or verbal) to be husband and wife, this consent must be followed by "a mutual assumption of marital rights, duties, or obligations." What is the meaning of this strange phrase? The law, as previously settled in this state, and as settled throughout the country, is, that a consent or agreement of the two parties to be husband and wife, followed by "consummation" or "cohabitation," was sufficient without anything else to constitute a valid marriage. The "consummation" or "cohabitation," here meant, in plain English, simply sexual intercourse, copulation, nothing more nor less. That is not only shown by numerous decisions; but it is most clearly and unmistakably expressed in the familiar maxim, "marriage is contracted *per verba in praesenti cum copula;*" while the converse of this rule was also generally settled that a marriage was not contracted *per verba in futuro cum copula.* The doctrine was thus firmly established that a mutual consent, without any form or solemnization, accompanied or followed by sexual intercourse, copulation, constituted a valid marriage. No "habit" and "repute," no holding each other out to the world as husband and wife, no living together as husband and wife, were necessary in addition. In fact, in the greatest number of the decided cases which have held the parties to be in reality married in pursuance of this doctrine, the parties had never acknowledged the marriage openly; had never held each other out to the world, nor had lived as husband and wife; but on the contrary had lived *apparently* in a state of concubinage as man and mistress. Is the phrase "mutual assumption of marital rights, duties and obligations," intended as a delicate *euphemism* for "copulation," and as meaning the same thing? and is the common law rule thus left unchanged? Or, on the other hand, does this phrase mean something more than, something in addition to, copulation? and is the common law doctrine thus altered? The phrase is absolutely unknown to the law, and is so vague and indefinite that no one could even guess its meaning without the help of judicial interpretation. Does it mean that the two spouses must openly live as husband and wife, must hold each other out to the world as

Reaching thus the conclusion that the courts would adopt some general, fixed, uniform principle or system of interpretation, which should be consistently pursued, and applied alike to all parts of the civil code, in determining the true meaning and intent of every particular provision, there are in fact but two *such* systems possible, and these stand in direct antagonism to each other. One of these possible systems or principles of interpretation, may be substantially described as follows: In construing every provision of the code the court should regard the text alone as the ultimate and only authority. It should treat the text of every provision as a new and independent utterance or creation of the law, and not as declaratory of, or even as being connected with any pre-existing law. It should interpret every provision solely by itself, by ascertaining the fair and reasonable meaning of its language, but without looking beyond it at the pre-existing law for explanation, and should thus construe and apply every provision according to its own terms, without enquiring or even caring whether it agreed with, altered, or abrogated any previous rule of law on the subject. In short the very text

husband and wife, etc.? There are strong arguments against that meaning. In the first place the phraseology to describe exactly that condition has long been settled and is very familiar, and, if the authors of the code had such a meaning, it seems hardly possible that they should reject this familiar and expressive phraseology. Instead of saying that consent must be followed by "habit and repute," or "by the parties holding each other out to the world as husband and wife, which would have left no doubt as to their meaning, they adopt this uncouth phrase, which does not *necessarily* have such a meaning. But in the second place, such an alteration of the common law rule seems to be entirely without any reason, and opposed to common sense. Under the law previous to the code, proof that two parties had treated each other as husband and wife, had lived together as such, and had held each other out to the world as such, was sufficient to enable a jury or court to infer and find the fact of a marriage. Why? Not at all because such living and holding out *of itself constitutes a marriage;* but solely because from such living and holding out, the court or jury may find that at some previous time the two parties did as a fact consent to be married; did, as a fact, agree to be husband and wife. This conclusion is sustained by all the decisions of authority. The previous actual consent or agreement to be husband and wife is the ultimate and essential fact which the jury must find; the mode of life, the holding out, and the like, are nothing but circumstantial evidence from which that fact may be inferred. Now, when living as husband and wife, and holding out as such, were only necessary as evidence for the purpose of *inferring* the fact of a previous consent, it seems strange and useless to require evidence of the same kind, of holding out and living as husband and wife, and the like, when the fact of a prior consent has already been clearly established by other and independent evidence. There seems to be no good sense in such a great alteration of the common law doctrine. The uncertainty in the meaning of this most important section can only be removed by judicial interpretation. In such provisions, so nearly affecting all classes of persons, the meaning ought to be clear and unmistakable. The true construction of this section is one of the most important legal questions involved in the notorious Sharon case.

Again, in §§1460–1466, the civil code defines covenants running with the land, and those not running with the land, together with the rights and liabilities flowing from them respectively, in strict accordance with the common law rules, as settled in Spencer's case, and in subsequent decisions. There can be no doubt that the common law rules, on the subject, are enacted by these sections, without any change. Turning to §§822–823, we find sections, the language of which, taken literally, *seems* to abolish all distinction between covenants running with the land, and those not running with the land, when contained in leases. In other words, these sections seem to make the assignees of the lessee, and the assignees of the lessor, liable for the breach of all covenants, whether they are such as run with the land or not. It seems strange that the common law rules on this subject should be altered at all, for they were in the highest degree just and right; and, on the other hand, it is clearly unjust to make assignees liable for *all* the covenants made by their assignors—whether lessee or lessor. It seems equally strange that such a sweeping change in the common law rules should be made in this indirect and unequivocal manner. Here, again, nothing but a judicial interpretation can solve the question, and remove the doubt.

of the code should be followed without deviation, as though it was the only and the original source of the rule which it contains; and the text should be fairly and reasonably interpreted so as to get at its exact meaning in all cases. Behind the text the court should not go.

If this principle of interpretation were strictly and uniformily followed by the court, members of the bar would undoubtedly be able to form some well founded and correct opinion as to the meaning and effect of sections which had not yet been judicially interpreted; and they could thus advise their clients with some reasonable assurance of correctness. But there are, as I shall attempt to show, insuperable objections to this system in its application to our civil code.

On the other hand, the court might regard the code as primarily and mainly a declaration and enactment of common law rules. They might interpret every provision as intended to be a mere statement of the common law doctrines unchanged, with all its consequences, unless from the unequivocal language of the provision, a clear and certain intent appeared to alter the common law rule. They might construe all new, hitherto unused, and ambiguous phraseology, as not designed to work a change in the pre-existing settled rules, unless the intent to work such a change was clear and unmistakable. This, I submit, is the general principle of interpretation which the courts should adopt and apply without any deviation to the civil code.

J. N. P.

[TO BE CONTINUED].

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

THE CASE OF FORMER RESIDENCE BY A CHINESE LABORER.

[IN RE CHEEN HEONG, ON HABEAS CORPUS.]

September 29, 1884.

CHINESE RESTRICTION ACT—LABORER—EVIDENCE OF PRIOR RESIDENCE—CERTIFICATE.—A Chinese laborer, who left the United States before the restriction act of 1882 went into operation, cannot re-enter the same, after the amendatory act of 1884 went into operation, without producing the certificate provided for in such acts. Parol evidence of his former residence is inadmissible.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

Before FIELD, circuit justice, SAWYER, circuit judge, and SABIN and HOFFMAN, district judges.

T. D. Riordan and *L. I. Mowry*, for the petitioner.

S. G. Hilborn, United States attorney, and *Carroll Cook*, assistant United States attorney, for the United States.

FIELD, Circuit Justice. The facts of this case differ from those in the case of the Chinese laborer *with an unused tag*, *ante*, page 19, recently decided, in this particular, that the laborer left the United States after the passage of the act of 1882, without a certificate enabling him to return, relying upon a tag entitling him to such a certificate, but which he had not obtained, whilst the laborer here left before the passage of the restriction act, and of course before any certificate was required. It appears from the agreed statement of facts, that the petitioner is a laborer of the Chinese race, and a subject of the emperor of China; that he resided within the United States on the seventeenth of November, 1880, and continued his residence until June, 1881, when he departed for Honolulu, in the Hawaiian Kingdom, where he remained until September of the present year (1884), and then returned to the port of San Francisco; and of course without any certificate under the act of 1882, or that of 1884, as none could be issued to him whilst out of the country; and he now seeks to land by virtue of his residence here on the seventeenth of November, 1880, contending that the acts of 1882 and 1884 except Chinese laborers in like situation from the necessity of presenting any certificate, inasmuch as it would be impossible to obtain one.

My associate, the circuit judge, sustains the contention of the petitioner, and in a written opinion has presented his construction of the act with his usual elaboration and learning. The district judge of this district concurs with him. It is, therefore, with much diffidence that I venture to express my dissent from their conclusions.

The restriction act of 1882 in its first section declares that after ninety days from its passage, and for the period of ten years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come after the ninety days, to remain within the United States. The second section makes it a misdemeanor punishable by ne, to which imprisonment may be added, for the master of any

vessel to knowingly bring within the United States from a foreign port and land any such Chinese laborer. The third section then provides, that the two sections mentioned shall not apply to Chinese laborers who were in the United States on the seventeenth of November, 1880, or who came within ninety days after the passage of the act "who shall produce to such master *before going on board such vessel* and shall produce to the collector of the port in the United States at which such vessel shall arrive, *the evidence hereinafter in this act required of his being one of the laborers in this section mentioned*," nor shall they apply to the case of a master of a vessel coming within the jurisdiction of the United States, by reason of stress of weather, or touching at any port of the United States on its voyage to a foreign port, the laborers brought to depart with the vessel.

What then is the evidence which must thus be produced to the master in the foreign port, and to the collector at the port of the United States, by the laborers thus within the exception mentioned? The fourth section answers this. It declares that for the purpose of identifying those laborers, that is, those who were here on the seventeenth of November, 1880, or came within the ninety days mentioned, and to furnish them with "the proper evidence" of their right to go from and come to the United States, the "collector of customs of the district *from which any* such Chinese laborer shall depart from the United States, shall, in person, or by deputy, go on board such vessel, having on board any such Chinese laborer, and cleared, or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, to be entered in registry books, to be kept for that purpose, with a statement of the age, occupation, last place of residence, and of physical marks or peculiarities of each one necessary to his identification; and each laborer thus departing shall be entitled from the collector, or his deputy, to a certificate, containing such particulars corresponding with the registry, as may serve to identify him. "The certificate herein provided for," says the section, "shall entitle the Chinese laborer, to whom the same is issued, to return and to re-enter the United States, upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter."

Now what is the meaning of these provisions? It is not, as I read them, that the Chinese laborer in the United States, on the seventeenth of November, 1880—the date of the supplementary treaty—or who came within ninety days after the passage of the act—that is, before it took effect, shall be subsequently permitted, that is, after the act had taken effect, to come without any certificate, for the act makes no exceptions of persons by whom it must be obtained. It means, in my judgment, that those laborers *if still in the United States when the act takes effect*, and are desirous to leave and yet return again, shall be permitted to do so upon obtaining the prescribed certificate. The production of that certificate is the only protection of the master of the vessel against criminal prosecution

for bringing and landing those laborers, after the expiration of ninety days from the passage of the act; it is the only evidence which the act requires to be furnished by them; and its production is the essential condition prescribed for their landing. The act, interpreted according to its direct language, necessarily excludes in its operation those who left the country before the act took effect.

If this construction works any hardship, it is for congress to change the act. The court has no dispensing power over its provisions. Its duty is to construe and declare the law, not to evade or make it. Oftentimes, indeed, there is a sense of impatience in the public mind with judicial officers for not announcing the law to be what the community at the time wishes it should be. And nowhere has this feeling been more manifested than in California, and on no subject with more intensity than that which touches the immigration of Chinese laborers; but it often does great injustice to officers anxious to perform their whole duty. Whilst I differ from my associates in the construction of the restriction act, I can bear testimony to the great solicitude manifested by them to reach a right conclusion.

If, as already stated, the law works any hardship, it is for congress to change it. With that body it rests, under the constitution, to determine what foreigners shall be permitted to come to the United States and on what conditions to remain.

The provisions of the amendatory act of 1884, seem to me to remove any doubt as to the necessity of the certificate, if any existed under the act of 1882, for the admission of any Chinese laborers, whether they left the country before or after the passage of the original act. Under the construction, adopted in this circuit, parol evidence had been allowed in a multitude of cases, where previous residence was alleged; and the district and circuit courts were blocked up by them to the great delay of their general business and the inconvenience of suitors. This circumstance, and the suspicious character, in many instances, of the testimony produced from the loose notions entertained by the witnesses as to the obligation of an oath created a general expression of a desire for further legislation placing some restriction upon the evidence which would be received. This desire led to the passage of the amendatory act; and by that it is declared that the certificate which the laborer must obtain "shall be the *only evidence permissible* to establish his right of reentry" into the United States. This declaration applies to the certificate issued under either act. By it the door is effectually closed to all parol evidence. Nothing can take the place of the certificate or dispense with it. As was said in the case of the *unused tag*: "If the collecter refuses to the Chinese laboror any rights to which under the restriction act he is entitled, he should apply to the superior of the collector at Washington, the head of the treasury department, for proper instructions to him. The court has no supervising jurisdiction over the manner in which he discharges his duty."

Writ discharged and petitioner remanded.

SAWYER, CIRCUIT JUDGE, DISSENTING. The petitioner, a Chinese laborer, who was residing in the United States on the seventeenth day of November, 1880, left San Francisco for Honolulu, in the Hawaiian Islands, on June 18, 1881, before the passage of the Chinese restriction act of May 6, 1882, and, consequently, without the certificate prescribed by section 4 of that act. He remained at Honolulu, till September 15, 1884, when he embarked for San Francisco, in the state of California, at which port he arrived, September 22, 1884. He now claims the right to re-enter the United States, and to land from the steamship on which he came, upon other satisfactory evidence, of his former residence and departure, without producing the certificate prescribed by section 4 of the act, either as it originally stood, or as amended by the act of July 5, 1884. The question, is, whether under the restriction act and the treaty with China, he is entitled to land upon other satisfactory proof of his former residence, without producing the certificate prescribed—no such certificate being required at the time he left the United States, and it not being possible, under the acts of congress, since passed, to obtain one? In other words, are the provisions of section 4 of said Chinese restriction act, as amended on July 5, 1884, *applicable* to Chinese laborers, who resided in the United States on November 17, 1880, who, afterward, departed from the United States before the passage of said act of May 6, 1882, and who did not return till September 22, 1884, after the passage of the amendatory act of July 5, 1884; or, are the provisions of said section 4, only, applicable, to such Chinese laborers as departed *after* its passage, and who had an opportunity to procure the certificate required by it?

I have no doubt, that the act, and the amendatory act, took effect, as laws of the United States, from the date of their passage, and, no doubt, that the certificate prescribed by section 4, is the only evidence of a right to re-enter the country, as to all Chinese laborers *to whom it is applicable*, or, who are within the purview of its provisions. On these points I have no doubt; but construing the act upon a consideration of all its provisions, and in view of, and in subordination to, the provisions of the treaty, it is very clear to my mind, that congress did not intend to make the provisions of section 4 applicable, and that they do not apply, to those Chinese laborers, who were in the country on November 17, 1880, and who, subsequently, left the United States before the passage of the original act, and, who could not possibly have obtained the prescribed certificate, and as to whom the collector could not perform the prescribed conditions imposed upon him. The act purports to be an act "to execute certain treaty stipulations with China"—*not to abrogate them.*

It is scrupulously, framed, so as not, in express terms, to conflict with the provisions of the treaty. If it be held to take away any rights secured by the treaty, it must be done by construction, and by far-fetched and over-strained implications,—not be-

cause of any direct express provision to that effect. The treaty, and the act must, if possible, be so construed that they can stand together. The treaty with China authorized the government of the United States to "regulate, limit, or suspend" the coming of "Chinese laborers" to, or residence in, the United States. But it provided that "the limitation, or suspension, *shall be reasonable*, and shall apply *only to Chinese who may go to the United States as laborers, other classes not being included in the limitation.*" And it was further expressly provided, that, "legislation taken in regard to *Chinese laborers will be of such charucter, only, as is necessary to enforce the regulation, limitation, or suspension of immigration.*" It is still further provided, that "*Chinese laborers* who are *now in the United States* (at the date of the treaty, November 17, 1880), *shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions* which are accorded to the citizens and subjects of the most favored nation." The restriction act must be construed with reference to the provisions of the treaty. Section 1, of the act, as amended, in 1884, suspends the coming of Chinese laborers for ten years, and provides, that during said suspension "it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come, to remain in the United States." Section 2 makes it an offense for the master of any vessel, to land, attempt to land, or permit to be landed, any Chinese laborer from any foreign port or place. But section 3 provides, that the two foregoing sections *shall not apply to Chinese laborers who were in the United States on the seventeenth day of November*, 1880, or, who shall have come into the same before the expiration of ninety days next after the passage of the act, * * * *nor shall said sections apply to Chinese laborers, who shall produce to such master before going on* board such vessel, and shall produce to the collector of the port in the United States, at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in the section mentioned." Two classes are here plainly indicated, to which the prohibitory provisions "shall *not* apply"—or rather one whole class, and a subdivision of the class. The first, is general, embracing all "Chinese laborers," "who were in the United States on the seventeenth day of November, 1880"—and secondly, "*nor* shall said sections apply to Chinese laborers, who shall produce * * * the evidence hereinafter in this act required of his being one of the laborers in this section mentioned." They shall neither apply to the one class, containing all, "*nor*" to the sub-class, who shall procure and produce the prescribed certificate. Who constitute the sub-class referred to, who are required to produce the evidence hereinafter required? Plainly, those who depart *after* the passage of the act, and who procure, or who can procure under the law, the certificate required in section 4, which can, only, be obtained by those, subsequently, departing. In the original act the language was, "shall not apply to Chinese

laborers who were in the United States on the seventeenth day of November, 1880, * * * *and* who shall produce" the evidence prescribed. The significant change was made by dropping the "and," and adopting in its place, "*nor* shall said sections apply to Chinese laborers who produce," &c. This is, clearly, distinguishing between the two classes, or the two divisions of the one class—those laborers to whom the preceding sections *do not apply, who had already departed* and those, who should, *thereafter, depart;* and, who, upon departing, must procure the certificate provided for in section 4. Before the amendment, there was some little plausibility in claiming that none were exempt from securing the certificate, but there appears to me to be none, since the amendment. Under the act as it, originally, stood, we held in Leong Yick Dew, 2 W. C. R., 83, that the provisions of section 4, relating to the certificate did not apply to those who had departed before the passage of the act, and, who could not, possibly, procure the certificate; and with that decision, I am still, entirely, satisfied. *A fortiori* under the act, as amended, these provisions are inapplicable.

But the provisions of section 4, *ex vi termini* apply, and they can only apply to those Chinese laborers who depart after the passage of the amendatory act. They cannot possibly be applied to those who have already departed. They relate to, and provide for, *future action*, in obtaining and producing certificates. They have no relation to the past. Some entitled to return, have already gone; and some may go hereafter; and it is provided that the latter shall procure the certificates, the provision necessarily having reference to the latter. It is provided in section 4 "that for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, 1880, * * * and in order to furnish them with the proper evidence of their right to *go* from and come to the United States, as *provided in said act and treaty* * * * the collector of customs of the district from which any such Chinese laborer *shall* depart from the United States *shall* * * go on board each vessel *having on board* any such Chinese laborer and cleared or *about to sail* from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered on registry books * * in which *shall be stated* "the names, description, physical marks, etc., etc., and every Chinese laborer *so departing* from the United States, *shall be* entitled to and *shall receive* * * from the collector * * * at the time such list is taken, a certificate." * * * The certificate *herein provided for* shall entitle the Chinese laborer *to whom the same is issued*, to return and re-enter the United States upon producing and delivering the same to the collector of customs * * * and *said* certificate shall be the only evidence permissible to establish *his* right of re-entry. *Ex vi termini* all those provisions apply, and can only apply to those of the class who depart after the passage of the act. The future tense is used throughout the section, and the acts to be performed can only be performed in the future; and "*said*

certificate," which shall be the only evidence permissible to establish a right of re-entry, is the certificate provided for in the first part of the same section to be issued to *future* departing laborers.

And those who receive it, and *only* those who can receive it, are the ones to produce it, as the only permissible evidence of their right to return. *No certificate is provided for those already gone before the passage of the act*, and there is no requirement that they shall produce one. *Nothing is said as to what the evidence of a right to re-enter shall be for those not provided for in this section.* No practical form of evidence, other than that recognized by the ordinary law of evidence, could be provided for them; *and none was attempted to be provided. As to those who had a right to return under the provisions of the treaty, and under the express provisions of the first clause of section 3 of this amended act, in language similar to that of the treaty, in regard to whom no specific evidence is provided, the ordinary rules of evidence as to competency must apply; for no others are prescribed.* That congress could not have intended to require the collector to go on board vessels *already departed*, and *before* their departure, issue certificates to Chinese laborers, who were already gone, and safely landed in China, must be manifest.

In Long Yick Dew, 2 W. C. Rep., 85, *three judges sitting and concurring* in the decision, we said: "Congress could not possibly have intended to require that class of Chinese laborers to procure the required certificate where it was a physical impossibility for them to obtain it; and it is impossible for me to believe, under the circumstances, that congress intended to, arbitrarily, exclude that class in direct violation of the express terms of the treaty protecting them. Congress had declined to enact any such legislation as is contained in the restriction act, while the Burlingame treaty was in force, for the reason that it would be an act of bad faith on the part of the United States towards China, and a direct violation of the solemn stipulations of the treaty between the two governments. The United States went to the trouble and expense, and incurred the delay, of sending a special mission, composed of three distinguished gentlemen, to China, for the express purpose of procuring a modification of the Burlingame treaty, in order to enable the United States to adopt the legislation, now in question, without committing an act of bad faith towards China, and without violating the treaty stipulations between the two nations. A treaty was made with the modification sought by us, which was ratified by, and, apparently, satisfactory to both nations. And the modified treaty, in express and the most explicit terms, protected the class in question in their right to remain in the United States, or "to go and come of their own free will and accord," and also provided that they "shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations."

It is, expressly, stipulated in the supplementary treaty, "that the legislation in regard to Chinese laborers will be of such character

only as is necessary to enforce the regulation, limitation, or suspension of immigration," and, that, "the limitation, or suspension, shall be reasonable." Conceding the legislation requiring Chinese laborers departing from the United States after the passage of the act in question, and having an opportunity to do so, to procure and produce the required certificate to be "necessary," and "reasonable," still, such a requirement, as to those, who departed after the date of the treaty, and before the passage of the act, or, before it was practicable or possible, to obtain the certificate, could neither be necessary, nor reasonable. If congress, then, intended, by this act, to make this provision, requiring the prescribed certificates, applicable to those Chinese laborers who were in the United States at the date of the treaty, and who left before the passage of the act of May 6, 1882,—before it was possible to obtain the certificate—or intended to altogether exclude those already departed, then it was the deliberate intention of congress to act in bad faith towards the government of China, and to violate the solemn obligations of the very treaty it had taken so much pains to obtain, in order to enable it to honorably legislate at all upon the subject. Why take all this trouble to negotiate a treaty, if it was intended, at last, to flatly disregard it, and legislate in direct violation of its most solemn and vital stipulations? Congress might, with just as much propriety, have ignored and disregarded the Burlingame, as the supplemental treaty. There would be just as much propriety in wholly repudiating the treaty, as to repudiate it in this vital part, which the Chinese government took care to have inserted. It would be to the last degree absurd, under the circumstances, to suppose for a moment that congress intended to make the provisions of sections 3 and 4, relating to certificates, applicable to the class of Chinese laborers referred to. We can not attribute to congress a deliberate intention to commit any such act of bad faith, without provisions manifesting such a purpose, far more explicit than any found in the act. It would be disrespectful to that body, if not absolutely indecent, to attribute to it such an act of bad faith.

"Again, the same section which requires the certificate gives to the departing Chinese laborer an absolute, indefeasible right, without cost or expense, to have the certificate, in order that he may be able to produce it as evidence of his right to re-enter the United States. The necessity to produce it, and the right to have it, in order that he may produce it, are correlative conditions. The one provision is the complement of the other, they are reciprocal, and must go together. The obligation to produce the certificate presupposes the practicability, or at least, the possibility, of procuring it, in order that it may be produced. The two provisions go together, and form but one legal conception. The obligation to produce, and the right and ability to obtain it, are *dependent*, and *not independent*, conditions. One is the counterpart of the other, and it is not to be supposed that congress would have adopted one branch of the proposition without the other, otherwise it would

have, distinctly, done so in terms. If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or, if intended, it must be void. The law requires nothing impossible—*Lex non cogit impossibilia*: Bour. Law Dict., Maxims; Broom's Maxims, 242; and *Lex non intendit aliquid impossibile*: Bour. Law Dict.,—the law intends not anything impossible,—are among the most venerable maxims of the law. In a statute, 'No text imposing obligations is understood to demand impossible things:' Sedg. Stat. Law, 191. 'Provisions in acts of parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law; in which case the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act:' Dwarris on Stat., 582. The rule is to construe the words 'in their ordinary sense, unless it would lead to *obscurity, or manifest injustice*, and if it should, so vary them as to avoid that which, certainly, could not have been the intention of the legislature, we must put a reasonable construction upon the words:' *Ib.* 587; See Donaldson v. Wood, 22 Wend., 309; Lake Shore Ry. Co. v. Roach, 80 N. Y., 339.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice, oppression, or an absurd consequence*. It will always, therefore, be presumed that the *legislature intended exceptions to its language which would avoid results of this character*. The reason of the law in such cases should prevail over the letter:' U. S. v. Kirby, 7 Wal., 486. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum:' Henderson v. Mayor of New York, *et al.*, 92, N. S., 268; see, also, Brewer v. Blougher, 14 Pet., 198; U. S. v. Freeman, 3 How., 564. So in the case of the class of Chinese laborers now under consideration. To require them to produce a certificate as the *only* evidence of their right to land when it was impossible, or impracticable, to procure it, would be, in effect, to absolutely, and unconditionally, exclude them. Yet, it is, manifestly, the policy, intent, and reason of the law, to carry out in good faith the stipulations of the treaty; that they 'shall be *allowed to go and come of their own free will and accord;' and 'be accorded all the rights, priviliges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.*'

"We are, therefore, fully satisfied that those Chinese laborers who were in the United States on November 17, 1880, and left before the passage of the restriction act, and those, also, who came into the United States, and departed therefrom between that date and May 6, 1882, are entitled to re-enter the United States upon satis-

factory evidence other than the certificates provided for in said section 4"

The foregoing was said with reference to the act of 1882, before its amendment, but it applies with even greater force to the act as amended in 1884.

In Ah Quan's case, *ante*, arising under this act, as amended in 1884, after a further discussion of this point, as applicable to the act as amended, we stated our conclusion as follows: (22 Fed. Rep., 183.)

"To hold that congress intended to require the performance of the dependent obligation, on the part of the Chinese laborer, until the government has discharged its correlative and precedent duty, and obligation, upon which his obligation rests, imposed by the act, by furnishing the certificate, and, thereby, rendering it possible for him to produce it, would be to attribute to congress a deliberate intent to enact a palpable and glaring absurdity, thereby violating one of the most venerable canons of statutory construction, that a statute must not be so construed as to lead to an absurd conclusion. We must conclude, therefore, in the absence of any express declaration to that effect, and of any reference whatever to those, who had, already, departed, with a right, at the time of their departure, secured by express terms of the treaty, to return; that it was not intended to require the production of the certificate, by those who departed from the country before it was possible to obtain it. And in the absence of any provision so declaring, that congress did not, in fact, intend to exclude such Chinese laborers as were in the country at the time mentioned, is clearly manifest, because it has said so in express terms in the provision of section 3, 'that the two foregoing sections (excluding Chinese laborers) shall not apply to Chinese laborers, who were in the United States on the seventeenth day of November, 1880,' etc. It is clear, from the necessities of the case, that this section is only applicable to those who departed after the passage of the act, and who had the opportunity to procure the certificate.

"To hold otherwise, would be to render this clause, making the impossible certificate the only evidence, as to those who had departed before the passage of the act, absolutely inconsistent with the clause of section 3, referred to, that the preceding sections 'shall not apply to Chinese laborers who were in the United States,' at the designated period, and render that provision wholly nugatory, as well as to violate the treaty which the act proposes to execute, and not to abrogate. The different provisions of the statute must be so construed, if possible, that they can stand together, and not so as to nullify each other.

"The clause of the amendment making the certificate the only evidence, as to those to whom it is applicable, of a right to re-enter the United States, only declares, in express and explicit terms, what we held the original act to mean, and in no way changes its effect, in this particular, as we had construed it.

"Our construction of the original act in Long Yick Dew, 2 W. C. R., 83, and 19 Fed Rep., 491, was before congress at the time of the passage of the amendatory act. If it had been intended to make the amendment as to the prescribed certificate being the only evidence of a right to return applicable to those Chinese laborers, who were in the country at the date of the treaty, and who departed after that date, and before it was possible to obtain the certificate required, as to whom *we had before distinctly held it to be* inapplicable, congress would, certainly, have amended the first clause of section 3, so as to read in substance as follows: "The two preceding sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, etc., *except as to those who departed from the United States after said seventeenth day of November, 1880, and before the passage of the act, or before it was possible to obtain such certificate.*' This is, in effect, the way those who insist upon the production of such certificate by that class, as the only evidence of their right to re-enter the United States, must read it in order to sustain their view, or the view that it was intended absolutely to exclude that class in violation of the treaty stipulations. Congress has not introduced any such exception, and we are not authorized to interpolate it into the act. To do so, would be to legislate, not to construe. The action of congress in not introducing any exception of the kind indicated, but, on the contrary, so amending the act, as to make the propriety of our construction more clearly manifest in view of our well known previous construction of the original act on this very point, is, in effect, an emphatic approval of that construction:" See, also, the case of Shong Toon, 3 W. C. Rep., 596, where this question is well discussed by Hoffman, district judge.

Another shade of the opposing views maintained by the United States attorney, but, essentially, the same, has been suggested, which, *necessarily*, assumes that section 4, does not apply to those who departed pior to the passage of the act of 1882. It is, that congress did not intend that any of these Chinese laborers, who were in the country on November 17, 1880, who had departed before the passage of the act of 1882, or, in other words, who were not still in the country, at that date, should return at all; and, consequently, that there was no need of requiring, as to them, the certificate prescribed by section 4, or any other. There is not one word in the act, that, directly, declares or hints, at such a purpose, and not one section, clause or word from which an inferance of such intent, necessarily, or naturally, arises; nor does it necessarily, or, naturally, arise upon the whole act taken together. On the contrary, the opposite intent, as we have seen, is expressed in precise and unmistakable language, that cannot be misunderstood, in that clause of section 3, which provides, "that the two foregoing sections shall not apply to Chinese laborers, who were in the United States on the seventeenth day of November, 1880, or who shall come into the same before ninety days next after the passage of the act to which this is amendatory."

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This language embraces every individual member of the class to which it refers, no matter whether he was in the country at the time of the passage of the act, or not; and its force and effect cannot be limited except upon some vague, imaginary inference of a purpose not justified by any thing found elsewhere in the act.

The only supposed ground for the inference suggested not already noticed, arises out of sections 5 and 12.

Section 5 provides, "that any Chinese laborer mentioned in section 4 of this act, *being in the United States*, and desiring to depart from the United States *by land*," shall be entitled to demand and receive a certificate similar to those given to those departing by water, etc. The limitation is expressly restricted to the class provided for in section 4, that is those necessarily, who depart after the passage of the act. It is suggested, that this clause "*being in the United States*," indicates, that it was only intended that those allowed to return, are only such of those who were in the United States, on November 17, 1880, as were still remaining in the United States, at the date of the passage of the act; and that the first clause of section 3 should read: "That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, *and who are still in the United States at the date of passage of this act.*" I do not draw any such inference from that clause of section 5, either taken alone, or in connection with any other provisions of the act. Congress has not inserted in section 3 any such clause as, "*who are still in the United States at the date of the passage of this act*," or *any equivalent language*. To insert such language, would be to change the entire scope of the provision. As congress has not seen fit to insert words, so largely limiting the number embraced in the language of section 3, *as actually used*, we, certainly, are not authorized to legislate and insert it. The inference I draw, on the contrary, is, that in this section it appears by the express terms of the provision, that it was, only intended, to require those who were in the country at the date of the passage of the act, and who could comply with the act, to procure the certificates, and produce them on their return—or, in other words, it expressly sanctions what I have endeavored to maintain the true construction of section 4 to be—that its provisions were, only, intended to be applicable to these, who still remained in the country at the date of the passage of the act, and, *no provision at all is made as to what evidence those who departed before the passage of the act shall produce, and they are left to the usual evidence* recognized as competent by the general laws of the land. This clause, as I think, confirms, instead of opposes, the view which I have adopted and endeavored to maintain. Neither the provisions of sections 4 nor 5 apply to those who departed before the passage of the act, but are limited to those who were in the country at the date of its passage, and were, in fact, able to comply with its terms; and no other view can be sustained without incorporating into sections 3 and 4 language not used, or authorized by congress—without further amending the act.

From the fact that section 4 prescribed a certain certificate to be procured and produced, on return by those Chinese laborers who were in the country, at the date of the treaty, and departed after the passage of the act, and who could procure and produce it; and from the fact that *such* parties are required to procure and produce said certificate—the certificate issued to that class of Chinese laborers—as the only permissible evidence of *their* right to return; and from the further fact that *nothing* is said as to what kind of evidence shall be produced by all those Chinese laborers who were residing in the country on November 17, 1880, and who left before May 6, 1882, and who, under the treaty, and under the express provision of the first clause of section 3 of the act itself, are entitled to return, it is sought to draw the inference that congress intended that those very Chinese laborers mentioned in the treaty, and the first clause of said section 3, as being entitled to return, who had departed before May 6, 1882, should not be permitted to return at all. I do not, myself, perceive how such an inference or conclusion can be drawn from such premises. There is nothing in the least respect inconsistent in the two ideas; 1 That as to those who had departed before the passage of the act of 1882, to whom it would be impracticable to apply any other rule as to the competency of evidence, or to require any other kinds of evidence than those recognized by the general law of the land, should not be required to produce any other kind of evidence; and, 2. The idea that those who departed after the passage of the act, and who could procure the more certain prescribed certificate, should be required to procure and produce such certificate. The conditions of the two classes are radically different, and different conditions require, or at least admit of, different treatment, and different rules. The rules applicable to these two conditions in no way interfere with each other. They can stand, and, consistently, operate together, and the fact, that congress has prescribed a certain certificate for parties entitled to re-enter the country to whom they are, practically, applicable, under certain conditions, in which they are found, affords no inference, that congress, by so providing for such conditions, and such parties, and saying nothing about another class, surrounded by different conditions, equally entitled to re-enter under the express provisions of the same act and treaty, to which class a requirement to produce a similar certificate cannot possibly be made practically applicable, were intended by congress to be excluded altogether. Especially is no such inference afforded where the general rules of evidence applicable are practicable and effective, as to such latter class. I am not aware, that any statutory provision was ever held to be repealed, abrogated, nullified, or in any way rendered ineffectual by some other provision, in the same act, saying nothing at all about it, in no way inconsistent with it, and practically or possibly applicable, only, to other parties, and other conditions. I am not aware of any rule of statutory construction, justifying such an inference, not

naturally arising out of the conditions, or such an implied abrogation of another *express* provision of an act. Section 3 expressly provides, that "the two foregoing sections shall *not apply* to Chinese laborers, who were in the United States on the seventeenth day of November, 1880. * * * *Nor* shall said sections apply to Chinese laborers, who shall produce" the certificate provided by section 4, for those to whom its provisions can be made applicable, shall apply neither to one "*nor*" the other. What is the purpose or use of the first branch of this provision, if because, congress provided no kind of evidence, other than that recognized by general provisions of law, and said nothing about the evidence, as to them, it is to be inferred from the provisions for certain evidence for the *second* class that it was intended, that all of the first class, who departed before the passage of the act, and who were, therefore, not included in the second class, were to be altogether excluded, and those of the second class, were, after all, the only ones intended to be permitted to re-enter the United States at all? Some effect must, certainly, be given to the first, as well as to the second class of section 3. It is as clear and specific as the second, and cannot be misunderstood. It must stand, or be overruled and abrogated by an inference not, necessarily, or even, naturally arising out of the conditions. But none can be given it, if it is to be inferred from the provision of a specific class of evidence for the second class, that the first are to be altogether excluded. I confidently maintain that no such inference can be justified by any established rule of statutory construction, or without ignoring and utterly disregarding the unmistakable meaning of language—without annulling instead of construing it. *It is the first time in my experience, that an express, clear and explicit provision of a statute has been claimed to have been annulled by a subsequent provision relating to another class of subjects, in no way referring to the clause claimed to be abrogated, and not in the slightest degree inconsistent with it.*

Some support to the inference sought to be drawn from section 5, is, also, attempted to be drawn from the first clause of section 12, providing 'that no Chinese person shall be permitted to enter the United States *by land*, without producing to the proper officer of customs, the certificate in this act required of Chinese persons seeking to land from a vessel.' This is only the compliment or counterpart of section 5, out of place. Although broad in its terms, it is, evidently, intended to refer only to the certificate provided for in section 5 to be issued tothose departing after the passage of the act, like the provisions of section 4, applicable to those provided for in that section. The two provisions of sections 5 and 12 must be read together. It would seem to have been forgotten in drafting section 5, and afterwards inserted out of place with other provisions not properly germane to it. Besides, by its express terms, it only applies to passengers who enter "*by land*," and cannot be extended beyond its terms. It can do little to support an inference that has no other basis whatever upon which to rest, and it, certainly, does not author-

ize us to interpolate a clause into section 3 greatly limiting its scope, and which congress, itself, did not enact.

The question directly presented in this case, is, whether a Chinese laborer, who was in the United States, at the date of the treaty, but departed therefrom before the passage of any law requiring him to procure a return certificate, must now, under the provisions of section 4 of the amended act of 1884, be denied the right to land for failure to procure the certificate required by that section? or whether he can be permitted to land at all?

But the construction of the amended act, contended for by the U. S. attorney, and which seems to be adopted by the circuit justice, will not merely affect the rights of those, alone, who departed from the United States prior to the passage of the act of May 6, 1882. The language of the fourth section of the act, is deemed by the circuit justice so peremptory, that it, absolutely, prohibits the landing of all laborers who shall fail to produce the certificate *therein required*, although such prohibition may be in clear violation of rights, solemnly guaranteed by the treaty of November 17, 1880. But, if such be the true construction to be given to the section in question, it will exclude from the United States those Chinese laborers who have departed after obtaining the certificate required by the act of 1882; for they, like those who departed before the passage of any law on the subject, will be unable to produce the certificate required by the amendatory act of 1884.

The custom house authorities have, hitherto, and since the passage of the act of 1884, allowed Chinese passengers to land, who produced certificates issued in conformity with the provisions of the act of 1882, on the ground that the faith of the nation was pledged to allow the return of those Chinese laborers who left the United States while the act of 1882 was in force, and who complied with its requirements.

But if the ruling of the presiding justice is to prevail, the certificate issued under the act of 1882, will, in my judgment, upon that construction, no longer be available, and all those Chinese who departed from the country during the two years or more from June 6, 1882, to July 5, 1884, relying upon the certificates issued by the collectors authorizing their return, who have not already returned, must be excluded. It may be said that these certificates are similar in substance to those required by the act of 1884. This is to a certain extent true. But they are *not identical*. They differ in some *essential* particulars. The latter certificates, unlike those provided for by the act of 1882, are required to contain the statement of "the individual family and tribal name" (of the laborer) in full, and "*his occupation when and where followed*." The certificate is to be "issued in the name of the collector, and *attested by his seal of office*" * * * "and *said* certificate shall be *the only evidence permissible* to establish his (the laborer's) right of re-entry." It will be seen that this certificate differs, essentially, from that provided for by the act of 1882, embracing other particulars not required

under the original act, and if the last clause I have quoted is to be held to be applicable to *all* returning laborers who left the United States before the passage of any law on the subject of certificates, it must, also, be held to apply to all laborers who fail to produce the "*said certificate*" in that section described and required. I know not by what authority we can hold the law applicable to all returning laborers, and at the same time admit laborers who produce, not the certificate required by the existing law, but a certificate containing less, and which is essentially different, issued in conformity with a repealed and superceded law. If congress is to be deemed to have violated or disregarded the stipulations of the treaty with China, it must, also, be deemed to have violated the implied pledge given in the law of 1882, that those who should leave the United States after fully complying with its provisions should be allowed to return. Those who received the certificates issued during a period of two years, under the act of 1882, and departed upon the faith of the law, and the treaty, who have not yet returned, are no more excepted under the law, as amended in 1884, than are those who departed between the dates November 17, 1880, and May 6, 1882, relying on the assurances of a right to return contained in the then existing treaty and laws; and they must, also, be excluded. If congress is capable of such acts of bad faith as are shown in the passage of the original and amendatory acts, upon the construction given them by the presiding justice, then it must be capable of repeating these acts of bad faith at each recurring session, and thereby annually cutting off a considerable portion of those who left with a right to return, guaranteed to them by both the treaty and the law in force, and there is nothing in the treaty, the law, or the good faith and honor of the nation upon which these people can rest in security.

If it had been the intention to violate the specific terms of the treaty, which secured the right to those Chinese laborers who were in the United States at the date of the treaty, "to go and come of their own free will and accord," by excluding from returning all those who departed for temporary purposes, upon the faith of the treaty prior to the passage of the act of 1882, congress would, certainly, have acted in a manly way, and expressed that intention boldly, openly and by plain and direct language which could not be misunderstood.

In the language of the district judge in Shong Toon's case, *supra*, "Can it be contended, that any court should so construe this act—(if such construction could by possibility be avoided), as to to impute to congress when legislating, 'to execute certain treaty stipulations with China,' and, while affecting to acknowledge rights secured by the plain language of the treaty, the intention to attach by retrospective, and essentially *ex post facto* legislation, conditions precedent to the exercise of that right, which it was impossible to perform, and to enact that the non-performance of those conditions should forfeit the right? And this construction we are asked to give to a law which discloses a most scrupulous solicitude on the part of con-

gress to avoid, even the appearance of retrospective legislation; for it provides that the sections prohibiting the coming to the United States of Chinese laborers, not only, shall not apply to Chinese laborers in the United States at the date of the treaty, but also to those, who might come into the United States before the expiration of ninety days next after the date of the passage of the law, thus protecting from its operation not merely Chinese laborers *in transitu*, but laborers who might leave China before the expiration of a period of time reasonably sufficient for notice of the law to reach that country.

"It appears to us very plain that by adopting the construction contended for, we should, in effect, accuse congress of gross disingenuousness, or of utter disregard of a treaty stipulation, to the observance of which the national honor was pledged." In legislation respecting rights expressly secured by solemn treaty stipulation, in a treaty sought and obtained by ourselves affecting the good faith and honor of the United States, I cannot impute to Congress, a purpose, to— "palter in a double sense,

That keeps the word of promise to the ear,
And breaks it to the hope."

It is insisted, also, that it must be presumed, that all who departed before May 6, 1882, have returned, and at all events, they have now had a sufficient time to return, and ought not any longer to be permitted to return. If this were so, it could not affect the construction of the act. The act was as broad in its terms on the day of its passage, as it is now; and it affected those who departed the day before its passage, as well as those who left a year before. The act has made no distinction, and no exception on the ground of lapse of time. It might, as well be insisted, that one, who goes away with the proper certificate shall not return after the lapse of a year, or two years, where the law prescribes no such limitation. Neither the treaty nor the law, prescribed any limitation as to the time when those who departed before May 6, 1882, should return. It would, doubtless, be proper for congress to provide, that the right both of those who departed without certificates before the passage of the act, and those who depart after its passage with certificates, shall exercise their right to return, within some specified time, upon giving them a reasonable time to return after the passage of the act before it should be enforced against those already gone under the prior existing laws. Such a provision, would, doubtless, be reasonable, within the provisions of the treaty, and not in conflict with its provisions. But no such provision has been made, and the courts are not authorized to introduce one into the act. Nor, in the absence of such a provision, can lapse of time since the departure with the vested rights under the treaty and laws, as they existed at the time of leaving, afford any aid in the construction of the act, as it was actually passed.

For the reasons stated, I am satisfied, that the provisions respecting certificates in section 4 of the amended act have no application

whatever, to these Chinese laborers, who were residing in the United States on November 17, 1880, and who afterwards departed prior to May 6, 1882; that they were not intended by the act in question to be excluded from the country for want of such certificate, or on any other grounds; and that such Chinese laborers, are entitled to re-enter the United States upon their return upon other satisfactory evidence, without producing the certificate prescribed by said section.

There is no possible difficulty, or inconsistency, in applying the ordinary rules of evidence to those who departed prior to May 6, 1882, as to whom no specific evidence has been prescribed; and in insisting upon the certificate prescribed for those, who departed after the restriction act, and to whom this restriction is practically applicable, without abrogating the right secured to them, both by the treaty and section 3 of the law. And I have no doubt that it was the intention of congress to limit the certificate prescribed by section 4 to the latter class, and leave the former to be governed by the ordinary rules of evidence.

The construction I have given to this law, not only reconciles the legislation with the observance of the plighted faith of the nation, but it carries out and effectuates the object of the treaty, and the law. The evil to be remedied was the continued, unrestricted immigration of Chinese laborers.

It was recognized that rights of those who were already here, were secured by the Burlingame treaty and international law. No proposition for the expulsion directly, or, indirectly, would have been made by the United States, or entertained by the Chinese government—nor, if made, and admitted, would it have received the sanction of congress.

Both the treaty, and the law, recognized these rights, and the legislation was directed solely against any further addition to the numbers of the Chinese then here, or, who should come within ninety days after the passage of the act.

This object, the law in its practial operation, has been attained. Not only has there been no accession to the number of the Chinese in this country, but the statistics of the custom house show, that during the twenty-eight months, which have elapsed since the passage, the number of departures exceed the number of arrivals by twelve thousand. Not only, therefore, has the number of the Chinese on this coast not increased, but it has been diminishing (after making due allowance for those who may have, clandestinely, crossed the northern boundary of the United States), at the rate which ought to satisfy the sturdiest opponent of this class of laborers—a rate which could not be largely increased without serious disturbance to the industries of this coast.

But even if this were not so, there is a price too high, to be paid without absolute necessity, in any case, for the exclusion of Chinese laborers—and that price is the national honor. And especially, when as I have shown, the plighted faith of the nation may

be kept without impairing the effectiveness, and satisfactory operation of the law.

By the construction here adopted, also, the treaty and the law are in harmony; and the various provisions of the act are consistent and in accord with each other. But, on the construction insisted upon by the United States attorney and sanctioned by the presiding justice, the treaty and the law conflict, and various provisions of the restriction act itself are inharmonious and inconsistent with each other.

I, therefore, dissent from the decision of the presiding justice, and from the order remanding petitioner.

THE CASE OF THE CHINESE BOY CITIZEN.

[IN RE LOOK TIN SING, ON HABEAS CORPUS.]

September 29, 1884.

CHINESE BORN IN UNITED STATES — STATUS OF — CITIZENSHIP — RESTRICTION ACTS. — A person born in the United States of Chinese parents, who were subjects of the Emperor of China, is a citizen of the United States, within the meaning of the fourteenth amendment to the constitution. If such citizen leaves the United States before the Chinese restriction act of 1882 went into operation, he is entitled to re-enter the same after the restriction act of 1884 went into operation, without producing the certificate provided for in either of such acts.

THE SAME — FOURTEENTH AMENDMENT. — Section first of the fourteenth amendment to the constitution of the United States, declaring who are citizens of the United States, commented upon and explained.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

Before FIELD, Circuit Justice; SAWYER, Circuit Judge; and SABIN and HOFFMAN, District Judges.

T. D. Riordan and *William M. Stewart*, for the petitioner.

S. G. Hilborn, United States Attorney, *Carroll Cook*, Assistant United States Attorney, and *John N. Pomeroy*, for the United States.

FIELD, Circuit Justice, rendered the opinion of the court:

The petitioner is a Chinese boy of the age of fourteen years. He was born in Mendocino, in the state of California, in 1870. In 1879 he went to China, and returned to the port of San Francisco during the present month (September, 1884) and now seeks to land, claiming the right to enter the United States as a citizen thereof by birth. It is admitted by an agreed statement of facts that his parents are now residing in Mendocino, in California, and have resided there for the last twenty years; that they are of the Chinese race, and have always been subjects of the Emperor of China; that it was the intention of his father, when he sent the petitioner to China, that he should return to this country; that the father is a merchant at Mendocino, and is not here in any diplomatic or other official capacity under the

Emperor of China. The petitioner is without any certificate, either under the act of 1882 or that of 1884, and the district attorney of the United States, intervening for the government, objects to his landing for the want of such certificate.

The first section of the fourteenth amendment to the constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words "*subject to the jurisdiction thereof.*" These words were designed to cover the case of children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This ex-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents They also cover the case of persons born on the public vessels of a foreign country, whilst within the waters of the United States, and consequently within their territorial jurisdiction. Such persons are considered as born in the country to which the public vessel belongs. They are not born, in the sense of public law, within the jurisdiction of the United States.

The language used has also a more extended purpose. The doctrine recognized in the United States is the right of every one to expatriate himself and choose, if he likes, another country. This right would seem to follow from the greater right recognized and proclaimed to the world in the immortal document in which the American colonies declared their independence and separation from the British crown, as belonging to every human being—God-given and inalienable—the right to pursue one's happiness. The English doctrine, that allegiance to the government of one's birth is perpetual, attending the subject wherever he goes, never has taken root in this country, although there are dicta in some judicial decisions that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent when he published his commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as our citizens those belonging to our race, who come from other lands and show attachment to our institutions, and desire to be incorporated with us. So profoundly convinced are our people of the right of these dwellers in other countries to change their residence and allegiance, that when once they are naturalized they are deemed entitled, with the native-born, to all the protection which the strong arm of the national government can extend to them, where-

ever they may be, at home or abroad. And the same right, accorded to the people of other countries to become citizens here, is accorded to them and to the native-born, to change, if they choose, their allegiance from our government to that of other states.

In an opinion given by Judge Black, when attorney-general of the United States, in the case of a native Bavarian, naturalized in this country, who desired to resume his status as a Bavarian, this doctrine is recognized. "There is," he says, "no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with this government, if he sees proper to do so in time of peace, and for a purpose not directly injurious to the interests of the country. There is no mode of renunciation prescribed. In my opinion if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States, and I do not think we could, or would afterwards claim from him any of the duties of a citizen."

The doctrine thus stated has long been recognized in the United States as a settled rule of public law; and in the treaty of 1868 with China and this country, the right of man to change his home and allegiance is recognized as "inherent and inalienable:" Art. V. So if persons born or naturalized in the United States have removed from the country and renounced in any of the ordinary modes of renunciation, their citizenship, they cease to be persons subject to the jurisdiction of the United States.

With this explanation of the meaning of the words in the fourteenth amendment, "subject to the jurisdiction thereof," it is evident that they do not exclude the petitioner from citizenship. He is not within any of the classes of persons excluded by them from being citizens.

The clause declaring who are citizens of the United States was inserted in the amendment to do away with the judgment in the Dred Scott case, which had decided that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States, and were incapable of becoming such. The clause in question changed the entire status of those people. It lifted them from their condition of mere freedmen to that of citizens, equally entitled with all other native-born to the rights which attended citizenship. When this amendment was adopted, the naturalization laws of the United States excluded all colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. So the impossibility of the persons themselves becoming citizens under the naturalization laws in no respect impairs the effect of their birth, or the birth of their children upon the status of either as citizens.

Independently of the constitutional provision it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by Assistant Vice-Chancellor Sanford in Lynch against Clarke, found in the first volume of his reports. In that case, one Julia Lynch was born in the city of New York in 1819, of alien parents, during their temporary sojourn in that city, and returned with them the same year to their native country and always resided there afterwards. It was held that she was a citizen of the United States.

After an exhaustive examination of the law the chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever were the situations of his parents, was a natural-born citizen; and that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding, he mentioned the fact that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his parents were citizens or were foreigners; it is enough that he was born here, whatever was the status of his parents. He shows also that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of states, and establishes conclusively that there is on this subject a concurrence of judicial opinion and legislative declaration, which accords with the general understanding of the profession and of the public.

Whether it is possible for aliens who could be naturalized citizens of the United States to renounce for their children whilst under the age of majority the right of citizenship when, by the naturalization laws, they could acquire it for them, it is unnecessary to consider, as no such question is presented here. Nor is the further question before us whether if the parents cannot themselves become citizens, they can, by their acts, release any rights conferred upon their children by the constitution.

As to the position of the district attorney, that the restriction act excludes the re-entry of the petitioner into the United States, even if he be a citizen, only a word is necessary. No citizen can be banished from his country except in punishment for crime. Banishment for any other cause is unknown to our laws, and beyond the power of congress. The petitioner must be allowed to land, and it is so ordered.

THE CASE OF THE CHINESE WIFE.

[IN RE AH MOY, ON HABEAS CORPUS.]

September 29, 1884.

CHINESE RESTRICTION ACT—ADMISSION TO BAIL OF REMANDED PRISONER.—A Chinese person, prohibited by the restriction act from coming into the United States, and who has been remanded to the custody of the marshal to be deported therefrom, cannot be permitted to land upon giving bail for his appearance at the time of the sailing of the vessel upon which he is ordered to be deported.

APPLICATION for admission to bail. The opinion states the facts.

Before FIELD, Circuit Justice; SAWYER, Circuit Judge; and HOFFMAN and SABIN, District Judges.

T. D. Riordan and *L. I. Mowry*, for the petitioner.

S. G. Hilborn, United States Attorney, and *Carroll Cook*, Assistant United States Attorney, for the United States.

FIELD, CIRCUIT JUSTICE. In this case Ah Moy was remanded to the custody of the marshal, to be deported from the United States, upon the vessel by which she was brought to the port of San Francisco, or some other vessel of the steamship company. It appears from the statement of her counsel, that the vessel in which she was brought has departed, and that no other vessel of the company will leave this port under two weeks. He, therefore, asks that, in the meantime, she may be admitted to bail, upon a recognizance that she will appear when the vessel is ready to depart.

The application cannot be granted. According to our decision the petitioner was, under the law, prohibited from landing. We have no authority to allow this law to be evaded upon any conditions. We cannot say she shall be allowed to land for fifteen days, upon giving bail for her appearance at the end of that time, without a violation of its provisions.

Application denied.

SAWYER, CIRCUIT JUDGE, DISSENTING.—

Ah Moy, the wife of a Chinese laborer, came from China on the steamship City of Tokio, with her husband, who was entitled to reenter the United States, and was permitted to land. The wife, who had never been in the country before, was not permitted to land, and was, consequently, detained on the ship by the master. A writ of *habeas corpus* having been obtained, she was produced in court upon return of the writ, and by the court admitted to bail pending the proceeding to determine whether, or not, she was entitled to land. Upon the final hearing, the question arising under the restriction act, was determined against her, and she was remanded, to be retransported to China, and ordered into the custody of the marshal for the purpose of returning her to the custody, whence she had been, temporarily, taken, under the writ for the purposes of the enquiry as to her rights. Upon attempting to execute the order to remand petitioner, it was found, that the ship on which she came

had departed on her regular voyage, and would not return for several weeks; and that no other steamer, belonging to the same company, would depart for fifteen days. The agents of the ship refused to receive her till a ship should be ready to leave for China.

There was no other ship of any line that would depart for several days. The marshal, upon this state of facts, confined the petitioner in the county jail for safe keeping, until he could execute the order, and, thereupon, she makes this application to be admitted to bail, pending the delay thus necessarily, and unavoidably, occurring. A final order remanding the petitioner having been made, and she, being in custody for the purpose of executing the order, and there being no appeal, the circuit justice is of the opinion that the court has no further jurisdiction, or power, to admit her to bail; and, that, she must continue in the custody of the marshal till the order remanding her can be fully executed. From this ruling, I am compelled to dissent.

When the body of a petitioner is produced in court, on the return to a writ of *habeas corpus*, the petitioner is in the control of the court. Pending the proceeding to determine her rights, the court can, temporarily and provisionally, commit the petitioner to the party detaining her, if deemed safe and proper to do so; or may commit her to the custody of the marshal, or may admit her to bail. In either case she is in the custody of the law. When an order to remand has been made, and the petitioner placed in the custody of the marshal for the purpose of executing the order to remand, she is still in the custody of the law, and under the control of the court, till the order to remand has been finally executed. The marshal is but the executive arm of the court, and, while the petitioner is still in his custody, by reason of the order to remand not having been fully carried out, both she and the marshal are under the control of the court, and the court, in my judgment, has jurisdiction and authority to admit to bail during any further necessary detention, or any unavoidable delay which prevents an immediate execution of the order to remand. In my judgment, the admission to bail under such circumstances, and for such purposes would not, in contemplation of law, be a landing of the petitioner contrary to the provisions of the Chinese restriction act. As was said in the case of Ah Kee, recently decided, while provisionally taken into the custody of the court, and temporarily removed from the ship, in order that she may not be carried away pending the proceedings to determine the legality of her detention, in contemplation of law, she has not been landed. This being so, she cannot be deemed to have been landed till the court has divested itself of its custody and control of her person, by either discharging her altogether, or fully executing the order to remand her. She is still in the custody and control of the law while lawfully on bail.

I therefore dissent from the order denying bail.

Conceding the power of the court to admit the applicant to bail, under the circumstances stated, I think it would be a great

hardship, not to say a gross violation of her personal rights, to refuse it upon security satisfactory to the court. I think she should be admitted to bail. But the statute expressly provides in case of an opposition of opinion between the judges, that a judgment or order shall be made in accordance with the views of the presiding judge. The opinion of the presiding justice must, therefore, prevail till the question shall be finally decided by the supreme court on the certificate of opposition of opinion certified to it by the disagreeing judges for that purpose.

SUPREME COURT OF CALIFORNIA.

No. 20,006.

PEOPLE v. SCHENICK.

Department One. Filed September 30, 1884.

IMPEACHMENT OF WITNESS—CONVICTION, HOW PROVED.—Under section 2,051 of the code of civil procedure, a witness may be impeached by asking him if he has been convicted of a felony. The conviction of a misdemeanor, however, must be proved by the record of conviction.

APPEAL from a judgment of the superior court for the city and county of San Francisco, and from an order denying the defendant a new trial. The opinion states the facts.

John D. Whaley, for the appellant.

Attorney General, for the respondent.

MCKEE, J. When the defendant was under cross-examination, as a witness in his own behalf, the district attorney asked him this question: "On the third of May, 1882, was a judgment pronounced against you in the police judges' court of the city and county of San Francisco for the crime of petit larceny, under the name of L. Smith?" Defendant's counsel objected to the question upon several grounds, and among others on the ground that it calls for secondary evidence. The objections were overruled, and the defendant excepted.

By section 2,051, C. C. P., it is allowable to impeach a witness by asking him if he has been convicted of a felony, or the fact may be proved by producing the record of conviction. Proof of such a fact, by oral testimony of the witness, is, however, an exception to the general rule, as it existed before the code. Under that rule the only admissible evidence of the former conviction of a witness of felony was the record of conviction. And the rule is yet applicable to the proof of conviction of an offence other than felony, for the code, which has made an exception to the rule in convictions of felony, declares that a witness cannot be impeached by evidence of particular wrongful acts; these do not fall within the exception, therefore the fact of a former conviction of misdemeanor cannot be

proved by the examination of the witness. The record of conviction of misdemeanor is the best evidence of the fact, and it is indispensable: Section 1,863, C. C. P., People vs. Reinhart and People vs. McDonald, 39 Cal., 449, 697.

Judgment reversed and cause remanded for a new trial.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,559.

PEOPLE EX REL. HOY *v.* ALVORD ET AL.

In Bank. Filed September 30, 1884.

THE POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO are not elective officers.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants.

Attorney General and *John J. Coffey*, for the appellant.

Alfred Clarke, for the respondents.

THE COURT. In Staude v. Election Commissioners (10 P. C. L. J., 29) it was held that the police commissioners of the city and county of San Francisco were not elective officers. Upon the authority of that case the judgment in this must be affirmed. It is so ordered.

No. 8,030.

BLAND *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

Department One. Filed September 30, 1884.

EXPULSION OF PASSENGER FROM CAR—CONFLICT OF EVIDENCE—VERDICT.—As to the fact whether the plaintiff was rightfully expelled from the train of the defendant without unnecessary force, and at a proper place, *held* that the evidence was conflicting, and that a verdict founded thereon should not be disturbed.

EFFECT OF INJURY—EVIDENCE OF BY NON-MEDICAL EXPERT.—A person, not a medical expert, who has been injured through the negligence of a railroad, may testify as to the consequences of the injuries received, as for example that he had lost a leg, with reference to the construction of an artificial leg used by him, and as to the effect upon the stump of a blow or jar. He may also state the consequences immediately following the injury upon other organs of his body.

EXPULSION OF PASSENGER—DUTY OF EXPELLED PASSENGER—CARE AND CAUTION REQUIRED OF.—A passenger expelled from a railroad car is not required to use the utmost care and caution to avoid injury. It is sufficient if he uses such prudent care as is reasonable under the circumstances. Whether it was prudent for a passenger, after his expulsion from a car, during which he received an injury, to walk to a place other than the nearest dwelling house, is a question for the jury. Under section 487 of the civil code the passenger expelled is under no duty to go to the nearest dwelling house.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

McKissick & Rankin, and *Moore, Laine & Johnson*, for the appellant.

D. M. Delmas, for the respondent.

THE COURT. 1. The first point made by appellant is that the verdict is contrary to the evidence, for the reason that plaintiff was rightfully expelled from the train of defendant, without unnecessary force, and at a proper place.

Appellant contends that evidence proved that the conductor of the train offered to return, and did return, to plaintiff the two dollars paid as and for his fare, before he ejected plaintiff from the car.

The plaintiff testified: "When we got to the platform he put his hand in his pocket and handed me the two dollars, holding me all the time with the other hand. As he gave me the money he shoved me off. The conductor did not return, or offer to return, the two dollars I had paid him, or any portion of it, until he had thus shoved me off." The fare claimed by the conductor was two dollars and twenty cents. There was at least a substantial conflict in the evidence as to the point whether the two dollars, handed by plaintiff to the conductor, were or were not returned before the latter commenced to remove the plaintiff, or stopped the train. The evidence is very different from such as it appeared in the record when the case was here before: Bland vs. S. P. R. R. Co., 55 Cal., 570. We cannot say the verdict, so far as it is based on the question of fact above considered, should have been set aside.

2. Appellant contends the Court below erred in permitting plaintiff to testify, as an expert, to the consequences of the injuries by him sustained.

We can see no impropriety in permitting the plaintiff to testify that he had lost a leg, with reference to the construction of an artificial leg used by him, and as to the effect upon the stump of a blow or jar. The question was put to the witness: "Describe to the jury what effect this injury, this shock produced upon your general system, especially upon your nervous system, your head and spinal column?" This question was answered at length, but no objection was made to the question, nor did defendant move to strike out the answer. Subsequently, the witness was asked what effect "the accident" had upon particular organs. To this question the defendant objected as "irrelevant, immaterial and incompetent."

Of course, the mere fact the plaintiff discovered, that the organs in question had wasted away perceptibly six or eight months *after* "the accident," and that from thence the atrophy continued, would not necessarily prove that the decline was a consequence of plaintiff's expulsion from the car. In passing upon the admission of such evidence, the court must be careful not to be misled by the fallacy *post hoc ergo propter hoc*. But unless we can say that no immediately perceptible evil effects could have been produced upon the organs referred to in the question, we cannot say the objections to the *question* should have been sustained. There are consequences imme-

diately following upon every bodily injury, palpable to the senses, and to which the non-expert is competent to testify.

3. No objection was made to the hypothetical question propounded to the medical experts by counsel for plaintiff.

4. Appellant contends that an instruction of the court, permitting the jury to consider the "voluntary walk" of plaintiff as an element of damage, was erroneous.

The question whether the walk to the station at Santa Clara was a prudent act for plaintiff, under the circumstances, was left to the jury. We think the statute (C. C., 487,) does not impose the absolute duty upon a passenger evicted from a car to go to the nearest dwelling-house, there to remain until he can be returned by carriage to his home, or to the station at which he entered the car. Whether the train was stopped "near" a dwelling-house, within the meaning of the code, was itself a matter of fact to be determined by the jury. The direction of section four hundred and eighty-seven of the code to conductors or managers of railroad trains imposes on *them* a positive duty, not upon the passenger removed. The very highest degree of care and caution is not required of the expelled traveler. It is sufficient if he uses such prudent care as is reasonable under the circumstances, and that matter was submitted to the jury.

The court stated to the jury that plaintiff *claimed* that concussion of the *spine* had been produced by his expulsion from the car, and the distance he "was required to walk." And the court said: "It is for you to determine from his evidence whether concussion of the spine has been suffered by plaintiff, and if so, whether it was in consequence of his removal from the car, and the walk which followed upon it, or some other precedent or subsequent cause," etc.

It is not urged by appellant that the jury were led to believe that, in the opinion of the court, it was a prudent and necessary thing for plaintiff to walk back to the station. It is not claimed that the court charged as to a matter of fact (in violation of the constitutional provision), but that the court should have held, as matter of law, that the walk was not necessary, and ought to have refused to charge that any injury, produced by the walk, *could be* considered in finding damages. We think, however, if a certain necessity to take the walk was imposed on plaintiff by his expulsion from the car—by which is not meant that the walk was indispensible, or the most prudent thing which plaintiff could have done, but that it was that which ordinary prudence and caution dictated as the better course to pursue, in order to avoid more inconvenience or discomfort—the walk became a direct consequence of the expulsion within the rule which allows damages for the direct consequences of any trespass.

Judgment and order affirmed.

No. 9,203.

ANDREWS v. RUNYON ET AL.

Department Two. Filed September 30, 1884.

MARRIED WOMAN, WHEN MAY SUE ALONE—DESERTION.—A married woman may sue alone to recover for personal injuries sustained by her through the negligence of the defendants, when she is living separate and apart from her husband, by reason of his desertion of her.

DESERTION—OFFER TO RETURN AND REFUSAL—HUSBAND AND WIFE.—A wife's desertion of her husband is cured if she, before the expiration of the statutory period required to make the desertion a cause of divorce, and when in the vicinity of her husband's home, offered to go back and resume the performance of her marital duties, and he refuses to receive her. Under such circumstances an actual physical return is not necessary. From the date of his refusal the husband is deemed to have deserted the wife.

CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.—In an action to recover damages for personal injuries, caused by the alleged negligence of the defendants, when the defense relied on is contributory negligence on the part of the plaintiff, and the evidence is such that the question of contributory negligence is properly submitted to the jury, it is error for the court to remark to the jury that he does not see how the facts alleged to constitute contributory negligence were unreasonable, "or something which an ordinary man would not do."

CONTRACT—LIABILITY FOR ILLEGAL ACT—INFERENCES OF INTENTION.—A party is not bound for the consequences of an illegal act, from a mere suggestion in a conversation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually.

INSTRUCTIONS—REFUSAL TO GIVE ON ACCOUNT OF LENGTH.—The court can not refuse to give instructions requested, on account of their length, when the same are handed in at the time prescribed by the court's rules.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

McKune & George, *A. Campbell, Sr.*, *P. J. Van Loben Sels*, *L. S. Taylor*, and *Hart & White*, for the appellants.

Grove L. Johnson and *Jones & Martin*, for the respondent.

THORNTON, J. This action was instituted to recover damages for personal injuries alleged to have been occasioned by the negligence of defendants and comes before this court on appeal of the parties last named from the judgment and order denying a new trial.

Many points are argued in briefs of counsel, which we are called on to consider and determine.

As to the objections to the complaint, we are of opinion that they are not well taken.

It is urged that the plaintiff was a married woman who had deserted her husband and therefore was not competent to sue alone. The court in its direction to the jury ruled against this contention, and error is assigned on this ruling.

The statute, C. C. P., 370, requires that when a married woman is a party, her husband must be joined with her, except under certain conditions therein specified. The exception under which the plaintiff claims she is authorized to sue alone, is that when this action was commenced living separate and apart from her husband by reason of his desertion of her. The evidence on this point is as follows: The plaintiff and her husband resided at Walla Walla, in the territory of Washington. The husband failed to support her and his child by a former marriage (the support of the child and herself thus

falling on her), and on this account she left him in May, 1880; that she offered to go back to him and perform her duties as a wife in January, 1881, again in May, 1881, a third time in July, 1881, and still a fourth time in October 1882, and that he refused to take her back. When she made the offer in January, 1881, she was in Umatilla, in Western Oregon, about twenty miles from Walla Walla. That she did not return at that time, because she was sick and unable to go. Of this sickness her husband knew and manifested no interest in her, never inquired about her, but simply refused to have anything to do with her or take her back. That if she had not been sick and and unable to go she would have gone back. These offers were made in good faith, as the plaintiff testified, and there is no contradictory testimony. It further appears that in August, 1882, she received a letter from her husband asking her to come back; that in reply she wrote an amiable answer; that in October, 1882, he wrote her another letter stating that he had a house in Lewiston, Idaho, describing the house and saying he wanted her to be with him, but before she received this letter she had another from him in answer to one from her written from the county hospital, refusing to live with her, and telling her that the county hospital was the proper place for her. This last was written after he had heard of her crippled condition, caused by the injury on which this action is based. These offers by the plaintiff to return were all made by letter, and except the first in January, 1881, written from Umatilla, were written from this state, to which she had subsequently come.

The statute (C. C., Art. 71, Chap. II, First Division,) on this subject defines wilful desertion as "the voluntary separation of one of the married parties from the other, with intent to desert: C. C., Sec 95. It would seem from the evidence above given that if there was any desertion in the first place, it was on the part of the plaintiff.

It is further provided, in a subsequent section (102) of the article above cited, that if one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal.

Did not the plaintiff comply with the requirements of this enactment by her offers? It is said she did not, for the reason that the law requires a return, an actual physical return, and this she did not do. It will be observed that the first offer was made from Umatilla, when she was only twenty miles from the place of his residence, and that he refused to receive her or to have anything to do with her. Does the law require any actual physical return when the wife is in the vicinity of her husband's home and offers to go back and resume the performance of her marital duties, and he, in effect, tells her you need not come, I wish to have nothing to do with you? Must she perform a journey entirely useless for any purpose when she is told

you need not come, for your coming will accomplish nothing? The other offers to return appear to have been after the statutory period had passed, but they tend to sustain the conclusion here reached, that the husband was unwilling to receive his wife in January, 1881, when an offer was made within the statutory period, and that his intent was then not to receive her at all. Entertaining these views of the law, we are of opinion that the court below did not err in holding that the plaintiff was competent to maintain this action.

The court erred in not sustaining the motion for a non-suit as to Loben Sels.

The evidence on the point of contributory negligence on the part of plaintiff was such as must have carried it to the jury under the rule laid down in Fernandez vs. Sacramento City R. R. Co., 52 Cal., 45, which may be regarded as settling the law on this point in this state.

The court in its ruling did submit this question to the jury, but with an observation which, in our judgment, invaded their province. The court on this point gave these directions: "There is a question here as to contributory negligence. The general rule about that is that, although a defendant may have been the prime cause of the injury, yet, if the plaintiff is also guilty of what is called contributory negligence, he cannot recover. Negligence is generally understood to be the omission to do something which an ordinarily reasonable and prudent man would do under the circumstances, or the doing of something which an ordinarily prudent man would not do. It is claimed in this case, that the driving of a team at night along the road is contributory negligence. I think that is more a question of fact than of law, for you to determine. If you believe that the plaintiff was guilty of contributory negligence in the sense in which I have defined it, she could not recover." The court then made this remark: "I do not see that the question whether or not a person driving at a certain gait along a road known to him after night, is an unreasonable act, something which an ordinary man would not do."

This was, in effect, telling them that there was no contributory negligence by plaintiff. If this was so, the court should not have submitted the question to the jury at all, but should have directed them that there was no question of the kind for their consideration. The court did right in submitting the question to the jury, but when the instruction given was qualified by the remark just above quoted, they were directed as to what the evidence proved. The authority of the court is limited to stating the evidence and declaring the law.

The remarks of the court in relation to the contract were, we think, calculated to mislead the jury. We refer to that part of the charge in which the jury is told that: "If, however, at the time the contract was made, it was the fair understanding and intention of all parties that the road was to be dug up for the purpose of building the levee, then I think that whoever made the contract is liable, because if those be the facts, the digging up of a public road was

an inherent part of the scheme of building the levee." If it was a part of the contract that the road was to be dug up to build the levee, Runyon would certainly be bound. It must be understood in the sense that the contract was so made to bind Runyon. If by this is meant that the jury were to infer from some conversation with regard to where the contractor was to cut the road to build the levee and before the contract was entered into, then the jury should have been directed not to regard it unless it entered into and formed a part of the contract. The same remark applies to any conversation on this subject occurring after the contract, which was an oral one, was entered into; that it was intended by what was said on the subject that the contract should be added to in that regard. As to defendant's liability in this regard, the direction should have been that the jury must be satisfied that it was a part of the contract to build the levee with dirt taken from the road, or they were to disregard it. The law does not justify the holding a party bound for the consequences of an illegal act from a mere suggestion in a conversation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually. The understanding and intention are to be inferred from what was agreed on contractually. As to the court's refusing to give the thirty-three instructions or requests asked by defendant, on account of their length, we think it only necessary to say that the court is not justified to refuse to pass on such instructions when handed in at the time prescribed by the rule. The jury can be dismissed for a time, that the court may have an opportunity of considering the requests.

It is said that the matters of law embraced in the requests were given by the court. We do not think, as the case goes back for a new trial, it necessary to compare the requests referred to with the instructions given by the court, to see whether such was the case, as we cannot think it will occur again in a new trial.

For the errors pointed out, the judgment and order are reversed and cause remanded for a new trial.

SHARPSTEIN, J., and MYRICK, J., concurred.

No. 10,905.

PEOPLE *v.* JORDAN.

Department One. Filed September 30, 1884.

NOTICE OF APPEAL—FORM OF.—A notice of appeal which plainly indicates the particular order appealed from, is sufficient in form.

JUDGMENT ON DEMURRER TO INDICTMENT—ENTRY OF—NOTICE OF APPEAL.—The penal code does not provide for any entry of judgment on a demurrer to an indictment other than the entry of the order upon the minutes. The order in the minutes is the judgment. A judgment that such demurrer be "sustained" is a substantial compliance with section 1,007 of the penal code, and is in effect a judgment that the demurrer be allowed. An appeal from such judgment is not rendered ineffectual because in the notice of appeal the judgment specifically described is called an "order."

APPELLATE JURISDICTION OF SUPREME COURT—PROCEDURE ON APPEALS.—The supreme court cannot decline to take cognizance of a matter clearly within its jurisdiction, because the mode of procedure applicable to it has not been regulated by statute, written rule or precedent. In such case it is its duty to create a precedent, and it may adopt or ratify the practice resorted to on the first occasion when the exigencies of a cause require a reasonable and unprecedented practice to be resorted to.

THE SAME—APPEALS IN MISDEMEANORS—PROCEDURE.—The supreme court has jurisdiction to entertain appeals in cases of misdemeanors prosecuted by indictment or information, and, as the legislature has failed to prescribe the mode of procedure on such appeals, to provide therefor by rule, and, in the absence of a previous rule, to sanction a mode of procedure adopted on a particular occasion. The practice pursued in taking the present appeal is adopted, and hereafter appeals in criminal actions prosecuted by indictment or information amounting to misdemeanors only, will be sustained, from the judgments and orders mentioned in chapter I, of title 9, of part 2, of the penal code, when the appeal is taken in the manner therein prescribed.

MOTION to dismiss an appeal from the superior court of the city and county of San Francisco. The opinion states the facts.

Attorney General, for the appellant.

John M. Lucas, for the respondent.

MCKINSTRY, J. Motion of respondent to dismiss appeal

This is an appeal by the people from a judgment for the defendant on a demurrer to the indictment: Penal Code, 1,238.

Respondent moved to dismiss the appeal on the grounds:

1. That the notice of appeal is insufficient, ambiguous and unintelligible, in that it purports to have been taken from an order of *this* and not of the superior court, and in that it does not designate the order appealed from with sufficient certainty.

2. That the appeal is from an order sustaining a demurrer and not from a judgment on demurrer.

3. That no appeal will lie, the offense charged, if any, being a misdemeanor.

1. The notice of appeal is entitled "In the superior court of the city and county of San Francisco, state of California," and the notice refers to the order of "said court" (which last words are claimed by respondent to relate to *this* court, because they follow immediately after the statement that the appeal is taken to the supreme court) "sustaining the demurrer to the indictment *in the above entitled* cause." The notice plainly indicates the purpose to appeal from a particularly described order of the superior court.

2. The penal code does not provide for any entry of judgment on demurrer other than the entry of the order upon the minutes: Section 1,007. The order in the minutes is the judgment. Although it is always better to employ the language of the code, a judgment that a demurrer be "sustained" is in effect a judgment that the demurrer be allowed. The language of the judgment appealed from is: "It is ordered, adjudged and decreed that the defendant's demurrer be and the same is sustained." This is in substantial compliance with section 1,007 of the penal code. The mere fact that in the notice of appeal the judgment specifically described is called an "order" does not render the notice ineffectual.

3. The legislature has prescribed no procedure for an appeal to this court in criminal actions, except "in criminal actions amount-

ing to felonies:" Penal Code, 1,235. But the supreme court has appellate jurisdiction "in all criminal cases prosecuted by indictment or information," etc.: Const., Art. VI, Sec. 4. The same section of the constitution provides: "The court shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." The power to issue the writs specified, or any other writ, in a case where it may be necessary or proper to resort to it to secure the complete exercise of the appellate jurisdiction of the court, would exist had the constitution been silent on the subject. It may be conceded for our present purposes that where machinery has been supplied for the employment of its jurisdiction by legislative enactment, such machinery must be adopted or accepted by the court. But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it; a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise. In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this State to establish an entire code of procedure in civil cases, and an entire system of procedure in criminal cases, except that criminal actions of a certain class must be prosecuted by indictment or information: Const., Art. 1, Sec. 8.

While the English courts have recognized the power of parliament to create a practice, or to amend an existing practice, the main body of the practice was established by rules, or was the outgrowth of customs recognized and sanctioned by the courts at Westminster. Before the 1 W., 4, c. 70, the course of proceedings in the superior courts of law as well respecting practice as pleading was regulated by one of four authorities, viz: first, by general statutes; secondly, by express written rules; thirdly, by *prior decisions;* and, fourthly, by *usage*. The statutes in general equally applied to all those courts, but the express rules were made by the judges of each court from time to time, and only applied to the proceedings of that particular court; and the decisions and usages were principally confined to a particular court. Such usages constituted what might be termed the *common law* of the court as distinguished from the statutes and written particular rules: 3 Chitty's Gen. Pr., 50. Long usage in the practice of the courts, or of a particular court, may be considered the common law of the court; for the acquiescence in constant proceedings, as well by the judges as its experienced officers, denotes that it is reasonable, and has not been found objectionable, because if it had it would soon have produced an immediate change; the judges of each court have *implied power* to alter any inconvenient practice when they think fit: *Id.*, p. 56. In a conservative spirit Mr. Chitty adds: "It is important that such usage should be adhered to until expressly altered by statute or rule, because otherwise practitioners relying on the known practice, would be misled if there were any sudden unpromulgated changes; and the same principle, indeed,

weighs against any change, unless imperatively called for by strong necessity," etc.

Doubtless when a practice with respect to any procedure, as to which the statutes are silent, has been once adopted by this court, the protection of practitioners would demand that no change should be made, except by rule, duly published. But the authority of any usage is derived from its recognition and sanction by the court, and we cannot decline to take cognizance of a matter clearly within our jurisdiction, because the mode of procedure applicable to it has not been regulated by statute, written rule or precedent. In such case it is our duty to create a precedent.

When this is done we do not recognize an existing *usage*. But as the usages of the English courts, of however long standing, had no innate force as rules or laws, but derived their sanction solely from the court which permitted them to be followed, and which had power to alter them at any time, so this court (the statutes being silent) may adopt or ratify the practice resorted to on the first occasion when the exigencies of a cause require a reasonable and unprecedented practice to be resorted to.

If *casus omissus* in the procedure established by law, and written rules is called to our attention in advance, we may, by rule, provide for it; if not, when the case is presented we must adopt for it an appropriate mode, in itself reasonable, which is to be followed in like cases until altered by statute or rule. The power of courts to establish a system of procedure, by means of which parties may seek the exercise of their jurisdiction, at least when a system has not been established by legislative authority, is inherent. *A fortiori* must this be so in California, where the judicial is a separate department of the government under our written constitution.

Applying these principles to the case in hand, the defendant here was prosecuted by indictment, and the legislature has failed to provide any machinery for taking an appeal from a judgment for or against him. We are confronted by the duty, imposed by the constitution, of reviewing the proceedings of the court below. We entertain no doubt that we have the power of declaring, and that it is our duty to declare, how this and like cases may be brought here for review. We may issue to the lower court a writ of *mandamus* or *certiorari*, or we may frame and issue any other appropriate writ. But our power is not limited in the exercise of our appellate jurisdiction to the employment of technical *writs*. We may by *rule* establish any appropriate practice for the bringing here a record or proceeding in the court below. Still further, we possess the power, as necessarily incident to our jurisdiction, of recognizing as proper any mode of procedure already adopted for bringing a cause before us. In Piper v. Centinelli Land Company, 56 Cal., 173, this court held that where the statute prescribes no mode by which papers used on a hearing in the court below shall be authenticated, this court has power to prescribe, by rule, how such papers shall be brought before it on appeal; and also (in the absence of any

rule), to ratify the mode adopted in the court below. If, in the absence of legislative regulation, it may thus ratify a portion, it may adopt the whole of the procedure by which a cause is brought here.

The case cited by counsel for respondent from 3d Dallas, 321, 409, and 3d Cranch, 159, are not in point. The constitution of the United States provides that the appellate jurisdiction of the supreme court shall extend to enumerated cases "with such exceptions, and under such regulations, as the congress shall make."

In early cases in this state the writ of *certiorari* was refused by this court where no appeal had been provided by statute: Warner v. Hall, 1 Cal., 90; White v. Lighthall, 1 *id.*, 347. "But," as said by Mr. Hayne, "at that time the power of the court to frame process proper for the exercise of its jurisdiction, in cases where no process had been provided by the legislature, does not seem to have been understood:" New Trial and Appeal, Section 181. The same learned writer adds: "The cases may, however, be regarded as authority upon the proposition that the constitutional jurisdiction of the court cannot be exercised in the absence of process provided by some competent authority."

The three judges who concurred in the order dismissing the appeal in *Houghton's Appeal*, 42 Cal., 58, held that the constitution then in force did not give to the supreme court appellate jurisdiction, in a statutory proceeding for *modifying grades*, etc. Also that such proceeding in the county court was a "special proceeding," and not a case at law "involving the validity of an assessment" within the meaning of the constitution. Further, that the judgment from which the appeal in form had been taken was made "final and conclusive," and unappealable by the express terms of the statute. In that case the statute prohibited an appeal and the constitution gave none. It was however said in an able concurring opinion by chief justice Wallace: "Independently of rules adopted by this court (and there are none), an appeal as mere procedure is defined by statute; it is essentially the creature of the statute, and may be accorded or withheld, restrained or wholly abrogated. It cannot be held to have any existence except as found in the expression of the legislative will. * * * While that instrument (the constitution) has defined the cases to which the appellate jurisdiction of this court extends, it has not attempted to provide, in anywise, for the mere instrumentalities through which that jurisdiction is to be exercised. It has left that subject *wholly at large*, and to be provided for by the legislature through statutes enacted, or, in default of them, by this court through *rules adopted for that purpose*." We agree in the main with the views so clearly expressed by the late chief justice, but do not assent to the conclusion that, in default of a statute, or of a rule formally adopted and promulgated, we should refuse to exercise a jurisdiction imposed upon this court by the constitution. The power to establish rules providing an appropriate practice, where the legislature has not provided such, is not derived from the stat-

ute which purports to authorize this court to make rules, but exists inherently as an incident to the jurisdiction conferred, and it can hardly be doubted that, in the absence of statute, rules of practice with respect to matters as to which the codes are silent may be adopted to go into force after such publication as this court may deem proper, or without any publication.

In Middleton v. Gould (5 Cal., 190) it was said that, as the law stood, there was no statutory appeal from a judgment of a county court (on appeal from a justice's court) in an action of forcible entry and detainer. There is in the opinion *dictum* to the effect that the only remedy of the party aggrieved by such a judgment was to sue out a writ of error. But appellate jurisdiction in actions of forcible entry or detainer was not conferred in terms on the supreme court by the constitution of 1849, and the case does not show that the matter in dispute exceeded two hundred dollars in value. Unless the matter in dispute did exceed two hundred dollars in value the supreme court, under the constitution of 1849, had no jurisdiction to review the judgment through any instrumentality. Nor does it appear that any suggestion was made to the court with reference to its power to establish or adopt an appropriate procedure for the exercise of its jurisdiction.

This last remark applies equally to the case of French v. The People, reported in the seventy-seventh volume of the Illinois Report (p. 532).

In Blum v. Brownstone (50 Cal., 273) it was decided that where the legislature had enumerated the orders of the probate court from which an appeal might be taken, no *direct appeal* from any other probate order will be entertained, and in Sacramento v. Harlan (24 *Id.*, 334) that a *writ of error* does not lie when an appeal has been given by statute. Neither of these cases conflict with the view we have taken. In *ex parte* Thistleton (52 Cal., 220) the supreme court held that the omission of the legislature to provide the machinery for the taking of appeals from the city criminal court of San Francisco to the county court was not fatal to the act creating the former court, but that the appellate jurisdiction of the county court might be exercised by means of writ of error, or—under the statute authorizing it to issue all writs necessary to the exercise of its powers—by means of an appropriate writ framed for the purpose. The supreme court reserved the question whether the county court could, by rule or otherwise—in the absence of express authority from the legislature—establish a system for the taking of appeals, saying: "Whether in the absence of a statute purporting to grant the power, a court on which the constitution has conferred certain jurisdiction would have the power by rule to establish the machinery for bringing within its judicial cognizance the person of a party and an appropriate subject-matter, and of prosecuting a proper plaint to judgment, is a question which need not now be considered."

Hamilton v. Smith, 21 Cal., 129, only decides that when the system provided by the practice act provides an adequate remedy, no

other can be pursued. The legislature of Alabama having omitted to prescribe the regulations by which the ordinary constitutional power of the supreme court of that state, over subordinate jurisdictions, was to be exercised in criminal cases, the supreme court held that in bringing such cases before it for revision, it might resort to such writs as were known to the common law: Lynes v. The State, 5 Porter, 236.

We are fully satisfied that we are empowered to make applicable to misdemeanors, prosecuted by indictment or information, the provisions of the penal code with reference to appeals in criminal actions amounting to felonies. We adopt the practice pursued in taking the present appeal, and will hereafter entertain appeals in criminal actions prosecuted by indictment or information amounting to misdemeanors only, from the judgments and orders mentioned in chapter I, of title 9, of part 2, of the penal code, when the appeal is taken in the manner therein prescribed.

Motion to dismiss appeal denied.

MORRISON, C. J., MYRICK, J., SHARPSTEIN, J., ROSS, J., and THORNTON, J., concurred.

No. 7,565.

CLARK *v.* SMITH ET AL.

In Bank. Filed September 30, 1884.

STATUTE OF LIMITATIONS—ACTION UPON AN UNDERTAKING ON APPEAL.—The complaint alleged that on April 19, 1867, one Littlefield recovered a judgment in the district court against Nichol and Weisse for the possession of a tract of land; that on appeal to the supreme court, an undertaking was given by defendants, for the purpose of staying execution on said judgment, whereby defendants jointly and severally promised on the part of the then appellants Nichol and Weisse, that if said judgment was affirmed, the said appellants would pay the value of the use and occupation of the land recovered from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of three thousand dollars; that said judgment was affirmed and the remittitur was filed in the district court on January 30, 1872; that the said land was conveyed to the plaintiff on November 23, 1870, and that said undertaking and all rights of action thereon were also then assigned to the plaintiff; that on the same day when said judgment was affirmed, the said Nichol brought an action against said Littlefield and others and obtained an injunction restraining the defendants therein, including this plaintiff, from enforcing said judgment, and said injunction continued in force until February 24, 1876, when it was dissolved; (the court does not consider the effect of this injunction in its decision); the complaint then alleges the value of the use and occupation of said land, and the damage sustained by him therefor, and prays judgment for such amount. The action was commenced on September 7, 1876. The defendants demurred to this complaint on the ground that the cause of action was barred by § 337 of C. C. P., and that it did not accrue within four years before the commencement of the action, the period of limitation mentioned in § 337 being four years. *Held*, that the order of the court below overruling this demurrer was not error.

THE SAME—WHEN THE CAUSE OF ACTION FOR USE AND OCCUPATION ACCRUES.—While the plaintiff might have commenced an action on such undertaking as soon as the judgment appealed from was affirmed, the cause of action for use and occupation is not complete at that time. The right of action only fully accrues when the use and occupation has been had. As against the defendants in the ejectment each day's wrongful detention is a new cause of action, and the action for it is only barred when four years have elapsed after the right of action has become complete. If they continued in wrongful occupation they would be liable for the use and occupation during the period of four years before the action was commenced, but there could be no recovery for their use and occupation prior to that four years period.

THE SAME—SURETIES IN THE UNDERTAKING.—As the position of the sureties on the undertaking in suit is analagous to that of guarantors, the same rule determines when the cause of action on the undertaking for the use and occupation accrues against them, and when the right of action against them is barred.

THE DEMURRER TOO BROAD.—When a complaint states a cause of action, some part of which is barred and some part not barred, a demurrer to the whole complaint on the ground that it does not state facts sufficient to constitute a cause of action, should be entirely overruled.

APPEAL from a judgment of the district court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Flournoy & Mhoon, for the appellants.

B. S. Brooks, for the respondents.

THORNTON, J. On the 19th day of April, 1867, Littlefield recovered judgment in the fifteenth district court for the city and county of San Francisco against Nichol and Weise for the possession of a tract of land, etc., etc., and on appealing to this court an undertaking was given, signed by defendants, for the purpose of staying the execution of the judgment, by which they jointly and severally undertook and promised on the part of the appellants that if the judgment appealed from was affirmed the appellants would pay the value of the use and occupation of the property recovered from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of three thousand dollars. The judgment was affirmed on the 30th of January, 1872, and the remittitur was filed on the same day in the district court above mentioned. The above facts were set forth in the complaint, and it was further averred therein that the land above mentioned was on the 23d of November, 1870, conveyed to the plaintiff and that there had been assigned to the plaintiff the undertaking and all rights of action thereon. It is further alleged that on the same day on which the remittitur was filed in the district court, Nichol brought his action in the same district court against Littlefield and others and procured an injunction to be issued restraining the defendants, including plaintiff herein, from executing the judgment above mentioned, and that the injunction remained in force until the 24th of February, 1876, when it was dissolved. The complaint proceeds to allege that the plaintiff was entitled to the use and occupation of the land conveyed, the value thereof, and that the rents, issues and profits are of the annual value of two thousand dollars, all of which has been withheld from plaintiff, and that he has sustained damage to the amount of more than five thousand dollars.

This action was commenced on the 7th day of September, 1876.

To this complaint defendants demurred, and as a ground of demurrer assigned that the cause of action was barred by the provisions of Section 337, C. C. P., and that it did not accrue within four years before the commencement of the action. The period of limitation mentioned in Section 337, C. C. P., is four years. The court below overruled the demurrer. It is contended that this was error.

We consider it settled in this state that the plaintiff was not obliged to wait for the delivery of the possession of the land for which the judgment above mentioned had been recovered, before commencing his action on the undertaking, (De Castro v. Clarke, 29 Cal., 11; Crane v. Waymouth, 54 *id.*, 476); and further, that the affirmance of the judgment was the condition on which the defendant's obligation became absolute: Same cases just above cited. The court, in ruling the latter point in De Castro v. Clarke, adds to it the remark, "though its extent in such a case might not be limited by that event:" 29 Cal., 11. But though an action can be brought at the period and in the circumstances above stated, it does not follow that the cause of action is complete or has accrued for use and occupation for a period of time for which a recovery could not be had in the action brought. If the action had been brought on the thirty-first of January, 1872, before delivery of possession, the plaintiff certainly could not have recovered anything for use and occupation after the trial—may be not for any use and occupation had after the action was commenced. For such later period there would have been no breach when the action was commenced. There certainly could not have been a recovery on a breach occurring after action brought. Such being the case, the right of action only fully accrues when the use and occupation had been had. The statute of limitations can only act on breaches when they occur. Is there not a breach every day that the possession is withheld by the appellant? Why not? It has been adjudged that he is not there by right; then he is a trespasser, and for every day's trespass a new action may be commenced: Gould's Pleadings, Sec. 90, Ch. III; Earl of Manchester v. Vale, 1 Saunders, 24, note 1; 1 Rolle's Ab., 545. The trespass of each day is a new trespass, and furnishes a new cause of action, though they may all be counted on in the same complaint with a *continuando*. (See citations just above.) We think it a just inference that the cause of action arises on each breach as it occurs, and the action for it is only barred when four years have elapsed after the right of action has become complete. Suppose the action was against the defendants in the ejectment suit, this would certainly be so. If they had occupied the prescribed period of limitation, viz., four years after the cause of action accrued, and the action was commenced on the last day of this period, there could be a recovery for the four years, and there could be no recovery for anything prior to the four years period. Could the parties executing the undertaking be responsible for less than the defendants above named, whether they be regarded as guarantors or sureties, or as independent promissors? Certainly their liability by the terms of the undertaking would be no less than the parties for whom they become responsible. That is the language of their contract; they undertake that the appellant will pay the value of the use and occupation for the period mentioned; and they are protected by the act of limitations just as the parties for whom they undertake, and no further.

If it is not a contract of guaranty, such contract is very analogous to it, and the decisions on such contracts afford analogies which furnish a key to the solution of the question before us. The case of Kirby v. Studebacker, 45 Ind., 45, affords an illustration in point. In that case two persons purchased of a third all the strawberries that might ripen on his patch during the season, and agreed to pay him a given price therefor on delivery. A fourth person became surety for the purchasers by an agreement to the effect that he would become responsible with them for the purchaser's part of the contract. *Held*, that the contract bound this latter person as a surety for its direct performance, and was in effect that he or his principals would pay for the berries on delivery, and that the seller might have demanded the price as each load was delivered, and on such delivery the purchasers became debtors to the seller to the amount of the berries delivered: See 15 Ind., 47, remarks of court in paragraph commencing, "Now, as between."

Now, in this case, the right of action was complete when each load of berries was delivered, and if an action had afterward been brought against the surety, the statute of limitations would not have barred the remedy for any loads delivered within the period of limitation, but would have been a bar for those delivered prior to the period—that is to say, the cause of action arose when the liability became complete, and the plaintiff had the whole period of limitation, whether two, or four, or six years, within which to bring his action. Such was the ruling in Calvin v. Buckle, 8 M. & W., 680. The contract in that case was one of guaranty, and was contained in a letter dated twenty-second November, 1817, addressed by the defendants to the plaintiffs, in these words: "You having expressed some doubts of the propriety of paying Mr. Gooch his draft on you for eight hundred and fifty pounds in our favor, we hereby engage, if you will pay us the same, we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of Mr. Gooch's pending accounts with your London or Bengal house, or from any other circumstances."

The facts out of which this transaction arose are as follows: Bazette & Co., who were, in this action, represented by plaintiffs, were in advance to Gooch, who had sent to Calcutta a cargo of goods for sale there on his account. The goods were consigned to Colvin & Co., of Calcutta, plaintiffs' agents, and were to be disposed of there by them. The proceeds were to be used in procuring for Gooch a return cargo, to be consigned to plaintiffs in London, so as to give them security for their advance to Gooch. In this state of things, defendants applied to Bazette & Co. to make a further advance to Gooch of eight hundred and fifty pounds. But as it was doubtful whether anything would be coming to Gooch on the termination of the transactions above stated, the above letter was written by defendants to the plaintiffs. On this letter Bazette & Co. accepted and paid Gooch's draft for the sum above mentioned. A difficulty

arose on the return of the ship with the cargo from Calcutta. The owner of the ship (one Campion) notified the East India Company, in whose docks the vessel lay, not to deliver any portion of the cargo without his authority. The company, on this notice, sold the cargo, paid the ship-owners' demand for freight, and in consequence of the conflicting claims from the ship-owner, filed an interpleader bill and paid the balance of the proceeds into court. Proceedings in court had, under legal advice, continued between the parties up to 1837, which resulted adversely to Bazette & Co., plaintiffs. In 1838 a demand for eight hundred and fifty pounds was made on defendants upon their guaranty. The statute of limitations was pleaded, and the question to be decided was, when the statute commenced to run, or, in other words, when the cause of action accrued. The court observed as follows on this point: "The present action is brought on the guarantee so entered into by defendants; and the question is, when did the liability of the defendants first arise? for from that period, undoubtedly, the statute of limitations began to run."

It was contended on behalf of plaintiffs that this liability did not arise until the accounts between Gooch and them had been adjusted, and that as such adjustment had been delayed by disputes arising on the ship-owner's claim of lien for freight between the owner and the plaintiffs, it did not finally take place until within six months before the commencement of the action, and thus the statute did not furnish a defense.

The court held against this contention. "We think," said the court, by Abinger, chief baron, "the cause of action arose as soon as, by the sale of the return cargo in this country, all the facts were ascertained on which the adjustment of the pending transactions might and ought to have taken place; and that the delay occasioned by the disputes between the plaintiffs and Campion does not in any manner affect the defendants. Every fact necessary to the adjustment of the accounts existed, and was fully ascertained, prior to the filing of the bill by the East India Company in 1818." As that event happened more than six years before the action was commenced (which was in 1838) the bar was held complete.

The rule that the cause of action accrued when the liability attached is the rule which must govern in all cases, and the liability here attached when the use and occupation had been had, and not before.

Certainly there was no bar for the use and occupation had within one year or two years, or three or four years next preceding the commencement of the action. The cause of action having accrued, the plaintiff has, under the statute, the full period of four years after such accrual had taken place. Assuredly the plaintiff had not four years during which to bring an action for a cause of action which had accrued less than four years before action brought. Hence it follows that the bar of the statute is complete for such use and occupation as was had prior to the four years preceding the

commencement of the action, but is not a bar to that occurring within the above-mentioned period of four years.

As the demurrer was taken to the whole cause of action and some part of it is not barred, for that part the complaint does state facts sufficient to constitute a cause of action, it follows from the foregoing the court ruled correctly in overruling it: Gould's Pleads, Ch. IV, Section 49; Young v. Pearson, 1 Cal., 448; Stoddard v. Treadwell, 26 Id., 294.

It further follows that the court properly refused the instruction designated as second in the transcript, and that it committed no error in refusing the third request. This latter request was based on the assumption that the action was commenced on the ninth of September, 1876, whereas it was brought on the seventh of that month.

As to the questions arising on the offers of defendants in connection with the receipt dated twenty-fifth of March, 1876, signed "B. S. Brooks, attorney for plaintiff," with the words "Littlefield against Nichol *et al.*," at the head of it, we think it sufficient to say that the matters proposed to be offered were all *res inter alios acta* as to plaintiff Clark. There was no proof or offer to prove, admitting that the matters proposed to be given in evidence were otherwise admissible, that Tewksbury had any authority to bind Clark, or ever pretend to act for him. When objections were made on the ground that evidence was inadmissible as against Clark, the counsel for defendants never offered to show that Clark was so far represented in the transactions embraced in this offer, as that they would bind him. No offer was made to show that Clark had any connection with the matters embodied in such offer or that anyone was authorized to act for him in such matters. We certainly cannot find cause for reversal in this. The transactions embraced in the offer took place in March, 1876, and there is no evidence whatever to show that in March, 1876, Clark was not the owner of the demand sued on, or that at that time it had passed to Tewksbury by assignment from plaintiff. The evidence relative to this assignment is very loose, too loose to base a ruling on. The date of the assignment spoken of is not given and it was not produced, though a witness was in court called by defendants who stated that she thought she could produce it. Under these circumstances, we hold, for the reasons above given, that the court committed no error, for which there should be a reversal.

Judgment and order affirmed.

MORRISON, C. J., SHARPSTEIN, J., MYRICK, J., and MCKINSTRY, J., concur.

MCKEE, J. I dissent. The agreement, expressed by the terms of the contract upon which the action is founded, resulted in a promise by the defendants, jointly and severally, to pay to the plaintiff's assignor, upon the affirmance of a judgment from which an

appeal was taken, or upon the dismissal of the appeal, the value of the use and occupation of the tract of land, for which recovery had been had, from the day of the taking of the appeal until the surrender of possession of the land; and thereby, the promisors became bound to pay an ascertainable sum of money, namely: the value of the use and occupation of the land between two specified and certain dates, upon the happening of a certain event.

When the event happened the promisors became bound by their contractual obligations to pay the sum of money, as an entirety, and not otherwise; and a cause of action accrued in favor of the promisee to enforce that obligation: De Castro v. Clarke, 29 Cal., 17: Crane v. Weymouth, 54 *Id.*, 476. The contract out of which the obligation arose being an express contract, it furnished the limits of the rights of the respective parties, and none others could be implied. The single object of the contract was the payment of an ascertainable sum of money, the obligation to pay was therefore indivisible; and as an indivisible obligation it cannot be carved into several causes of action. That would be making a new contract for the parties to which they did not assent.

As the cause of action accrued on the thirtieth of January, 1872, and the action in hand was not commenced until the seventh of September, 1876, it was therefore barred by the statute of limitations. But it is urged, possession of the land was not surrendered within the time of the statute of limitations. Nevertheless, upon the affirmance of the judgment, there not only accrued an enforceable cause of action for the value of the use and occupation of the land, but also an enforceable remedy for the recovery of its possession by a writ of restitution, which was issuable at any time within the statute of limitations. Before that was done however, the principal obligor in the present action, who had possession, enjoined, by a suit in injunction, the plaintiff in the judgment from which the appeal was taken, from issuing a writ of restitution upon the judgment after its affirmance. But assuming that as a fact, the possession was thenceforward held by him under a new contract, namely: the undertaking given in the injunction suit; and for any possession maintained under that contract the parties to it were liable; but the parties in this action were not parties to it, and therefore they are not bound by it.

No. 9,505.

RECLAMATION DISTRICT NO. 3 v. GOLDMAN.

Department Two. Filed September 30, 1884.

RECLAMATION LANDS—FORECLOSURE OF LIEN OF ASSESSMENT—PLAINTIFF—RES ADJUDICATA.—In an action to foreclose the lien of an assessment on reclamation lands, when the supreme court has reversed a judgment entered in favor of the defendant, after his demurrer had been sustained on the ground that the facts stated in the complaint did not constitute a cause of action, on a subsequent appeal in the same action, it will not hold that the action was brought in the name of the wrong plaintiff, as, for example, in the name of the reclamation district, instead of in the name of the people.

RECLAMATION DISTRICT—FORMATION OF—NOTICE OF MEETING.—The meeting for the reorganization of a reclamation district, under the act of March 28th, 1868, may be called by the swamp land clerk of the board of supervisors, as by the proviso to the forty-sixth section of such act the board is authorized to employ a clerk to attend to matters pertaining to swamp lands.

THE SAME—DUE PROCESS OF LAW—NOTICE—ASSESSMENT.—An assessment for the reclamation of swamp lands, which, according to the law of this state, can only be enforced by suit against the tax-payer, and in which notice must be given to, and an opportunity afforded, him to question the validity of the assessment, is not an infringement upon the provision of the United States constitution, which declares that no state shall deprive any person of property without due process of law.

THE SAME—FINDINGS—EVIDENCE—STATEMENT.—The finding that no statement, as required by the amended section 34, of the act of 1868, was ever presented by the board of trustees of the district to the board of supervisors, reviewed, and held not sustained by the evidence.

THE SAME—ASSESSMENT OF LANDS NOT BENEFITED.—Lands lying within a reclamation district, which would not be benefited by a proposed assessment, need not be assessed.

THE TRUSTEES OF A RECLAMATION DISTRICT HAVE DISCRETION to make trifling deviations from the approved plans, or deviations which would result in benefit.

APPROVAL OF FORMATION OF DISTRICT—ADDITIONAL ASSESSMENT.—The formation of reclamation districts previously existing, and reorganized under the act of 1868, need not be approved by the board of supervisors of the county in which the district is situated. As to such district, the board of supervisors have power, whenever the tax levied is insufficient to pay for the reclamation, or for necessary repairs, to make additional levies of assessments, upon revised estimates, furnished by the trustees.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. S. Carey and *G. W. Gordon*, for the appellant.

H. McKune, for the respondent.

THORNTON, J. This action was instituted to foreclose the alleged lien of a delinquent assessment upon lands within a reclamation district, situate in Sacramento county. The district existed before, but was reorganized under the act of March 28, 1868, "to provide for the management and sale of the lands of the state:" Stats. 1867–8, p 507.

It is urged here on behalf of respondent that the judgment should be affirmed for the reason that the action is wrongly brought, that it is brought in the name of the district when it should have been brought in the name of the people. But when this cause was here before (6 Cal., 205), on appeal from the judgment, which had passed in favor of defendant by reason of a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been sustained by the court below, this court reversed the judgment, thus holding that the complaint was sufficient in its statement of facts. That the question here made is within

the scope of the demurrer heretofore passed on, is held in People v. Haggin, 57 Cal., 387. If we were to hold on this appeal that the action was not properly brought, we would be practically overruling the decision on the former appeal. We would be holding now that the complaint did not state facts sufficient to constitute a cause of action, whereas we held then that the complaint, which is identical with the one before us on the former appeal, did state facts sufficient to constitute a cause of action. This we cannot do under repeated decisions of this court. The former decision becomes the law of the case: See Clary v. Hoagland, 6 Cal., 685; Davidson v. Dallas, 15 *Id.*, 75; Mulford v. Estudillo, 32 *Id.*, 131; Jaffe v. Skae, 48 *Id.*, 540; Donner v. Palmer, 51 *Id.*, 636. The same facts, so far as they relate to the question we are considering, are before us now as on the former appeal, and the judgment then rendered must constitute the law of the case in all its stages: See cases above cited. In view of this rule, which we regard as well settled in this state, we must hold that the question whether the action is properly brought in the name of the reclamation district is no longer open for decision.

The plaintiff was organized in 1861, under the laws then existing. In 1871 it took steps to reorganize under the 43d section of the act of 1868 above referred to: Stats. 1867–8, pp. 507–519. It appears from the bill of exceptions that the plaintiff on the trial introduced in evidence the original record of the proceedings of the land-owners of District No. 3, organizing the district in conformity with the provisions of section 43 above cited. But the meeting for the purpose of organization was called by Grove L. Johnson, who was at that time swamp land clerk for the board of supervisors of Sacramento county (in which county the district is situated). The statute (see section 43 above cited) requires that such meetings shall be called by the clerk of the board of supervisors. At the time these proceedings were had, to wit, in May, 1871, the county clerk was then *ex-officio* clerk of the board of supervisors. It is urged that the organization of the plaintiff into a reclamation district is void, and it can maintain no action for the reason that the meeting for such organization was not called by the officer designated by the statute, it having been called by the swamp land clerk.

But we are of the opinion that the proviso to the forty-sixth section to the act of 1868 makes the swamp land clerk the clerk of the board of supervisors for the purpose of calling such meeting. By that proviso the board is empowered to employ a clerk to attend to matters pertaining to swamp lands, and among such matters, in our view, is that of calling a meeting of the land-owners concerned in the business of organizing under the act of 1868.

The point that the due process of law guaranteed to the defendant and secured by the fourteenth amendment of the constitution of the United States, is violated in the assessment of defendant's property, is disposed of adversely to the contention of defendant by Hager v. Reclamation District No. 108: 111 U. S. Rep., 701-711. The

case just cited, like the one under consideration, was brought to enforce the alleged lien of an assessment made on lands within a reclamation district formed under the act of 1868. The court held that such an assessment, according to the laws of this state, could be enforced only by suit against the taxpayer, in which notice must be given to the defendant and an opportunity afforded him to be heard respecting the assessment, and that in such suit the taxpayer may set forth, by way of defense, all his grievances.

Where this opportunity to be heard respecting the assessment is afforded to the taxpayer in an action, there has been given him all that the guarantee of due process of law requires and secures, and he has nothing to complain of in regard to such process: See Reclamation District No. 108 v. Evans, 61 Cal., 104. We are of opinion that there is no violation of the constitution of the United States in the proceedings concerning the assessment involved in this case, and that it must be so ruled.

This court is of opinion that the finding of the court below that no statement, as required by the amended section 34 of the act of 1868, (see statutes of 1871–2, p. 668), was ever presented by the board of trustees of the district to the board of supervisors of Sacramento county is not sustained by the evidence. It seems from the testimony of Sheehan, who was one of the trustees, that he, by authority of the board of trustees and under its direction, furnished all the data to their attorney, Grove L. Johnson, who prepared the statement under the direction of Sheehan and presented it on behalf of the board of trustees to the board of supervisors. The statement had to it the name of T. W. Sheehan; appended to his name is the word secretary. If the name of Sheehan was not signed to this statement in his own handwriting, it was done by Johnson by his authority. Sheehan testifies that the figures as inserted in it were such as he was authorized by the board of trustees at its meeting on the tenth day of July, 1876, to insert as well as the other things which appear in it. His testimony substantially amounts to this: That the contents of the statement were agreed on by the board of trustees at its meeting, to be reported to the board of supervisors in a statement, and he was authorized to have the statement prepared accordingly and presented to the board. There was no testimony to the contrary. It is said that the minutes of the meeting of July 10th are contrary to this, for the reason that more appears in the statement than in the minutes. We do not concur in this conclusion. Sheehan explains this in his testimony. He testified that the report made to the board of supervisors was based on estimates made by the board of trustees before he left the district. We think it satisfactorily appears from the testimony of the witness that if any amounts are inserted in the statement which do not appear in the minutes, that they were there inserted at the oral direction of the board of trustees. We can see no reasonable objection to this. The law does not require that the board shall keep any minutes or record of its proceedings. It is only required (section 36 of the act of

1868) to keep accurate accounts of all expenditures. If the law did require it to keep such record, what was done by the board at its meeting and not inserted in the record might be established by oral evidence.

The defendant (respondent here) contends that the act of 1868 (Sec. 33), requires the board of trustees to report to the board of supervisors the plans of the work made by the engineer employed by it (Sec. 32); that no such plans were reported. But inasmuch as this is found adversely to the contention of respondent, and he is not the appellant, we are of opinion that the point is not before us for decision on this appeal.

The commissioners on making the assessment of the cost of reclamation inserted in its assessment list a tract of land belonging to one McIntyre by a proper description in the same way as it inserted tracts of land belonging to other persons. A portion of that list is inserted in the bill of exceptions to show the manner in which this tract and other tracts were dealt with by the commissioners:

EXHIBIT A.

ASSESSMENT LIST FOR RECLAMATION PURPOSES UPON THE LANDS WITHIN SWAMP LAND DISTRICT NO. 3, SACRAMENTO COUNTY, CALIFORNIA.

Names of the owners of each tract assessed.	Description of each tract assessed.....	No. of acres in each tract.....	Amount of the charge assessed against each tract.....		Remarks.
			Dols..	Cts...	
Clarke, C. W....	All of swamp land survey No. 301, not embraced in the lands of A. M. Tullis.....	430	4,252	70	Paid to D. E. Calahan, July 2d, 1877.
Goldman, Chas...	Swamp land survey No. 492.....	195	1,888	..	
McIntyre, Geo...	Swamp land survey No. 507.... .	114.98	0,000	..	

From this it appears that no part of the estimated cost of reclamation was imposed upon the McIntyre tract, the charge against it being represented by a row of ciphers. It is here urged that this vitiated the entire assessment. It is found that the commissioners jointly viewed the lands in the district and assessed on these lands other than the McIntyre tract the whole assessment to be raised.

The court below found that this piece of land was excluded from the assessment because it lies at the extreme lower end of Grand

Island (a part, or the whole of which island constituted the district), and was a narrow strip running to a point, and owing to the flow of waters of Cache creek at that point, it would be difficult to maintain a levee around it.

There was but one witness (William Gwynn) who testified on this point. His testimony is as follows: "I was a trustee of district No. 3 from May 10, 1871, to about May 10, 1874; am familiar with its levees, localities and position. Swamp land survey No. 507, containing a little over one hundred acres, comprises the south end of the island. The land in that survey is an elongated three-corner triangle; in 1871, the land then being very low and in times of high water, Cache slough, which is opposite, would overflow and innundate, and so high and great was the rush of waters that we feared if we put the levee there it could not be sustained, and thought that the best way was to make a cross-levee above this rush of waters; it was to save the upper levees; that was the intention of that and the trustees so decided."

Swamp Land Survey, 507, is McIntyre's land.

We infer from this testimony that this land was left outside of the levee, for the reason that the expense of constructing and maintaining the levee so as to include it would be greater than any profit or benefit to the district or the tract that would result from including it, and not alone because it was difficult to maintain it. Therefore a cross levee was built excluding this tract. We think the court erred in finding that the difficulty of maintaining a levee so as to include this McIntyre tract, was the sole or controlling reason for excluding it, and that it should have found as indicated above.

But it is said that under any circumstances the failure to assess the McIntyre tract was fatal to the assessment. It is evident, from the testimony above given, that the land was not assessed because it was not benefited. Does the law require that lands within a reclamation district, not benefited, shall be assessed? Clearly here the land of McIntyre was not, and would not be benefited at all. Why should anything be assessed upon it when the reason by which assessment for benefits is sustained does not exist? It would be the height of injustice to put a charge upon land upon a surmise or theory that it is, or would be, benefited, when the fact is established that it is not and would not be benefited.

Nor do we think that the statute makes any such requirement. The benefits to each tract are to be adjusted by the commissioners, as it is in their judgment benefited. Full discretion is vested in them to fix the amount to be paid, and such amount must be fixed as a measure of the resulting present or prospective benefits. If no benefits, no assessments must be charged on the land. According to the view urged by the respondent's counsel, an assessment, however small, would satisfy the requirement of the law. Even one cent or one mill would be sufficient. In this state of the case, we think the maxim *de minimis non curat lex* applies. If one cent or one mill would satisfy the demands of the law, and we are

of that opinion, we do not think that we should be justified in holding the entire assessment null for the failure to assess so insignificant a charge.

Nor do we think that a deviation from the approved plans in making the reclamation, where no injury results from such deviation, but rather a benefit, is outside of the discretion vested by the statute in the trustees. Some discretion must be left to the trustees in regard to the work, and a trifling deviation from the plans, or a deviation which would result in benefit, should not be regarded as a violation of the requirements of the statute. A work of reclamation with a deviation justifiable under the circumstances may well be regarded as a substantial compliance with the original approved plan.

But it is further urged that the board of supervisors of Sacramento county had no power to order a further assessment, because the formation of the district was not approved by it. And to maintain this point, we are referred to section 34 of the act of 1868, as amended in 1872. By the section as amended, it is provided that "in case the original assessment be insufficient to provide for the complete reclamation of the lands of the district, or in case further assessments be required from time to time to provide for the protection, maintenance and repair of the works of reclamation, the trustees should present to the board of supervisors of the county, by whom the formation of said district was approved, a statement of the work done, or to be done, and its estimated cost, and said board shall make an order" for the assessment.

The formation of the district in this case was not approved by the board of supervisors of the county mentioned, nor was it required by the statute. Section 43, which provides for the organization of a district already formed when the act of 1868 went into effect, did not require such approval. That section required that a notice should be given by publication in a newspaper published in the county, or by posting three notices in the district, for the election of trustees and the establishment of by-laws. It then prescribes that the holders of certificates of purchase on patents, or their agents, representing one half the land held shall constitute a quorum for the transaction of business at such meeting; and the trustees elected at this meeting shall have power, and it shall be their duty to carry out and complete all unfinished business commenced by the board of supervisors, and to do all other things authorized by the by-laws of the district or by this act.

It appears that such a meeting was called and trustees elected. When this was done, we are of the opinion the district was organized under the act of 1868, and this was clearly ruled in the opinion of the lower court. The provision as to the approval of the formation of the district applies only to districts originally formed under the act (sections 30, 31), and has no application to districts previously formed and organized under the act of 1868. It is further provided as to such previously existing districts, that whenever any such district shall organize under the provisions of this act (of

1868), the supervisors of the county shall turn over to the trustees all the books and papers in their possession relating solely to that district.

It was certainly the intention of the framers of the act, as it was at first provided, that whenever the tax levied should be insufficient to pay for the reclamation or for necessary repairs, the supervisors of the county where the district was situated should, upon revised estimates furnished by the trustees, make additional levies of assessment for that purpose: Sections 33, 34. Such intention existed and applied as well to districts, previously existing and organized under it as to districts originally formed under it. Such intention is indicated by what has been just above cited from the statutes. We see no reason to hold that such intention on the part of the legislature ceased to exist by the amendment in 1872, of Section 34. Further, the object of the requisition of the amended section to present the statement mentioned to the board of supervisors, by which the formation of the district was approved, was to direct to what board the statement should be presented when the district included lands lying in more than one county. In such case a copy of the petition, after approval by the board of supervisors of the county to which it had been first presented, had to be furnished by the trustees to the board of supervisors of each county in which any portion of the lands lay: Section 32. This provision was inserted to designate to the trustees to what board to present a statement, where the lands lay in more than one county. But one board had to approve the petition, and the statement was to be presented to that county, no matter in what number of counties the lands of the the district lay. But when the lands, as in this case, were in one county, to that board only must the petitioner go. Under such circumstances, the board of that county alone was to deal with and order the levy. We think it sufficiently appears from the whole act that the intention was that the statement, in case the land was situated in one county, should be presented to the board of supervisors of that county.

We are of opinion that the statement herein was properly presented to the board of supervisors of Sacramento county, in which county the district was situate, and in so ruling we are carrying out the intention of the law makers We are, therefore, of opinion that this objection to the assessment cannot be sustained.

For the reasons above pointed out, the judgment and order must be reversed and the cause remanded to be tried anew in accordance with the views herein set forth, and it is so ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 7,788.

IN RE CARRILLO.

In Bank. Filed October 1, 1884.

JUSTICE'S COURT OF SAN JOSE—CRIMINAL JURISDICTION OF.—The justice's court of the city of San Jose, organized under the charter of 1874, has jurisdiction to try and determine a criminal action for one of the public offenses enumerated in section 115, of the code of civil procedure, charged to have been committed within the corporate limits of said city, until the organization of the police court for said city, and the election of the police judge thereof, under the general law of April 1, 1880, relative to courts of justice.

APPEAL from a judgment of the superior court for Santa Clara county. The opinion states the facts.

D. W. Herrington, for the appellant.

S. J. Hinds and *William L. Gill*, for the respondent.

MCKEE, J. The question arising out of the record in this case is, Whether the justices' court of the city of San Jose has jurisdiction to try and determine a criminal action for one of the public offences enumerated in section 115 of the code of civil procedure, charged to have been committed within the corporate limits of said city?

By section 1, article VI, and 5, article XI, of the constitution of 1879, it was ordained as follows:

"The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish, in any incorporated city, or town, or city and county.

"The legislature, by general and uniform laws, shall provide for the election or appointment in the several counties * * * and such other county, township and municipal officers as public convenience may require, and shall prescribe their duties and fix their term of office."

By a general law relative to courts of justice and various officers connected therewith, passed April 1, 1880, stats. 1880, p. 63, the legislature, in carrying out the commands of the constitution, provided for the establishment and organization of justices' courts in incorporated cities and towns, and in townships within the several counties of the state, and for the establishment of a police court in each of the incorporated cities and counties, cities, and towns of the state, and prescribed the jurisdiction and powers of said courts: Articles II and III, chapter V and chapter VI, stats. 1880. The judicial power of every city was vested in a police court (sec. 121, C. C. P., sec. 4,355 pol. code), for which a police judge was to be elected, to hold office for a term to be fixed by the common council: Sec. 4,370, pol. code. And there was granted to the court exclusive jurisdiction, within the corporate limits of the city, of the subject-matters enumerated in sections 4,426, 4,427, *supra*.

At the time of the passage of this general law, and of the adoption of the constitution under which it was framed, the city of San

Jose was administering its local affairs under a charter which had been granted to her in the year 1874: Stats. 1873–4, p. 395. The constitution declared that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws:" Sec. 6, art. XI, const. The city itself and the charter of the city were therefore subject to the jurisdiction of the general law of 1880, by which a police court was established for the city; but so far as appears by the record before us, or otherwise, no police judge has been elected for the city, and no police court has been organized under the law.

That being the case the charter of the city as to the judicial power of the city, remained in full force: Desmond v. Dunn, 55 Cal., 242; Wood v. Board of Election Commissioners, 58 *Id.*, 561; and by the provisions of the charter there was established a police court for the city. Sections 48 and 49 of the charter declare:

"The judicial powers of the city are vested in a municipal Court, the presiding officer of which is styled a police justice." But the charter contains no provision for the election or appointment of such an officer. It, however, declares justices of the peace of San José township and the mayor of the city competent to discharge all the duties of the office, and to hold a police justice's court: Sections 48, 46, *supra*. The mayor of the city is, therefore, by the charter *ex-officio* police justice, and authorized to hold a police court for the city; for "the term 'police court,' as used in the penal code, includes police judges' courts, police courts, and all courts held by mayors or recorders, in incorporated cities or towns:" Section 1,461, Penal Code.

But the police court of the city of San José is not the police court established by the legislature by the general law of 1880, which provided for the organization of a police court in every incorporated city by the election of a police judge; and gave to it, within the boundaries of the city in which it was established, exclusive authority of the subject-matters of its jurisdiction. The legislature, in the exercise of its discretion, might have made the mayors of incorporated cities *ex-officio* judges, but it did not. The police court of San José is, therefore, a charter, not a statutory court, and the mayor of the city, as an *ex-officio* police justice, is a charter judicial officer, with such judicial powers as the charter confers. These are: "Such jurisdiction and authority as is conferred by law upon justices of the peace in all criminal matters, where the crime may have been committed within the corporate limits of said city, and for all violations of city ordinances:" Section 49, *supra*.

But the jurisdiction of justices' courts over criminal matters is not exclusive. The charter declares that justices of the peace for San José township are competent to discharge all the duties of police justice for the city. The jurisdiction of the two courts is, therefore, under the charter, concurrent. Whence it follows that the appellant, as a city justice of the peace, had authority to try and

determine the criminal action commenced in his court, and the judgment prohibiting him from exercising his jurisdiction is erroneous.

Judgment reversed and cause remanded.

MYRICK, J., SHARPSTEIN, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 7,542.

GLADDING ET AL. *v.* INSURANCE ASSOCIATION.

Department Two. Filed October 2, 1884.

FIRE INSURANCE—INCREASE OF RISK—CONDITIONS—WAIVER.—A condition in a policy of fire insurance, that if the risk is increased the policy shall be void, enters into and forms part of the contract of insurance; and if the policy contains an express stipulation that such a condition shall not be waived, except by indorsement on the policy, it cannot be waived in any other way.

THE SAME—EVIDENCE—FINDINGS.—The finding that the increase of risk in this case was not occasioned by the plaintiffs, or with their consent, reviewed, and held unsupported by the evidence.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the the defendant a new trial. The opinion states the facts.

A. W. Thompson, for the appellant.

Fox & Kellogg, for the respondents.

SHARPSTEIN, J. The finding that the hay, which was in a shed near the building destroyed by fire, was not stored there by the plaintiffs or with their consent, but was stored there with the knowledge and consent of the authorized agent of the defendant, and that the increase of risk occasioned thereby was with the knowledge and consent of the defendant, is attacked on several grounds, some of which we think to be well founded.

1. A witness for plaintiffs testified that he stored the hay in the shed, and that before doing so he applied to plaintiffs for permission, and was told by one of them that he would not consent unless witness obtained the consent of Mr. Kinney (defendant's agent). If he consented, witness could put the hay in. He says he saw Kinney, and was told by him "to go on and put it in." Thereupon witness stored the hay in the shed. This evidence is not contradicted, and being introduced by plaintiffs we may assume, as against them, its entire truthfulness. The finding that the hay was not stored in the shed with the consent of the plaintiffs is clearly at variance with the fact of their having consented to its being so stored if Kinney would consent.

2. There is a stipulation in the policy that it shall be void "if the risk be increased by any means," and another that "the use of general terms, or anything less than a distinct, specific agreement clearly expressed, and indorsed on this policy, shall not be con-

strued as a waiver of any printed or written condition or restriction therein."

It is alleged in the answer that the risk was materially increased by storing hay in said shed. The court should have found whether it was or not. There was some evidence which tended to prove that it was.

If an effect is to be given to the clause last above quoted from the policy, the finding that the hay was stored "with the knowledge and consent of the authorized agent of the defendant," is not sufficient to constitute a waiver of the preceding clause, that "if the risk be increased by any means" the "policy shall be void." That finding has no other support than is afforded it by evidence that when the plaintiffs were asked to consent to the storage of hay in the shed, they told the applicant that if Kinney would consent they would; and that Kinney was at that time defendant's local agent at Oakland. The powers of such an agent are nowhere stated. He was not the agent through whom the application for insurance was made, and does not appear to have had any connection with the matter before his consent to the storage of the hay was asked and obtained. The authority to consent to an increase of the risk was probably inferred from the fact that he was the local agent of the company in the city where the loss occurred.

As to who should have indorsed on the policy a consent to an increase of risk, in order to have it constitute a waiver of the condition that if the risk was increased the policy should be void, the instrument is silent. But it explicitly declares that unless so indorsed, it shall not be construed as a waiver of any written or printed condition or restriction contained in the policy. Apparently, the mode is the measure of the power. If so, no officer of the company was authorized to consent to an increase of the risk in any other than the prescribed mode. We do not doubt the competency of the parties to stipulate that no condition or restriction contained in the policy should be waived except by indorsement on it; and that they did so stipulate is too clear to admit of doubt.

The condition that if the risk was increased the policy should be void entered into and formed a part of the contract of insurance, and we know of no case in which it has been held that an express stipulation that such a condition should not be waived except by indorsement on the policy, could be waived in any other way. The furthest that any court has gone, so far as we are advised, was to hold that this did not apply to stipulations which were to be performed after a loss had occurred, such as giving notice and furnishing preliminary proof of the loss: Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md., 100.

Judgment and order reversed.

MYRICK, J., and THORNTON, J., concurred.

No. 20,012.

PEOPLE v. CARLTON.

Department Two. Filed October 2, 1884.

EVIDENCE HELD SUFFICIENT TO JUSTIFY THE VERDICT, and no error found in the instructions or in the questions asked the defendant.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Lamar & Layson, for the appellant.

J. H. Campbell, for the respondent.

THE COURT. We think the evidence sufficient to justify the verdict. The charge, as a whole, seems to have been as favorable to the defendant as the circumstances required.

The defendant's case could not have been prejudiced by the questions put to him when on the witness stand, by the district attorney. The answers were all favorable to the defendant, and no attempt was made to contradict him.

Judgment and order affirmed.

No. 8,320.

HOME AND LOAN ASSOCIATES v. WILKINS.

Department Two. Filed October 3, 1884.

FORECLOSURE OF SEPARATE MORTGAGES—DECREE—SALE.—The decree in an action for the foreclosure of two mortgages, each being on separate parcels of land, must provide that each parcel should be sold to satisfy the sum for which it was separately mortgaged.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

E. A. & G. E. Lawrence, for the appellant.

J. R. Brandon, for the respondent.

THE COURT. This action was brought to foreclose two mortgages, each of which was on a separate and distinct parcel of property. The decree is for the sale of both parcels to satisfy the aggregate sum due on both mortgages. In that regard the decree is erroneous. Each parcel should be sold to satisfy the sum for which it was separately mortgaged.

Cause remanded with directions that the decree be modified as above suggested.

WEST COAST REPORTER.

WHOLE No. 42. OCTOBER 14, 1884. VOL. IV. No. 3.

THE TRUE METHOD OF INTERPRETING THE CIVIL CODE.

(*Continued.*)

We can conceive of circumstances under which the first of these two systems or principles would be appropriate and advantageous. If a code were absolutely complete, so that the pre-existing jurisprudence might be blotted out without injury to society; if it embodied and enacted every rule of the law necessary for the regulation of human affairs, so that courts would never be obliged to go outside of its provisions, and to take a rule from the previous statute or common law; if its arrangement and classification were made according to strictly scientific principles, so that there was no conflict, omission, or obscurity; if the phraseology adopted by its authors were uniform and consistent throughout all of its provisions, so that no doubt could arise as to the meaning of particular words or clauses; then the courts might, perhaps, follow the first mentioned system in its interpretation, without wrong to suitors, and without injury to the law of the state. This would more especially be the case, if such a code dealt exclusively with the penal or criminal law, rather than with that department of jurisprudence which relates to private civil rights and duties. For example, if the code of criminal law, herein before described, now pending before the British Parliament, should be enacted, the English courts might well apply to it this purely textual principle of interpretation, and might be under no necessity of invoking the aid of common law doctrines, in order to determine the meaning and effect of particular provisions.

All these features and elements, however, which could warrant such a mode of judicial exposition and treatment, are utterly wanting in the civil code of California.

My fundamental proposition, to which all of the foregoing discussion is merely introductory, may therefore be stated as follows: Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform prin-

ciple of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation. A general intent of the legislature to re-enact and declare common law doctrines and rules, with all their consequences, should be assumed and strictly enforced by the courts in their work of interpreting all the provisions, except in the few special instances where a contrary intent is unequivocally manifested by the particular language. Although in formulating a particular rule, the authors of the code may have abandoned the customary and familiar phraseology of judges and text-writers, and have adopted terms hitherto unused and unknown; and even although a particular definition, statement of doctrine, or rule may be so expressed that, if the provision stood alone, as a new and independent creation, unconnected with any pre-existing law, its *literal* import and meaning might be different from the common law, yet the courts should apply the same principle, should recognize and enforce the same general intent, and should regard such provisions as enactments of common law definitions, doctrines, or rules—unless the language left no doubt whatever of a design to depart from the common law. No provision of the code should be interpreted by itself alone; its meaning and effect should be discovered by a comparison with all the other provisions relating to the same subject-matter, and especially by a reference to the pre-existing and still existing common law rules.

The correctness of this proposition seems to be clearly established by the following among other reasons, some of which extend with equal cogency to all codes, while the others apply with special force to our civil code.

First. The common law as a form of jurisprudence possesses certain peculiar excellencies, acknowledged by all able jurists to belong to it in the highest degree, which constitute its essential characteristics, and which render it, in those respects, superior to any other form of municipal law in its adaptability to the needs of a progressive society; and a code should be so composed, and especially should be so interpreted and construed by the courts, as to preserve to the greatest possible extent these peculiar excellencies. The distinguishing element of the common law, and one of its highest excellencies, is its elasticity, its power of natural growth and orderly expansion. Its doctrines, however formulated, are not limited to any fixed, existing condition of facts, but they may, by virtue of their own inherent power, be extended to new facts and circumstances, as these are constantly arising in the intercourse of men and transactions of life. The peculiarity of statutes, on the other hand, is their rigidity. Statutory rules once enacted cannot

be readily modified and expanded by the courts so as to cover new facts and relations not included within their expressed terms. I may be permitted to quote language which I had used with reference to this subject in another place: "What is required in any form of national jurisprudence that it may best accomplish its design? First, that the several rules should be clear, precise and certain, so that the citizen, as far as the nature of the subject will admit, may understand them, and be instructed in his duty. Secondly, that these rules should be comprehensive, so that they may embrace not only transactions and relations already known, investigated, and in terms provided for, but all others which may naturally arise in the progress of society. Thirdly, that these rules, however stringent they may be, should not forever remain fixed and immovable, the same through all time, but should possess in themselves the inherent power of adaptation to the wants of a progressive people, being able to withdraw from the forms of the past, and fit themselves to the life of the present. Fourthly, that these rules as they exist at any time, should be flexible, containing provision for exceptions to their general requirements, so that when a case does not fall within the reason, although it may within the letter, of a regulation, it shall not be controlled by such rule contrary to justice and equity. Fifthly, that these rules should not be arbitrary and disconnected, but should be united together by general principles into one complete system, with parts mutually dependent and sustaining."[1]

Of these five requisites the single one of certainty is claimed on behalf of codes as their chief and distinguishing excellence; while even the ablest advocates of codification concede that all the others are possessed in the highest degree by the common law, and by it alone. That all these peculiar features are of the utmost importance to the well being of society, and that no system of national jurisprudence can be perfect without them, it needs no argument to show. All the really able jurists of the highest authority in England and in this country, who have advocated the system of codification, have expressly recognized and fully admitted this peculiar excellence of our common law. They have insisted that the same excellency *can* be preserved in a code; and that a national code, in order to accomplish its beneficial design, should be drawn up by its authors, and interpreted by the courts, as to preserve this distinctive feature of the common law, in connection with the element of certainty belonging especially to codification. By far the ablest of all the English advocates of codification was Mr. John Austin. It is not too much to say that all of the present tendency in favor of codes among the lawyers and judges of England, is the direct result of his teachings. While urging the benefit to be derived from codification, he

[1] Pomeroy's Introd. Munic. Law, § 326.

freely admits the very great difficulty of framing a code which shall come up to his ideal, and produce the benefits theoretically belonging to that form of a national jurisprudence. He dwells at large upon the distinguishing elements of elasticity, expression and progressive development possessed by the common law, and declares that the same elements may be, and could be preserved in a code properly planned and executed in conformity with the perfect ideal or type. We thus reach the conclusion that the element of certainty should not be attained in a code by a sacrifice of all these other peculiar features which belong to the common law; but on the contrary, these distinguishing excellencies of the common law should be preserved and maintained in connection with the "certainty" which, it is claimed, accompanies statutory legislation.

It must be confessed that the authors of our civil code in formulating its provisions, have done little to retain, even if they have not completely lost sight of and ignored, these attributes of the common law. These peculiar excellencies of the common law, therefore, if they are preserved at all, must be secured and maintained by the judicial interpretation given to the code. It is only by construing and interpreting the code as being declaratory of common law definitions, doctrines, and rules, that the element of elasticity, expansion and comprehension can be preserved and made efficient. Indeed, the very element itself, as applied to and connected with the code, consists wholly in such a mode of interpretation. If each section were interpreted textually, as a new and independent enactment, all the peculiar excellencies and advantages of the common law system would at once disappear from our state jurisprudence. If, on the other hand, these sections are generally interpreted as being merely declaratory of common law definitions, doctrines, and rules, those doctrines and rules would remain as efficient parts of our jurisprudence, unchanged in substance, operation, and effect, although clothed with a statutory form. The doctrines, while embodied in the code, under the authority of the legislature, would still retain the elasticity, the power of expansion, and of adaptation to new facts and circumstances, and the comprehensiveness which belonged to them in their original form as portions of the "unwritten" common law,—or law promulgated by judicial decisions. Many of the examples given in the previous articles will furnish illustrations of this effect. If the § 2,444 concerning the liability of one held out as a partner heretofore examined, were interpreted textually, with no reference to the pre-existing law, by giving a strictly literal meaning to the word "communicated," the result would be a doctrine quite different from that of the common law, rigid and inflexible in its operation, and capable of applying to one condition of fact alone. All the flexibility, justice, and equity of the

[2] See *ante*, pp.

common law doctrine would be lost at one blow. If, however, no special effect is given to the word "communicated," and the section is interpreted simply as an enactment of the familiar common law doctrine, then that doctrine, although clothed in statutory language, will retain its original breadth and flexibility, and will apply to every possible condition of fact which comes within its scope and operation. If §§ 2,316 and 2,317, previously discussed,[3] are interpreted as declaratory of the common law, as intended to reach the general doctrines as to the nature and effect of "express authority" and "implied authority" of agents, then these sections will apply to and control all the various facts and relations which can arise in the affairs of life, as fully and as certainly as though the doctrines which they embody had remained in their original common law form, and had not passed through the hands of the legislature. I need not multiply illustrations. Every intelligent lawyer will appreciate the paramount importance of construing the civil code so that its sections shall preserve all the flexibility, comprehensiveness, and power of expansion and adaptation which are the peculiar and distinguishing excellencies of the "law of judicial decision," or so called "unwritten" common law.

Second. The civil code, as a matter of fact, was not designed to make any general alterations in the established doctrines and rules of the common law. In this connection, it should be carefully remembered that the rules of our jurisprudence, as they existed before the code was adopted, included the doctrines and rules of equity, as well as those of the common *law*, technically so called. These doctrines and rules of equity, and of the law, as they had been established by judicial decision previously to the code, were, on the whole, eminently just and equitable, and were particularly well adapted to our social and business wants, and to our modes of thought and life. No serious objection was made to the *substance* of the then existing jurisprudence; the objections were urged to its form and outward condition, to its being scattered through innumerable decisions and isolated statutes, so that it could only be known to the professional lawyer. This defect it was proposed to remedy by a code. The main object of a code, and the principal benefit claimed to result from it, was the single element of certainty. By a code, it was asserted, the existing rules of the law might be collected from the decisions, statutes, and text-books, in which they were then scattered, and arranged into one systematic body, and might thus become known to all persons of average intelligence. In all the movement in favor of codification, no design appeared to make new law. The sole purpose was to put the established rules of the law, most of which then existed merely in the form of judicial decision, into a statutory and definite form

[3] See *ante*, pp.

and language. The authors of the code were, in reality, to be compilers, rather than creators, of law. The correctness of these statements is shown by the writings of the ablest advocates of codification in England and in the United States; by all the discussions which preceded the adoption of our own codes; and by the official reports of the commissioners, who prepared the proposed civil code in New York, and of the commissioners who drafted the civil code of California. While a few incidental rules were objected to, and avowedly changed, the main purpose to clothe *existing* rules in a statutory form, is everywhere apparent.

Such being the fact, it follows, as a necessary consequence, that this intent and main design of the authors of the code, should be constantly recognized, and carried into effect by the courts. In construing and interpreting the text, courts should proceed upon the assumption that the settled rules of law and equity are not changed, but are simply reenacted in all their force and with all their effect, *even though there is some verbal deviation from the familiar language and mode of formulating these rules in almost every section.* It is only where, from the language employed, and the mode of expression, an intent to alter the previous law is unequivocal, and beyond all doubt, that the courts should interpret a provision as making any change. In this manner alone can the main design of the code be carried into operation.

Third. The civil code does not embody the whole law concerning private and civil relations, rights, and duties; it is incomplete, imperfect, and partial.

It is, perhaps, inevitable that the system of codifying the private civil jurisprudence, the common law and equity—shall finally prevail in this country and in England. One fact, however, is true, if any certain conclusion can be drawn from both reasoning and experience. The benefits which are claimed for the system of codification, *avowedly belong only to a complete code*—to a code which shall embody the entire existing civil jurisprudence of the state, absolutely all of the legal rules which are recognized as operative, whether originally created by statute or by judicial decision. Such a code should cover the whole domain of civil jurisprudence, so that the courts should find in it the source of all their decisions, and should never be obliged to go behind it, and borrow a rule from the pre-existing common law or equity. Austin, who is the leading advocate of codification among the English jurists, and who really originated the movement in England and in this country, bases all his reasoning upon such a complete and exhaustive code; but while holding it up as an ideal, he fully admits the great difficulty of framing a code which shall at all fulfill the conception and produce its anticipated benefits. It seems to me that reasoning and experience, alike, show that a mere partial civil code, a code which only professes to con-

tain elementary definitions, the most general doctrines, and a few special rules, leaving the great mass of practical rules and doctrines still existing as a part of the common law and equity by its side, is only an additional source of uncertainty and confusion introduced into the jurisprudence of a state. As this description applies in the most direct manner to the civil code of California, the inquiry remains, how far may this uncertainty and confusion be lessened or removed by its judicial interpretation?

J. N. P.

[TO BE CONTINUED.]

SUPREME COURT OF COLORADO.

SWEET *v.* RONK ET AL.

Filed May 16, 1884.

MINING LAWS—LOCATION OF PLACER CLAIM—STATUTES AFFECTING.—The provisions of section 2,324 of the United States revised statutes, requiring a mining location to be distinctly marked on the ground, so that its boundaries may be readily traced, that a record of the claim should be made, and that annual work to the value of one hundred dollars should be done thereon, apply both to placer and to lode locations. A state statute, or a rule of miners, which attempts to dispense with such requirements is void.

POSSESSION OF CLAIM—SUBSEQUENT LOCATION.—Mere possession of a mining claim, without a valid location, is not sufficient to hold such claim as against a subsequent location, made in accordance with law.

ERROR to the district court of Chaffee county. The opinion states the facts.

McDonald & Norris, for the appellants.

A. S. Weston, for the appellee.

BECK, C. J. This was an action brought by plaintiff in error, in the court below, in support of an adverse claim, filed against an application for a patent to a placer mining claim. Plaintiff claims to own the "Holmes placer claim," consisting of one hundred and sixty acres, situate in Cottonwood mining district, Chaffee county, by purchase from the original owners, who, it is alleged, duly located it in compliance with the local laws and rules of miners of said mining district, and with the laws of the United States and of the state of Colorado, on the sixth day of January, 1879.

It is alleged, and the exhibits offered in evidence show, that eight persons joined in the location, and that a location certificate describing the premises, was filed and recorded in the office of the county clerk and recorder of said county, on the seventh day of January, 1879.

It is alleged that defendants entered upon a portion of said tract, known as the "Ronk placer claim," consisting of forty acres, on the eleventh day of May, 1880, and subsequently applied for a patent thereto.

Defendants claimed to have staked off their two claims of twenty acres each, which they style "the Ronk placer claim," on the twentieth of March, 1877, but admit that they filed for record no location certificates until April and July, 1880.

The verdict and judgment were for the defendants, and the errors assigned by the plaintiff relate to the rulings of the court upon the trial, and to the instructions given and refused.

The pleadings and proofs show that defendants made no record of their location for a period of three years after "staking" their claim and taking possession of it. They further show that the plaintiff's grantors located and recorded "the Holmes placer claim," (which includes within its boundaries the Ronk claim,) one year and eight months after the location of the latter.

The testimony is conflicting as to the amount of work and improvements done and made annually by the respective parties on

their claims, but the important inquiry, under the errors assigned, is, was the case tried upon a correct construction of the law applicable to the location and possession of placer mining claims?

Plaintiff in error says defendants failed to comply with two essential requirements, viz:

First—Their location was not distinctly marked upon the ground so that its boundaries could be readily traced.

Second—No record was made of their location until long after their rights of possession were forfeited.

If the foregoing were essential requirements at the time of defendants' attempted location, and if they were disregarded, as alleged, then the "Ronk claim" was subject to relocation, and if the plaintiff in error and his grantors complied with the law in respect to their location and possession, they were entitled to recover.

The plaintiff's location certificate was at first admitted in evidence, and afterwards rejected, and the jury instructed to disregard it, on the ground that it was made and recorded before the passage of the state statute of June 10, 1879, which requires the recording of a location certificate of a placer claim; the court ruling that prior to the passage of this act no location certificate was required to constitute a valid location of such a claim.

Upon the same theory, apparently, the court refused or failed to instruct the jury as to the necessity of marking the boundaries of defendants' claims.

It is conceded that prior to the act of June 10, 1879, no state statute specifically applying to the location of placer claims, existed in Colorado, but upon the part of plaintiff in error it is claimed that the act of congress of May 10, 1872, covered this class of claims as well as lode claims, and that a compliance with its provisions was necessary to constitute valid locations of both classes of claims.

The provisions relied upon are embodied in section 5 of said act, which section is incorporated in the revised statutes of the United States, and numbered therein section 2,324. It provides as follows:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. On each claim located after the tenth day of May, 1872, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, 1872, ten dollars' worth of

The theory upon which the case was tried below, a theory, too, entertained by some law writers of repute, was that the provisions of the act of congress concerning the marking of boundaries, the recording of claims, and the performance of annual labor to the extent of one hundred dollars on each claim, did not refer to placer claims.

The court appears to have adopted the view, that if the defendants proved prior discovery of mineral, prior possession, and an annual expenditure of twenty-five dollars upon the Ronk claim, these facts constituted a compliance with the law upon the subject, and they were entitled to a verdict.

On the contrary, however, the act of May 10th, 1872, as we have seen, includes this class of claims, and requires the observance of all the requirements mentioned in section 2,324. The act limits the extent of a claim for a single individual to twenty acres, and instead of an annual expenditure of twenty-five dollars, as stated in the instructions to the jury, requires an annual expenditure of at least one hundred dollars on all claims thereafter located. Neither a rule of miners nor a state statute can authorize less, without being in conflict with the law of congress, and therefore void. We are of opinion that section 2, of the act of June 10, 1879 (laws 1879, p. 140), is in conflict with the act of congress of May 10, 1872, upon this point.

It being evident that error intervened on the trial in respect to the steps necessary to constitute a valid location, and in reference to the requirement concerning annual labor, nothing would seem to remain, in the legal aspect of the case, save the possession. This would clearly be insufficient to protect the claim as against a subsequent valid relocation thereof.

In the language of chief justice Waite, in Belk v. Meagher, 104 U. S., 284; "The right to possession comes only from a valid location. Consequently if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location.

"A location is not made by taking possession alone, but by marking the ground, recording and doing whatever else is required for that purpose, by the acts of congress, and the local laws and regutions."

The supreme court of Montana say, in the recent case of Hopkins v. Noyes, 4 Mont., 550: "Possession within a mining district, to be protected, or to give vitality to a title, must be in pursuance of the law, and the local rules and regulations. It must stand upon the law, and be the result of a compliance therewith. * * * Possession without location carries no title. * * * The mere naked possession of a mining claim, upon the public lands, is not sufficient to hold such claim, as against a subsequent location, made in pursuance of the law, and kept alive by a compliance therewith."

For the errors mentioned the judgment is reversed, and the cause remanded for a new trial.

SUPREME COURT OF NEVADA.

STATE, EX REL. PERRY, v. COMMISSIONERS OF EUREKA COUNTY.

Filed September 29, 1884.

ELECTION OF OFFICERS—CONSTRUCTION OF CONSTITUTION.—Under the constitution all necessary state, county and township officers must be elected by the people of the locality immediately concerned.

THE SAME—ELECTION OF COUNTY ASSESSORS—EXTENSION OF TERM.—County assessors are necessary officers within the meaning of the constitution, and must be elected by the people. The legislature has no power to extend the terms of such officers beyond the time for which they were elected, except in cases of emergency.

APPLICATION for mandamus. The opinion states the facts.

Eugene R. Garber, for the relator.

Baker & Wines and *R. M. Clarke*, for the respondents.

LEONARD, J. It is the official duty of the several boards of county commissioners of the state to cause their clerks, at least twenty days before any general election, to make out and deliver to the sheriff of their county, or to the justice of the peace of any county attached for judicial purposes, three written notices for each election precinct, stating the time and place where such election will be held, and the names of the offices to be filled: Stat. 1873, 198, Sec. 4. On the twenty-fifth of August, 1884, at a regular meeting of the board of county commissioners of Eureka county, respondents, acting as such board, directed their clerk to issue election notices for county and township offices in and for Eureka county, to be voted for on the first Tuesday after the first Monday in November, 1884, but in said notices omitted the office of county assessor.

Relator, a citizen of the United States, a resident, qualified elector and taxpayer of Eureka county, appeared before said board, and in writing demanded that the office of county assessor be inserted as an office to be filled at said election.

Respondents refused, and still refuse, to give any notice of the election of said officer, on the ground that, by an act of the legislature of the state, which became a law March 14, 1883, the terms of the several county assessors of the state were extended from two to four years; that by reason thereof there is no county assessor to be elected in said county for the two years next ensuing the first day of January, 1885, and that, therefore, a notice of the election of said officer is not required or authorized by law.

Prior to the last session of the legislature in 1883, the terms of county assessors were fixed by law at two years, and the several incumbents were elected at the general election of 1882, for the period of two years.

According to the statutes in force at the time of their election, their term of office would have expired on the first Monday in January, 1885.

But the legislature of 1883, passed an act which provided that there should be elected at the general election in 1866, and every four years thereafter, in each county, one county assessor, and that

the terms of the office of county assessors then in office should expire on the first Monday in January, 1887.,

In other words, the legislature endeavored to extend, and if the second section of the statute in question (stats. 1883, 123) is valid, did extend the terms of office of the several county assessors of the state two years beyond the time for which they were elected by the people.

It is claimed by relator that the legislature had not such power, for several reasons, but mainly because, under the constitution, the office of county assessor must be filled by an election by the people, and that the statute under consideration violates that right.

On the contrary, it is urged by respondents that this is not a constitutional office; that it is purely of legislative origin and creation, and that, therefore, the legislature may do with it as it wills; that under the constitution the legislature has power to declare by law the tenure of the office, and that, consequently, it may extend the term to four years.

In construing constitutions the first and last duty is to ascertain the intention of the framers of the instrument and of the people who ratified it.

Courts are governed by the same rules whether constructing constitutions or statutes.

It is undoubtedy the duty of courts to uphold statutes passed by the legislature, unless their unconstitutionality clearly appears; in which case it is equally their duty to declare them null.

From an examination of the entire constitution does it clearly appear that the people intended to retain the right to elect the incumbents of the office of county assessor, and if they did, does the second section of the statute in question violate that right?

We deem it unnecessary to pass upon the question whether this office is of constitutional or legislative origin; for whether it be one or the other, if, as we think, under the constitution, it must be filled by election by the people, no other method can be adopted.

So, for the purposes of this decision, we shall admit that it was created by the legislature, and therefore that the law-making power could abolish it and adopt some other method of complying with section 1 of article 10 of the constitution concerning taxation.

But this admission by no means sustains the conclusion that the legislature has power to fill the office by legislative or other appointment, or otherwise than by popular election, so long as the office exists.

We admit; also, that the legislature can perform any act not prohibited by the constitution; that outside of constitutional limitations and restrictions its power is "as absolute, omnipotent and uncontrolable as parliament."

But in seeking for limitations and restrictions, we must not confine ourselves to express prohibitions. Negative words are not indispensible in the creation of limitations to legislative power, and if the constitution prescribes one method of filling an office, the legislature cannot adopt another.

From its nature, a constitution cannot specify in detail and in terms every minor limitation obviously intended. It follows, that implied as well as express restrictions must be regarded, and that neither the legislature nor any other department of the government can perform any act that is prohibited either expressly or by fair implication; People v. Draper, 15 N. Y., 543; Lowery v. Gridley, 30 Conn., 458; People v. Hurlbut, 24 Mich., 98.

Prohibitions implied, if they plainly exist in a constitution, have all the force of express prohibitions.

For instance, it is declared in section 32 of article 4 that the legislature shall provide for the election, by the people, of certain officers named. There are no negative words employed to the effect that the legislature shall not elect or appoint them, or provide for their election or appointment in some other way; still no one would claim that a law providing for their election or appointment by a different mode would be constitutional. In fact, counsel for respondents admit that it would not be.

After a careful examination of the entire constitution, we are clearly of opinion that the framers and the people intended that all necessary state, county and township officers should be elected by the people of the locality immediately concerned.

Such, in the main, was the method of choosing officers prior to the adoption of the constitution, and such has been the construction placed upon that instrument by the legislature, at least before the passage of the statute under consideration, and even according th this statute, the same method is to continue, after the expiration of two years.

The constitution makes provision, in terms, for the election by the people of a governor, lieutenant governor, treasurer, controller, surveyor-general, attorney-general, superintendent of public instruction, clerk of the supreme court, justices of the supreme court, district judges, boards of county commissioners, members of the legislature, county clerks, recorders, who are *ex-officio* auditors, district attorneys, sheriffs, treasurers, surveyors, public administrators, justices of the peace, "and other necessary officers."

It will be noticed that this list includes all state officers whose offices were created by the constitution, and all at any time since or now existing, with the exception of state mineralogist, now abolished, and state printer, both of which were created by the legislature subsequent to the adoption of the constitution.

It includes, also, all county officers by name, for whose selection, in any manner, constitutional provision was made, save such as might be chosen under and by virtue of the words "and other necessary officers," in section 32 of article 4. It includes all county officers whose offices have existed since the adoption of the constitution, and all that now exist, except county assessor and county school superintendent. It is not claimed that the legislature could make provision for the election or appointment of the officers included in the above list, other than by election by the people. But

the framers of the constitution did not intend to name in that instrument all the officers that could be elected, or limit the state to such as were mentioned. On the contrary, section 32 of article 4 plainly shows an intention to leave it to the legislature whether officers other than those specifically named are required, and if they are, power is given to create them and to make provision for filling them, provided, only, that the incumbents shall be elected by the people.

Section 32 is as follows: "The legislature shall provide for the election, by the people, of a clerk of the supreme court, county clerks, county recorders, who shall be *ex-officio* county auditors, district attorneys, sheriffs, county surveyors, public administrators and other necessary officers, and fix by law their duties and compensation."

Provisions for the election of the other officers named in the constitution is made in other sections.

At the time the constitution was framed the law provided for the election of county assessors and county school superintendents. We cannot say why those officers were omitted from the constitution. It may be because the framers deemed it wise to leave the method of exercising the important functions of the government appertaining to the revenue and public schools to the wisdom of the legislature in order that it might be changed according to possible emergencies.

But whatever the reason may have been, it cannot be said that a failure to make specific mention of assessor or any other officer in section 32, or elsewhere in the constitution, justifies the conclusion that the legislature is empowered to fill a necessary office by any method other than by election by the people.

The use of the words "and other officers" bars such a conclusion.

Those words were inserted for a purpose, and they cannot be disregarded.

They show how carefully the framers of the constitution intended to guard what, in free governments, has always been considered an inestimable privilege—the right of the people to select their own officers.

Under section 32, it is as much the duty of the legislature to provide for the election by the people of "other necessary officers"—that is to say, officers that are necessary in exercising the functions of the government in running the machinery of the state—as it is to provide for the election of the officers named.

The upshot of the whole matter is this: The framers of the Constitution decided for themselves that the officers named were necessary, and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county or township, requiring only that they, like those named, should be elected by the people.

The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature, and

that body, in 1866, decided that an assessor was necessary by enacting that, among other officers, there should be elected, in each county, one county assessor, whose term of office should be two years. And the legislature of 1883, that enacted the statute in question, also recognized such necessity, as before stated, by continuing it, by providing for the election of assessors in 1866, and every four years thereafter, and by endeavoring, at least, to extend the term of the present incumbents two years beyond the period of their election by the people.

Outside of the decision of the legislature as to the necessity of county assessors, it is evident that the present method of assessment and collection, or some other, to accomplish the same purpose, is indispensable.

Section 1, of article 10, of the constitution declares that the legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, with certain exceptions not material here. This mandatory provision can not be obeyed without some efficient method of ascertaining the value of property. The duties now required of the assessor must be performed by some instrumentality, and the manner of performing them is left with the legislature.

From every standpoint, then, we conclude that assessors are necessary officers. So long as they are such, until the office is abolished, they must be elected by the people.

Other portions of the constitution are strongly corroborative of the views above expressed.

Section 20, of article 4, provides that the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * regulating the election of county and township officers, and section 21 declares that "in all cases enumerated in the preceding section * * * all laws shall be general and of uniform operation."

Thus it is made the duty of the legislature to regulate the election of township and county officers by general laws.

In Clarke v. Irwin, 5 Nev., 121, referring to this section, the court said: "When words are used in a constitution, unless so qualified by accompanying language as to alter their ordinary and usual meaning, they must be received in such meaning. The word 'Elected,' in its ordinary signification, carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. This is clearly the sense of the use of the word in the clause referred to, especially when taken in connection with sections 26 and 32, referring to the same subject. Section 32 has been previously quoted. Section 26 reads thus: 'The legislature shall provide by law for the election of a board of county commissioners in each county.' Now, although in one of those sections the legislature is commanded to provide for an 'election,' and in the other for 'an election by the

people,' it will hardly be contended that the same mode of election was not contemplated in both cases, and that for the reason that the ordinary meaning of the word 'elected' implies a popular vote, unless otherwise qualified. When, then, the legislature is prohibited from passing local or special laws, regulating the election of county and township officers, the prohibition runs against making distinctions between counties or township, in the matters of the popular election of their officers."

It is plain, from sections 21 and 22, that the method contemplated of filling county and township officers is by an election under a general law.

And section 13, of article 17, provides that, "all county officers, under the laws of the territory of Nevada, at the time when this constitution shall take effect, whose offices are not inconsistent with the provisions of this constitution, shall continue in office until the first Monday of January, 1867, and until their successors are elected and qualified. And all township officers shall continue in office until the expiration of their term of office, and until their successors are elected and qualified." * * *

But it is urged by counsel for respondents that section 10, of article 15, justifies the action of the legislature in extending the terms of assessors.

That section is as follows:

"All officers whose election, or appointment, is not otherwise provided for, shall be chosen, or appointed, as may be provided by law."

It is said that the only way to harmonize sections 10 and 32, is to hold that the officers, specifically named in the constitution, and known as constitutional officers, shall be elected by the people, and officers not so named, created by the legislature, known as legislative officers, shall be chosen as the legislature may direct.

Such construction utterly disregards the words, "and other necessary officers," in section 32, and is inconsistent with the evident intention of the framers of the constitution.

It convicts that body of inserting, in a most important instrument, words of sweeping import, which they did not intend to have construed according to their usual signification.

Section 10, of article 15, in no manner conflicts with section 32. It does not refer to state, county or township officers, whose election, by the people, is otherwise provided for in the constitution.

Our opinion is, that the office of county assessor is elective, and that so long as it exists as a necessary office, its permanent incumbents must be elected by the people.

It is claimed, however, that although it is an elective office, the right of the legislature to extend the term of office has been recognized in three cases, decided in this court, viz.: Clark v. Irwin, 5 Nev., 111; Rosenstock v. Swift, 11 Nev., 128; Denver v. Hobart, 10 Nev., 28.

We are unable to find anything in either case mentioned, that is opposed to our conclusions in this.

We don't deny that the legislature may make provisional appointments, if necessary, in order to put a new system in operation.

Offices that must be permanently filled by election, in cases of emergency, may be provided for, temporarily, by other means. The constitutional mandate does not apply to such exceptional cases: Clarke v. Irwin, *supra;* People v. Fisher, 24 Wend., 129.

Clarke v. Irwin shows that certain parties were named as county officers in the bill, creating the county of White Pine, to hold until the next general election. Irwin was designated as sheriff.

The court held that the statute did not violate that part of the constitution which requires county officers to be elected by the people, because the office was filled only temporarily by the legislature, until the next general election, and that the constitutional mandate did not apply to cases of emergency or special occasion.

Such is the undoubted law, but it does not apply to the statute under consideration.

In this case there was no emergency or special occasion calling for extraordinary action on the part of the legislature.

The several incumbents of the office had been elected for two years, under a general law, which required their successors to be elected by the people at the next general election in 1884.

Before the expiration of the term for which they were elected, there would be a general election, at which their successors could be elected in the manner and form provided by the constitution.

If it was desirable to change their terms of office from two to four years, still there is nothing to hinder the election of their successors at the general election in 1884.

Nor does Rosenstock v. Swift militate against our views.

The case shows that the act of the legislature, incorporating Carson City, made certain county officers of Ormsby county *ex-officio* city officers.

Among others the sheriff was constituted *ex-officio* city marshal.

It was claimed that the act was unconstitutional because it conferred city offices upon county officers, and thus permanently deprived the citizens of the state, residing within the municipal subdivision, of a fundamental right—the right of local self-government.

The court said: "The existence of a fundamental right of municipal local self-government is necessarily dependent upon some constitutional grant or manifest implication, neither of which can be found in the constitution of this state. Hence, a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication.

"Its officers or agents, who administer its affairs, are created by the legislature and chosen or appointed by the law of its creation."

Now, whether the court was wright or wrong in its conclusion that there was no constitutional inhibition against legislative appointments of municipal officers, matters not in this case. Its decision upon the objection urged was based upon such conclusion and it is not authority against relator in this case.

On the contrary, that case shows that, if the court had found the constitutional inhibition against legislative appointments to municipal offices that we have found against the legislative action under consideration, the decision would have accorded with ours.

Denver v. Hobart is so plainly inapplicable we shall not review it.

At the argument of this case we were referred to Christy v. Board of Supervisors, 39 Cal., 11, and People v. Batchelor, 22 N. Y., 135, in support of the doctrine that when an elective office has once been filled by an election, the legislature may extend the term of the incumbent, provided the whole term when extended does not exceed the time limited by the constitution.

The prevailing opinion in People v. Batchelor is rejected by the court of appeals in People v. Bull, 46 N. Y., 59, and People v. McKinney, 52 N. Y., 376.

We shall not stop to review these several decisions.

In Christy's case, as well as Batchelor's, it was held that the term could be extended by the legislature under the power to fix the duration of the term.

In the cases subsequently decided in New York it was held that an extension by the legislature was in substance an appointment to the office for the extended term, and a usurpation by that body of the right to fill the office, which was secured by the constitution to the electors.

We have examined these decisions with great care, and do not hesitate to adopt the reasoning and conclusions of the later New York cases, nor can we add anything to them.

To our minds it is enough to say that, since the constitution gives to the people of a county the right to elect their assessor, and they do elect him for two years, under the existing law, they have the right also to elect his successor, and if the legislature extends his term, their rights are abridged.

Should we hold that the term could be extended, we should have to admit that the incumbents would hold the office during the period of extension, by virtue of a legislative act, rather than by an election. The present assessors have been elected for two years. Should they hold their offices for four, they would have to point to the statute as evidence of their title to the office, instead of their certificates of election.

Our opinion is that section 2 of the statute under consideration, extending the terms of county assessors beyond the time for which they were elected, is unconstitutional and void.

Section 1 provides for an election in 1886, and every four years thereafter, but it does not supersede the existing law during the

next two years. It was not intended to go into effect during that time. It follows that county assessors must be elected at the ensuing general election, under the statute of 1866, for the two years succeeding the terms of the present incumbents.

The writ of mandamus should issue, as prayed for, and it is so ordered.

SUPREME COURT OF NEW MEXICO.

SPEIGELBERG ET AL. v. HERSCH & CO. ET AL.

Filed September 27, 1884.

MORTGAGE OF PERSONAL PROPERTY—POSSESSION BY MORTGAGOR—FRAUD.—A mortgage of the stock in trade of a merchant, by the terms of which the mortgagor is to remain in possession of the goods, to sell and dispose of the same as the owner, and remit the proceeds of the sales to the mortgagee, is a fraudulent transfer as against other creditors of the mortgagor.

APPEAL from a judgment of the district court. The opinion states the facts.

Breeden & Waldo, for the appellants.

Gildersleeve & Knaebel, for the appellees.

AXTELL, C. J. The issue in this case was the truth of an affidavit for attachment.

The affidavit charges that defendants had fraudulently concealed and disposed of their property with intent to hinder, delay and defraud their creditors. The facts proved are substantially as follows: Defendants were merchants in Santa Fe, engaged in a general retail trade; they were indebted to plaintiff in the sum of about one thousand dollars; that defendant L. Hersch, at Santa Fe, made his promissory note to his brother-in-law, Sigmund Praeger, of New York, for the sum of about six thousand dollars; that to secure payment of this note he executed to said Praeger a chattel mortgage upon his stock of goods in his store at Santa Fe, said mortgage covering nearly his entire stock; that it was understood and agreed between Hersch and Praeger that Hersch was to remain in possession of said goods and carry on the business exactly the same as before the mortgage was given; and in fact he did so remain and so conducted the business. There are some other circumstances in proof which might slightly vary, or shade the above statement of facts, but it is believed that there is enough stated to bring out clearly the point made by plaintiff in favor of sustaining the attachment. Plaintiff asked the court to instruct the jury as follows: In law, no one can mortgage a stock of goods and yet remain in possession and carry on the business in the usual way, without paying all the proceeds on the account of the mortgage debt; if there be other creditors, such mortgage is a fraudulent transfer as to creditors; and if the jury

believe from the evidence that such was the facts in this case, they must find for the plaintiff. The effect of this instruction was to take the case from the jury, by instructing them that such a mortgage was a fraud in law as to other creditors. The court refused to give the instructions. The jury found for defendant, and against the truth of the affidavit for attachment, and plaintiff appeals to this court. Substantially there was no other proof of fraud, or hindering, delaying and defrauding, except giving this mortgage. Is such a mortgage a fraud in law as to creditors? In Robinson v. Elliott, 22 Wall., 513, Mr. Justice Davis elaborately reviews the authorities and reaches the conclusion that such a mortgage is a fraud in law as to creditors.

In the language of that opinion: "It is not difficult to see that the mere retention and use of personal property until default, is altogether a different thing from the retention of possession, accompanied with power to dispose of it for the benefit of the mortgagor alone, the latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor." And as in that case so in the case at bar; whatever may have been the motive which actuate the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell their goods as their own, and appropriate the proceeds to their own purposes, and this too for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The mortgage, in the case at bar, is simply a fraudulent attempt, under the forms of law, to provide a shield, by means of which a dishonest tradesman might ward off his creditors for an indefinite period; and the transaction reflects discredit upon all persons connected with it. The note, pretended to be secured, is on demand; there is no provision in the mortgage when it is to be paid, but, for fear there should not be a sufficient protection, there is a provision, in this dishonest instrument, that it shall be a mortgage on goods thereafter to be bought, so long as such purchases shall not exceed the limits mentioned, which is set at thirty thousand dollars, about three times as large a stock as the store usually carried. There is, also, a provision in this fraudulent and scandalous instrument, that Praeger, the mortgagee, and brother-in-law of the mortgagor, may, at any time, upon default of payment of said note, which is payable upon demand, take immediate possession of said stock of goods, so if the court upholds this mortgage, the mortgagee can, at any moment, demand his money, and upon failure to pay, take immediate possession of all the goods in stock, leaving other creditors without remedy. In this case, according to the testimony, "the business was to go on just as it had been going on, the store was to be kept

open, and Hirsch was to go on selling goods; that he was to use the proceeds of sales for expenses, and pay his debts in Santa Fe, and remit to Praeger *as he could;* and it might have been well added, that when he got ready to break, Praeger would own the store in Santa Fe, and he would probably own the one in New York. That this fraudulent transaction should be carried up, under the forms of law, is simply a scandal to an honorable profession. The law gives no sanction to such arrangements, and will hold them void, as against creditors, as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands: Davis v. Ransom, 18 Ill.; Ford v. Williams, 3 Kernan; Edgett v. Hart, 13 Barbones, S. C.; Robinson v. Elliott, 22 Mass.; McLean v. Lafayette Bank, 3 McLean; Caddington v. Etheredge, 12 Grattan; Freeman v. Ranson, 5 Ohio; State Brooks v. Miner, 20 Mo.; Reed v. Pelletiur, 28 Mo.; Armstrong v. Tuttle, 34 Mo.

Judgment reversed.

BELL, J. I concur in the result.

SUPREME COURT OF CALIFORNIA.

No. 10,998.

PEOPLE v. WONG CHOW.

Department Two. Filed October 3, 1884.

INSTRUCTIONS—EVIDENCE.—Where the evidence warrants it, the court must give every instruction asked, which suggests a theory of the case, not suggested by the instructions given.

APPEAL from a judgment of the superior court for the county of Los Angeles. The opinion states the facs.

Thomas D. Riordan, for the appellant.

Attorney General, for the respondent.

THE COURT. The eleventh instruction, which the defendant requested to be given, and the court refused to give to the jury, suggested a theory of the case, which was not suggested by any of the instructions given, and we think the court erred in refusing to give it. The evidence, in our opinion, entitled the defendant to have that instruction given.

Judgment and order reversed, and cause remanded for a new trial.

No. 11,965.

PEOPLE *v.* ABBOTT.

Department One. Filed October 6, 1884.

CHALLENGE—IMPLIED BIAS—CONSCIENTIOUS SCRUPLES—TRIAL OF CHALLENGE.—Where a juror is challenged by the prosecution for implied bias, upon the ground that his testimony given during the examination as to his qualifications to act as a trial juror, shows that he has conscientious scruples against inflicting the death penalty, and the facts are denied by the defendant, the court may decide the challenge without a re-examination of the juror, if the defendant offers no testimony.

DEATH PENALTY—CONSCIENTIOUS SCRUPLES—JUROR.—Neither a person who testifies that in a clear case of willful and deliberate murder, he would be, as a juror, in favor of imprisonment for life and opposed to hanging; nor one who has, to a "certain extent," conscientious scruples against finding a man guilty of a crime for which he would be hung, should be permitted or compelled to serve as a juror in a prosecution for murder.

DYING DECLARATION—BELIEF IN IMPENDING DEATH—RES GESTAE.—In a prosecution for murder, the statements of the deceased, made in the presence of the defendant shortly after the infliction of the mortal wound, and after he had expressed a belief that he was about to die, and had given directions for the settlement of his affairs, to the effect that the defendant was "the man who cut him with a knife, and that he had no cause for it whatever," are admissible in evidence as dying declarations, and also as part of the *res gestae.*

VOLUNTARY CONFESSION TO OFFICER.—In such case the voluntary confession of the defendant made to the arresting officer is admissible in evidence.

CONDUCT, ACTS AND EXPRESSIONS OF PRISONER—EVIDENCE.—The conduct, acts and expressions of a person accused of crime, at the time of his arrest, are always admissible in evidence against him.

FORMER CONVICTION OF A FELONY MAY BE SHOWN BY THE EXAMINATION of the witness or by the record of the judgment.

UNLAWFUL KILLING—MALICE—BURDEN OF PROOF.—When an unlawful killing is proved, malice will be presumed, and the burden of proof is on the defendant to show the absence or want of malice.

THE CREDIBILITY TO BE ATTACHED TO DYING DECLARATIONS is a matter for the jury.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered upon a verdict convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

John D. Whaley, for the appellant.

Attorney-General, for the respondent.

MCKEE, J. The defendant, having been convicted of murder in the first degree, and sentenced to imprisoment for life, appeals from the judgment, and an order denying a motion for a new trial.

1. In impaneling the trial jury the court allowed certain challenges, taken by the district attorney to two of the panel of jurors, for implied bias, upon the ground that each of them entertained such conscientious scruples as would preclude him from finding the defendant guilty. The challenges were made upon the testimony of the jurors, given during their examination as to their qualifications to sit as trial jurors. When taken, the defendant's counsel "denied the facts." And the court, upon the testimony of the jurors, previously given—none other having been offered after the denial of the facts—allowed the challenges and excluded the jurors.

It is contended that the allowance of the challenges was erroneous, because there was no trial of the issue raised by the denial, and because the testimony of the jurors was insufficient.

Section 1,078 of the penal code provides: "If the facts are denied, the challenge must be tried by the court." But there was

substantially a trial. The testimony of the jurors was taken before the judge himself, and the question raised by the denial of the defendant, was submitted to the court for decision upon that testimony; for, after the denial of the facts, the defendant did not re-examine the jurors, nor offer any additional testimony; and, as the question was practically submitted by counsel for the people, and for the defendant, upon the testimony before the court, the court had the right to, as it did, decide it without requiring the jurors to repeat themselves.

The decision rendered was sustained by the evidence; for one of the jurors answered substantially, that in a clear case of willful and deliberate murder he would be, as a juror, in favor of imprisonment for life, but opposed to hanging. And the other, that he had, to a "certain extent," conscientious scruples against finding a man guilty of a crime for which he would be hung. A person summoned as a juror, who entertains such conscientious opinions, must neither be permitted nor compelled to serve as a juror: Section 1,074, penal code.

2. At the trial of the case the court admitted in evidence, as dying declarations, certain statements of the deceased. The statements were, that the defendant, who was taken, after his arrest, to the bedside of the wounded man, was "the man who cut him with a knife, and that he had no cause for it whatever."

It is contended that it was error to admit these statements, because it was not proved they were made under a sense of impending death.

Dying declarations are inadmissible, unless the declarant believed that death was impending. If, at the time of the declarations, he has any expectation or hope of recovery, however slight it may have been, and though death ensued soon afterwards, the declarations are inadmissible: 1 Greenl. Ev., p. 184. Under that rule we held in Hodgdon's case, 55 Cal., 72, certain dying declarations inadmissible, because while the declarant, at the time of making the declarations, expressed herself as believing she would die, yet she also expressed the thought that she might recover, and, therefore, she had not abandoned the hope of recovery. In Taylor's case, 59 *Id.*, 640, there was nothing in the circumstances of the case, or the expressions of the declarant to indicate that he thought death was inevitable.

In the case in hand the evidence showed that the deceased died on the twenty-third of May, 1883, of *traumatic peritonities*, caused by a knife wound inflicted by the defendant on the twentieth of May, 1883. After receiving the wound the deceased was taken to the receiving hospital. He suffered great pain. His medical attendant testified that such a wound was invariably fatal. And, although encouraged by those around him, the wounded man frequently expressed himself as follows: "I have got my death wound. I think I am going to die. I believe I am going to die from the wound," and he requested his wife to be sent for so that he might at once settle his affairs. His wife came, and was with him every

day till he died; and she testified that "he said he was afraid he would never recover." The circumstances of the dangerous nature and character of the wound, the physicial condition of the wounded man as shown by his sufferings, and of his mental condition, as indicated by his expressions, justified the inference drawn by the court that the declarant was conscious of impending death at the time of the declarations. The declarations were properly admitted in evidence: People v. Sanchez, 24 Cal., 17.

Besides, the declarations were made in the presence of the defendant, who did not deny them, and the defendant had, before he was brought into the presence of the wounded man, confessed the truth of the fact contained in the declarations. The confession of the defendant and the declaration of the wounded man, made in the presence of the defendant, were made within two hours after the stabbing, and both were admissible as part of the *res gestæ*. The confession was this: "I don't deny I cut the son of a bitch to kill him, and if he ain't dead, I hope he will die." It was objected that this confession was extorted from the defendant by force and threats, but the evidence shows it was voluntarily made at the time of his arrest, and before the officer had time to speak to him upon the subject, and when he did make it, the officer cautioned him about volunteering any statement of that kind, as it would have to be repeated at his trial to which he answered "he did not care." There was therefore no error in admitting the confession and declarations.

3. Nor was there any error in admitting evidence tending to prove that the defendant, immediately after making the confession, became turbulent in his conduct, resisted the officer, and refused to deliver up the knife with which he had done the stabbing for which he was arrested. The conduct, acts and expressions of a person, accused of crime, at the time of his arrest, are always admissible in evidence against him.

4. The questions asked by the district attorney on cross-examination of the defendant, who testified as a witness in his own behalf, were proper. Former conviction of a felony may be shown by the examination of the witness, or the record of the judgment: Sec. 2,051, C. C. P.

5. In the charge of the court we find no prejudicial error. The instructions are not contradictory. The law of murder and malice was correctly expounded in the language of sections 187, 188, penal code; and the court added: "In its legal sense malice does not mean mere hatred and ill-will, but denotes an intent to do an unlawful act, without legal justification or excuse. * * * When an unlawful killing is proved, malice will be presumed, and the burden of proof is on the defendant to show the absence or want of malice." Exception was taken to the last clause of the instruction. But the code (subdivisions 2, 3, of section 1,963, C. C. P.) declares: That a person intends the ordinary consequence of his voluntary act, and that an unlawful act was done with an unlawful intent. And the effect of these statutory rules of evidence is that when the act is

proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption: People v. Harris, 29 Cal., 682.

6. The instructions to the jury upon the subject of the dying declarations which had been admitted in evidence, were favorable to the defendant, and were properly given. After the admission of such evidence the question of its credibility remains for the consideration of the jury. It is their province to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give to the declarations such credit as upon the whole they may think them entitled to: 1 Greenleaf's Evidence, pp. 185–6.

Judgment and order affirmed.

ROSS, J., concurred.

MCKINSTRY, J. I concur in the judgment:

First—Appellant contends the court erred in allowing a challenge, on the ground of implied bias, to certain jurors. But no exception can be taken to the decision of the court *allowing* a challenge: Penal Code, 1,170.

Second—Appellant urges it was error on the part of the judge below to deny defendant's motion to examine other witnesses as to the condition of deceased at the time certain declarations, alleged to be dying declarations, were made. But the judge, being satisfied that the declarations were made when deceased was under a sense of impending death, was not required upon the mere suggestion of defendant's counsel that other persons *might* know something of the condition of deceased, to postpone further proceedings until they could be brought in for examination. If defendant had offered to prove by any named witness, that deceased, when he made the declarations, was not or did not believe himself *in extremis*, the point now made would have been presented by the record.

Third—It is insisted the evidence did not show that deceased had abandoned every hope of recovery when the declarations were made. But the evidence sustains the finding of the court in that regard.

Fourth.—The court did not err in admitting evidence of the fact that defendant remained silent when deceased said, "that is the man who cut me," for his silence was some evidence that the statement was true. Nor in admitting evidence of defendant's declarations when he was arrested; the fact that he was under arrest, not necessarily proving that the declarations were involuntary; nor in permitting the prosecution to put in evidence the pocket-*knife* of defendant, even if it be admitted, it was taken from him by force.

Fifth.—Appellant claims error in that the court overruled his objections to questions put to the witness, James Brown, and in "compelling" the witness to answer them. The witness was asked, in

effect, if he had been convicted of certain felonies, under other names than Brown; the objections were that the evidence called for was incompetent, irrelevant and immaterial. The witness did not decline to answer, on the ground that his testimony would tend to degrade him, but answered voluntarily. The evidence was not irrelevant nor immaterial. It was not incompetent: C. C. P., 2,051.

Sixth.—There was no material error in the portions of the judge's charge referred to in appellant's points. Conceding the court erred, after having held that the deceased was thoroughly convinced of his impending dissolution, and admitted the declarations, in permitting the jury to reject the declarations, if *they* should believe deceased did not think he was dying, the error could not have prejudiced defendant, since the declarations were adverse to him.

No. 9,142.

IRVING *v.* CUNNINGHAM ET AL.

In Bank. Filed October 8, 1884.

BOUNDARIES—PAROL EVIDENCE—INTENTION OF GRANTOR.—In a legal action for the recovery of land, the boundary of which is described in the deed as commencing at a given point, and running thence to a point on a small creek about two hundred varas south, and thence, etc., parol evidence is inadmissible to show that the grantor intended the line to run to a creek one thousand eight hundred and fifty feet in the same direction. If there was no such creek in that direction nearer than one thousand eight hundred and fifty varas, the reference to "a small creek," should be rejected.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

James McCabe, M. Mulleny and *E. J. & J. H. Moore*, for the appellants.

H. P. Irving and *Tully R. Wise*, for the respondent.

SHARPSTEIN, J. The principal controversy in this case, is as to the northern boundary of the tract conveyed by José Domingo Peralta to McAllister and others, on August 16, 1853. In the deed "the northern side line" is stated to be "a line drawn from a point two hundred varas south of a house occupied by a squatter, Espejo, and passing to a point at a small creek about two hundred varas south of the house now occupied by said Domingo with his family, and thence northeastwardly in a straight line to the top of the mountains."

As to where two of the monuments—the houses of "Espejo" and "Domingo"—stood, there is no dispute. But the defendants offered to prove that there was not before, nor at the date of the said deed, a small creek about two hundred varas south of the house of said Domingo, and that it was one thousand eight hundred and fifty varas from said house to the nearest creek in that direction.

In connection with that offer the defendants offered to prove other facts having a tendency to show that the grantor supposed the reference to a creek about two hundred varas south of his house, was really to the one thousand eight hundred and fifty varas south of it. If such had been the fact, the demanded premises would not have constituted any part of the tract conveyed by said deed. The offer was rejected, and the defendant's counsel insist that in rejecting it the court erred. If a written contract does not substantially express the intention of the parties to it, a court of equity will, in a proper action, correct or reform it, so as to make it conform to the real intention of the parties. But it is only in such an action that parol evidence is admissible to contradict or vary the terms of a written contract. This being an action at law, the rule which excludes parol evidence when offered to contradict or vary the terms of a written contract must be observed.

If there had been a small creek about two hundred varas south of the house occupied by the grantor, the evidence offered and rejected would have been clearly irrelevant and immaterial. If there was no small creek about two hundred varas south of his house, or nearer, in that direction, than one thousand eight hundred and fifty varas, the case is one in which the description is true in part, but not true in every particular; and so much of the description as is false must be rejected; and the instrument will take effect, if a sufficient description remains to ascertain its application: 1 Greenl., 301. If the words "at a small creek," be omitted from the clause we are considering; enough will remain to show plainly the intent. The words exclusive of the *falsa demonstratio* are sufficient of themselves to describe the property intended to be conveyed.

We think the circumstances of there having been a small creek at the distance of one thousand eight hundred and fifty varas south of the grantor's house, is altogether immaterial. The deed must be construed as it would be if there had never been a small creek in that direction from his house. It is legally incredible that the grantor could have had that creek in his mind when referring to one about two hundred varas south of his house. The description is not ambiguous. If there was a small creek about two hundred varas south of the grantor's house the description is correct in every particular. If there was no such creek in that direction nearer than one thousand eight hundred and fifty varas of his house, the reference to "a small creek" is of no manner or effect. In either view of the case the ruling of the court was correct.

Judgment and order affirmed.

McKINSTRY, J., ROSS, J., MYRICK, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 10,905.

PEOPLE *v.* JORDAN.

In Bank. Filed October 8, 1884.

TRANSCRIPT ON APPEAL—ATTACK ON IN SUPREME COURT.—The verity of a fact stated in the transcript on appeal cannot be attacked by affidavits in the supreme court.

OBTAINING MONEY UNDER FALSE PRETENSES—INDICTMENT.—An indictment for obtaining money under false pretenses, charged that at a certain time and place the defendant J., with intent to defraud one K., of his property, did unlawfully, knowingly and designedly, falsely pretend and represent to him that certain bonds of a railroad were of the market value of $650; that any bank in San Francisco would lend that amount on them; that the road of said company, issuing said bonds, was in running order, and was paying expenses; and that K., believing said false pretences and representations, was induced, by reason of the same, to loan and deliver to the said J., on the pledge of said bonds, the sum of $1,365. It further charged that said money was obtained by the defendant unlawfully, knowingly and designedly to defraud said K. The indictment then denied the truth of the false and fraudulent representations, charging that said bonds had not any market value; that no bank in San Francisco would loan any money thereon, and that the company issuing the bonds had no road that was in running order, or that was paying expenses, all of which facts the defendant knew. *Held*, that the indictment was sufficient, and a demurrer thereto should have been overruled.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

Attorney General and *C. B. Darwin*, for the appellant.

John M. Lucas, for the respondent.

MORRISON, C. J. The principal grounds on which defendant based his motion to dismiss the appeal have already been considered and overruled by the court; opinion filed September 30, 1884, *ante*, page 84.

But there is another ground not heretofore considered, on which the defendant asks that the appeal in this case may be dismissed, and that is, because section 1,240 of the penal code has not been complied with. That section provides that an appeal is taken by filing with the clerk of the court a notice of appeal, and serving a copy thereof on the attorney of the adverse party.

The contention here is, that the notice of appeal in the case now under consideration, was served on the adverse party one day before the same was filed in the office of the clerk. This fact defendant attempts to establish by affidavits.

Without passing on the question as to what would be the effect of such a proceeding, if true, it is sufficient to say that the transcript shows a different state of facts, to-wit: that the notice was filed and served on the same day.

It is not competent to correct the record of the court below by affidavits. If the record does not speak the truth it should have been corrected in a proper proceeding in the court below, and its verity cannot be attacked in the manner attempted in this case.

The motion to dismiss must be denied; and we will now consider the merits of the appeal.

The prosecution in this case is under section 532 of the penal code, which provides that "Every person who knowingly and design

edly, by false or fraudulent representations or pretenses, defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is liable," etc.

The above section, which is substantially copied from the English statute, and finds a place in the penal codes or criminal enactments of other states, was considered by the supreme court of Massachussetts in Commonwealth v. Drew, 19 Pick., 182, and it was there held, that to constitute the offense described, four things must concur, and four distinct averments must be proved:

"1. There must be an intent to defraud;

"2. There must be an actual fraud committed;

"3. False *pretenses* must be used for the purpose of prepetrating the fraud, and,

"4. The fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his money." And Mr. Bishop, speaking of this offense, says:

"In spite of somewhat varying terms, the essential elements of most of the statutes defining this offense, are the same. And the indictment to cover them as construed, must set out a pretense or pretenses, which it alleges to be false, and known to the defendant to be so, made to a person named, for the purpose of defrauding him or another, by means whereof he obtained from the defrauded person some specified thing of value of a sort included in the statutory inhibition. Herein the statutory words and phrases should be employed, and the facts be given with such minuteness and directness as to satisfy the common law rule of pleading:" 2 Bishop on Criminal Procedure, sec. 163.

If the indictment in this case is subjected to the test laid down in the foregoing authorities, it will be found to contain all that is required in such an instrument. The indictment charges that the defendant, at a certain time and place therein mentioned, with intent to defraud Joseph Kreling of his property, did unlawfully, knowingly and designedly, falsely pretend and represent to him that two certain bonds which he, Jordan, then and there had and produced to said Kreling, each of which purported to be a bond of the Arizona and Nevada Railroad and Navigation Company, and each being a promise to pay James G. Fair, or the holder thereof, one thousand dollars, the same being duly signed and executed, (giving a copy thereof), and did then and there unlawfully, knowingly, designedly, falsely and fraudulently represent and pretend to said Joseph Kreling that each of said bonds was then and there, in said city and county of San Francisco, of the market value of six hundred and fifty dollars, and that any bank in San Francisco would lend that amount on each of said bonds, and further, that the road of said company issuing said bonds was in running order and was paying

expenses. And the said Joseph Kreling then and there believing said false pretenses and representations, and being deceived thereby, was induced, by reason of such false pretenses and representations so made, etc., to loan and deliver, and did then and there deliver to sad Jordan, on the pledge and security of said bonds, the sum of thirteen hundred and sixty-five dollars in money. It is further charged that said money was secured and obtained by the defendant, unlawfully, knowingly and designedly, to defraud said Kreling. The indictment then proceeds to deny the truth of the false and fraudulent representations and pretenses, charging that said bonds, at the time and place the same were pledged, had not any market value whatever; that it was not true that any bank in the city of San Francisco would loan any money thereon, and that the company issuing said bonds had no road that was in running order, or that was paying expenses, all of which facts the said Jordan then and there knew.

We cannot see in what respect the indictment is defective, and are of opinion that the court below erred in sustaining the demurrer thereto.

It is true that the authorities may be somewhat conflicting, and that in many of them very nice and not entirely satisfactory distinctions are drawn between cases that are, and cases that are held not to be, within the statute; and as was said by Dewey, J., in the case of Commonwealth v. Norton, 11 Allen, 267: "It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur." But we have found no case that holds such representations as are charged in this case, not indictable. The following principles and authorities may be cited in further support of the views herein expressed:

A false pretense is defined to be "a representation of some fact or circumstance calculated to mislead, which is not true:" Commonwealth v. Drew, 19 Pick., 179. What is said to be a fuller and practically better definition is the following: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value:" 2 Bishop on Criminal Law, sec. 415. In the case of Reg v. Evans, 8 Cox's C. C., 257, note to 2 Bishop's Cr. Law, p. 235, it is said: "Had the prisoner represented the note to be of five pounds value, when she knew it was not of that value, and the jury had found the false pretense, and that the note was of less value than five pounds to her knowledge, it would have been sufficient to sustain a verdict of guilty." In the case of Commonwealth v. Stone, 4 Metcalf, 43, the supreme court of Massachusetts held that the passing of a bill of a broken bank at its nominal value by one who represents it to be of such value, yet knows it to be nearly if not quite worthless, is an indictable pretense under the statute, although the bill may be of some value. "A representation that a horse is sound, by one who

knows it not to be true, is within the statute and is indictable:" State v. Stanley, 64 Maine, 157.

The doctrine that, in the language of Russell, the pretense "need not be such an artificial device as will impose upon a man of ordinary caution, is fully established, at least in the English courts. And the pretense need not be such as cannot be guarded against by common prudence: 2 Bishop's Cr. Law, section 436. "It is substantially settled that any false representation, extending beyond mere opinion, concerning the quality, value, nature or other incident of an article offered for sale, whereby a purchaser, relying on the representation, is defrauded, is a violation of these statutes:" Id., section 447. "A mere opinion is not a false pretense; but any statement of a present or past fact is, if false:" Id., section 454. "There need be only one false pretense; and although several are set out in an indictment, yet if any one of them is proved, being such as truly amounts in law to false pretense—the indictment is sustained:" Id., section 418. A false representation that one Conlin was a liquor-dealer, doing business as such in Boston, was held to be within the statute: Commonwealth v. Stevenson, 127 Mass., 449.

We have examined the numerous cases cited by the learned counsel for defendant, but find none of them going to the extent claimed.

Other questions are made in the brief of defendant's counsel, but they do not properly arise. We have considered the only questions presented by the record on this appeal, and are of opinion that the judgment sustaining the demurrer appealed from should be reversed. It is so ordered.

ROSS, J., MYRICK, J., THORNTON, J. and MCKINSTRY, J. concurred.

No. 9,696.

MANSFIELD v. STERN.

Department Two. Filed October 8, 1884.

APPEAL—UNDERTAKING—STAY OF EXECUTION.—An undertaking on appeal to stay execution may be filed at any time, after the appeal is taken, and before the execution is satisfied.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

Napthaly, Freidinrich & Ackerman, for the appellant.

Eyre & Frank, for the respondent.

THE COURT. On the authority of Hill v. Finnigan, 54 Cal., 495, the appellant is allowed to file within twenty days a bond in the sum of four thousand dollars, with sureties to be approved by Hon. E. W. McKinstry, associate justice of this court; and upon the filing of such bond, execution on the judgment in the court below be stayed pending the appeal.

No. 9,663.

LE BRETON, ADMINISTRATOR, ETC. *v.* SUPERIOR COURT.

In Bank. Filed October 10, 1884.

ACTION TO ENFORCE TRUST ON REAL AND PERSONAL ESTATE—PLACE OF TRIAL.—An action to enforce a trust on both real and personal estate, is not based on a lien, nor is it a suit to enforce a lien. Such action may be brought and prosecuted in the county in which the trustee resides, although the real estate subject to the trust is situated is another county.

APPLICATION for a writ of prohibition. The opinion states the facts.

Pillsbury & Blanding, for the petitioner.

F. H. Merzbach and *Garber, Thornton & Bishop*, for the defendants.

MORRISON, C. J. The petition of plaintiffs prays for a writ of prohibition against the superior court of the city and county of San Francisco, under section 1,102 of the code of civil procedure, which declares that such writ "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." And the following section 1,103 provides that the writ shall issue in all cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law."

The petition filed in the case is of very great length; but the important facts which it contains may be briefly stated as follows:

On the first day of October, 1870, Juana M. Estudillo and others were indebted to Theodore Le Roy, John B. Felton and others, in the sum of nearly four hundred and fifty thousand dollars, of which amount there was due John B. Felton the sum of twenty-four thousand and five hundred dollars, and to secure the same they, Juana M. Estudillo and others, executed to Le Roy a deed of trust on certain lands therein described, situate in the counties of Alameda, Santa Barbara and San Luis Obispo, in this state, with power to sell said lands, collect the rents falling due thereon, pay the taxes and to exercise various other acts of confidence and trust respecting said lands, not only for his own benefit but for the joint benefit of himself and the other parties named in the deed as *cestuis que trust*.

The third article of the deed of trust made it the duty of the trustee to sell the lands conveyed to him, and by the fourth article he was directed to pay off the indebtedness specified therein. The said Le Roy entered upon the duties imposed by the trust deed, and in the course of the execution thereof commenced an action on the twenty-sixth day of September, 1874, in the district court of the then third judicial district, against Juana M. Estudillo and others, and procured an order of the court for the sale of the trust property to pay the debts embraced in, and provided for, by the trust deed. In pursuance of said order of sale, the commissioners appointed by the court for that purpose proceeded to sell the trust

property, at which sale Le Roy became the purchaser thereof, and deeds for the same were executed to him by the commissioners. But the amount for which the property was sold was not sufficient to satisfy the trusts provided for in the deed. Le Roy failed to pay the claim of Felton, or any part thereof, and departed this life in April, 1882. In the following May the petitioner Edward J. Le Breton, was appointed administrator of his estate. John B. Felton died in May, 1877, and in the following June his executor, Henry Barroilhet, and executrix, Katherine B. Felton, commenced the action complained of, and sought to be prohibited, in the superior court within and for the city and county of San Francisco. In the complaint in that action the foregoing facts substantially were set forth, and also the additional fact that Theodore Le Roy and Edward J. Le Breton, his administrator, who was the defendant in the action brought by Barroilhet and Katherine B. Felton, had been in the possession of the lands and premises described in the deed of trust, and had received therefrom rents and profits amounting to one hundred and forty thousand dollars. The prayer of the complaint in the action against Edward J. Le Breton is that an account be taken between the plaintiffs and defendant of and concerning the said trust, and of the advances and acts of the said Theodore Le Roy; that the trust be executed by selling the lands, premises and property subject thereto; that the proceeds thereof be apportioned between the plaintiffs and the defendant in the proportions in which they may be entitled to the same, and that plaintiffs have and recover costs.

The only question which we have at present to consider in the case is one of jurisdiction. Has the superior court of the city and county of San Francisco the right to entertain jurisdiction of the proceeding in the case of Barroilhet and Felton against Le Breton, administrator of the estate of Theodore Le Roy?

It is claimed, on behalf of petitioner, that it has not, because it is a proceeding to enforce a lien on real estate, and under section 5, article VI of the constitution, "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action, or actions, is situated." It is admitted that the lands described in the deed of trust are situate out of the county of San Francisco; and if the action in question belongs to any one of the kinds named in the constitution, the superior court, where the action was brought, has no jurisdiction.

But, on the other side, in support of the jurisdiction of the superior court, it is contended, in the first place, that the action is not of the kind named in the constitution, and secondly, that if it does in part come within the language of the constitution, there is another part that does not fall within the constitutional provision. In other words, that the object of the proceeding is to reach personal property as well as realty; and that in such case there is concurrent

jurisdiction created by law, in the court of the county in which the defendant resides. We will notice, briefly, both of these points.

The proceeding is not based on a lien, neither is it a suit to enforce a lien on real estate; but it is a proceeding to enforce a trust on both personal and real property. In such a case the rule is that the trustee may be sued wherever he can be found. In the case of Massie v. Watts, 6 Cranch, 160, chief justice Marshall said: "Upon the authority of these cases, and others which are to be found in the books, as well as upon general principles, this court is of opinion that in case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." And this, although the lands lie in a foreign jurisdiction: 1 Perry on Trusts, sections 70, 71 and 72. The suit was brought against the administrator in the county in which he resides, to enforce a trust, and we have no doubt the supreme court of that county had jurisdiction.

In the second place, the suit is brought to reach personal property in the hands of the trustee, and *that fact* gave the court jurisdiction. In the case of Black v. Black, 27 Geo., 40, the court says: "It is true that the object of the bill was to compel the defendant to convey to the complainant an interest in the unsold lots of the town of Orglethorpe, but it is equally true that another, and probably a much greater object of it, was to compel the defendant to pay over to the complainant his part of the profits, made by the defendant from the sales of the sold lots of that town; and, in so far as this last was the object of the bill, the proper county for the bill was the county of defendant's residence; and in that county it was brought. There was then at least as much reason that the bill should be brought in the county in which it was brought, as there was that it should be brought in the other county—that in which the land lay. This being so, a court of equity of either county would have jurisdiction of the case." To the same effect is the case of Ashurst et al. v. Gibson, 57 Ala., 584, where it is said: "Land must be the subject-matter, and the exclusive subject-matter of suit, or the jurisdiction conferred by this act does not attach. Remedies must be pursued in the district of the residence of a material defendant, if land and personal property are the subject-matter of suit."

For these reasons, therefore, and on both of the grounds above considered, we think jurisdiction over the case attached to the superior court of the city and county of San Francisco.

We are of opinion that the writ should be denied, and it is so ordered.

McKINSTRY, J., MYRICK, J., and SHARPSTEIN, J., concurred.

WEST COAST REPORTER.

WHOLE No. 43. OCTOBER 23, 1884. VOL. IV. No. 4.

THE TRUE METHOD OF INTERPRETING THE CIVIL CODE.

(CONCLUDED.)

The civil code is at most only an outline. It does not purport to embody the entire jurisprudence of the state; it contains only portions of that jurisprudence, and even those portions are given in a fragmentary manner. One very noticeable feature of the code is, that it makes no distinction whatever between the rules of law and of equity. By far the greater part of its definitions, doctrines, and rules are purely legal; and when any equitable doctrines and rules are given, they are commonly mingled up with legal rules, as though the two departments had no separate existence. Indeed, the code seems to be drawn up on the assumption that all distinctions between "law" and "equity" had been abrogated, and that the two had been combined into one homogeneous system; and it absolutely gives no indication whether any rule is legal or equitable. As a whole, the code is exceedingly meager and deficient in the statement of equitable doctrines. A very great number of the most important, well settled, and necessary doctrines and rules of the equity jurisprudence are nowhere formulated, mentioned, nor alluded to, nor included by necessary implication in any portions of the text.

In the chapters or titles upon each distinct topic, such as agency, partnership, negotiable instruments, guaranty, suretyship, trusts, wills, etc., etc., the uniform plan of the code is as follows: It gives general and elementary *definitions* of legal relations, terms, and transactions, which are uniformly stated in an exceedingly brief and concise manner, and are often stated in language differing somewhat from that which has been usually employed by judges and text writers. It formulates a number, greater or less, of the more general *doctrines*, which are sometimes clothed with a new phraseology, and are always expressed in an exceedingly abstract, condensed, and concise manner, without amplification or explanation, without illustrations or applictions, and without going into any detail of the separate individual consequences or results flowing from these very general doctrines. These very con-

sequences have been developed, in the form of innumerable special and single rules, through the progressive course of judicial decision; and it is, in fact, *these special rules which really constitute the body of our law as a practical jurisprudence*, and which are constantly quoted and relied upon by the courts as the practical guides and precedents ("the cases in point"), in the daily work of adjudicating upon the new controversies which arise in the varying affairs of life. *Almost all of these special and single rules are omitted*; the code is chiefly composed of quite general and abstract doctrines. Finally, in treating of important topics, such as agency, negotiable instruments, partnership, and the like, the code sometimes adds a very few,—one or two, two or three,—special and single rules, applicable to certain definite, ascertained, and fixed conditions of fact. In almost every instance, these special single rules are plainly introduced in order to settle and render certain some particular question concerning which there had previously been a doubt or difference of opinion arising from a conflict of decision between courts of different states, or between English and American courts, or perhaps between the decisions of the same court. The rule had been laid down differently by different courts, and the authors of the code plainly intended to remove all doubt, and to make the rule certain by the special provision of the text. The whole number of particular rules belonging to this class, is, however, very small.

In all these general doctrines and special rules, the instances are very few in which the authors of the code have plainly and unequivocally altered a settled common law doctrine or rule. In making this statement I would carefully guard against a possible misconception of my meaning. Of course, I do not refer to those portions where, either from considerations of policy, or borrowing from previous legislation, the code has departed widely from common law doctrines in respect to some entire and important subject matter—for example, the provisions concerning married women's property and contracts, community property, inheritance and succession, express trusts in law, contingent remainders, homesteads, the abolition of dower and curtesy, and the like—subjects in respect to which the entire theory of the common law has been abandoned.

The result is there reached that, taking the jurisprudence of the state as a whole, and leaving out of view subjects of the kind last above mentioned, the great mass of actual, practical rules of law and equity which immediately guide the courts in their work of adjudicating, are not expressed in the code, are not even included by necessary implication in what is expressed. For such rules the courts must go outside of the code, and must find them in the pre-existing and still existing common law or equity untouched or unaltered by the code. The daily experi-

ence of the courts demonstrates the truth of this conclusion. Very few cases are decided in which legal or equitable rules drawn from a source outside of the code, are not invoked as necessary for the decision. Some adequate notion may be formed of the enormous number of single, specific, separate rules constituting our entire jurisprudence as settled by the courts, by a reference to a complete and exhaustive digest of reported decisions, or to the works of text-writers. The "United States Digest," extending to and including the year 1869, consists of fourteen large volumes, each volume averaging about 800 pages, and the matter is so condensed that each paragraph is the statement of a distinct and separate rule. A separate additional volume of the same size, is required to contain the decisions of each subsequent year. If by a comparison of digests and text-books, we should assume that the total jurisprudence of the state dealing with private civil relations, rights, and duties, consisted of 50,000 separate, specific rules, then the civil code, by the largest allowance, would not contain, expressly or by necessary implication, more than 5,000 of this number.

This condition seems to demand most imperatively that the principle of interpretation, which I have suggested, should be followed by the courts without deviation, in order to prevent the law of the state from becoming inextricably confused and contradictory. In all our litigations arising under every branch of the mercantile or commercial law, or under the general law of contracts, or of personal rights, etc., the courts must invoke and be governed by the settled rules of the common law and of equity outside of the code, as well as the rules on the same subject matters contained in the code. In cases involving the law of agency, notes and bills, partnership, bailments, trusts, and the like, the decision must still frequently depend upon these external rules in place of or in addition to the doctrines which the authors of the code have incorporated into its text. In fact, the great majority of the *practical* rules upon which the courts must rely, are thus to be found outside of the code,—parts of the great common law and equity systems left untouched by the codification. Such being the case, an obligation of the highest character rests upon the courts, that the results of their invoking and following these two species of authority thus binding upon them, should be harmonious, consistent and not contradictory. For example, a cause arising under the law of agency, decided upon the authority of a provision in the civil code, should not conflict in any manner with a similar cause decided under the authority of a common law rule external to the code. This obligation, I submit, can be successfuly fulfilled only in one manner,—by interpreting all the provisions of the code as declaratory of common law or equitable doctrines and rules, unless the intent to make a change clearly appears from the unequivocal language of the text. The

results of adjudication in all controversies would then harmonize with the settled rules of law and equity that have not been embodied in the code; all conflict between the rules expressed in the code and those external to it would be obviated. The truth of this conclusion will clearly appear, I think, from the following considerations. If the courts do not adopt this uniform principle of interpretation, but on the contrary interpret *each* provision of the code textually, according to its literal terms, without reference to the pre-existing law or equity, than one or the other of two alternative effects must necessarily be produced. *First.* Either there would arise the very antagonism, conflict and contradiction, which I have mentioned, between the special and particular rules derived by judicial decision from the doctrines formulated in the code, and those contained in decisions based solely upon the authority of common law and equity doctrines and rules still left in operation outside of the code; or, *Second.* In order to escape this conflict, the courts would be compelled to modify and alter, to a greater or less extent, the whole body of common law and equitable rules existing external to the code, so as to bring them into a conformity with the express provision of the code as thus interpreted and construed. In other words, the courts would be forced to undertake the enormous and even appalling labor of reconstructing the entire system of common law and equity jurisprudence, so far as the same had not been embraced within the text of the civil code. There is plainly no other possible alternative. One or two simple examples will sufficiently illustrate my position. If § 2,444 concerning the liability of one held out as a partner, heretofore mentioned, is interpreted by the courts as simply declaratory of the established common law general doctrine, without modification, then all the special rules on the subject, laid down by the courts, by which persons are declared to be liable under a great variety of particular circumstances, would still remain in full force, to be invoked by our judges under proper cases, as much applicable and authoritative under the code as before its enactment.

But if this section should be interpreted textually, as altering and restricting the common law doctrine, by means of the word "communicated," then, as a matter of course, many of these special rules, resulting from the common law doctrine, would no longer be applicable; they must either be altered, or else entirely rejected and others substituted in their place. Again, under the common law, general doctrines concerning the nature and extent of "express" authority, and "implied" authority of agents, hundreds of special rules have been laid down by the decisions, declaring principals to be liable or not liable, as the case may be, from the acts of their agents under particular circumstances. If §§ 2,316 and 2,317 are interpreted as merely declaratory of these com-

mon law general doctrines without modification, then all of these special rules would be as applicable and as binding upon the courts under the code as before it, and the law of agency would continue to be a consistent and harmonious system. If, however, these sections are interpreted textually, as modifying the common law doctrines to such extent as would seem to be required by a strict adherence to the very letter, it is not too much to say that the law, which has regulated the relations between principals and third persons, arising from the acts of agents, would thereby be revolutionized. The courts would be compelled, virtually, to reconstruct this most just and equitable branch of the law merchant.

Fourth and last. The very defects, omissions and characteristics of the civil code in its language, style and mode of composition, described in previous articles, are most urgent grounds for adopting this principle of interpretation.

The ground stated under the foregoing head may possibly be regarded by some as merely theoretical and speculative, and as having no practical value. Some members of the bar may, perhaps, consider it a matter of no importance whether the peculiar excellencies of the common law are retained in construing the code, or whether the authors of the code had no general intent to change the common law doctrines, or whether the results of judicial decisions based on the code, are consistent and harmonious, and therefore the reasoning may be treated by them as having no force and cogency. On the other hand, the reasons which fall under the present head, are in every respect practical; their force must be recognized and felt by every lawyer; their effect cannot be be obviated, since they arise from the very fact that a judicial interpretation of the text is necessary.

It has already been shown in previous articles that the definitions, statements of doctrines, and rules contained in the civil code, every where assume and require a full knowledge of the previous common law and equity rules concerning the same subject matters. No meaning at all can be given to some of the provisions, and no full, complete and accurate meaning to any of them, without a resort to the common law and equity as they existed at the time when the code was adopted. To illustrate by one or two examples taken at random, without such a reference not only to the general doctrines, but even to the minute and special rules of the common law and of equity, it would be impossible to give any true interpretation,—hardly possible to find any satisfactory meaning,—of the sections concerning libel and slander, fraud, suretyship, guaranty, contracts of indemnity,[1] etc. On the other hand, certain

Civil Code, §§ 45-47, (defamation); 1,572, 1,573, 1,709, 1,710, (fraud); 2,840, 2,845, (suretyship); 2,794, 2,819, (guaranty); 2,778, (indemnity).

subdivisions of the sections concerning duress, furnish an example of an unequivocal intent to alter,—or rather add to,—the settled doctrines of the common law.[2] I need not add anything on this subject to what was said in previous articles. Now, since the provisions of the code thus assume a knowledge of pre-existing law, and since a resort thereto by the courts is absolutely essential, the only method by which any certain, consistent, and just results can be attained through an interpretation of these provisions, is by adopting and following the principle that they are, in general, declaratory of common law and equity rules. While the text of the code plainly discloses the pre-existing law and equity as its basis and source, it does not furnish the courts, in general, with any certain means of determining when or to what extent it departs from that original. The very characteristics of the text, its conciseness, condensation, abstract mode of statement, render it impossible for the courts, in interpreting a particular provision, to fix upon any plain meaning differing from the common law,—to decide in what instances, in what manner, and how far the general language had altered the rule of law or of equity on the subject previously settled. The provisions of the code refer the courts back to the previous law for their meaning and effect; but under the light thus obtained, no other and different meaning can with certainty and precision be given to their terms. Under this view, the principle of interpretation which we advocate, is not a matter of choice, it becomes a necessity. The practice of the authors of the code, heretofore described, of abandoning familiar legal terms and phrases, and of adopting in their place terms and phrases hitherto unknown in the legal nomenclature, is subject to the same observations. While these new, unusual and unknown words and phrases do produce more or less uncertainty, and thus require judicial interpretation to settle their meaning, they do not, in general, enable the courts to fix upon any clear and precise meaning different from the common law; they do not enable the courts to determine with exactness whether, and to what extent, the previous law has been altered.[3]

[2] *Ibid*, §§ 1,569, 1,570.

[3] In this connection, I add another instance of uncertainty, growing out of the very general mode of expression, and requiring judicial construction. The common law rule seems firmly settled that a factor having the goods of his principal in his possession for sale, can not pledge them for any purpose whatever without express authority. A pledge, no matter for what purpose, even though the money raised thereby was used by the factor for the benefit of his principal, was nugatory; the principal could disregard the pledge, and retake the goods from the pledgee without repaying the latter's advances. As this common law rule often worked great hardship in ordinary business transactions, it was modified, in the early part of the present century, by a statute of the British Parliament, called the "Factor's Act." Similar legislation has been enacted in many American states. This statute rendered such pledges valid as against the principals, although the factors had acted in violation of their authority in favor of pledgees who had made an advance on the credit of the goods pledged, in good faith, and without notice of the principal's rights. On this subject the civil code contains the following sections: In the article on "Factors," are the following: "§ 2,368. In addition to the authority of agents in general, a factor has actual authority from his principal: 1, to insure the property, etc.; 2, to sell on credit anything intrusted to him for sale, etc., *but not to pledge*, mortgage, or barter the same." "§ 23,69. A

It may be possible to draw up a code of the private civil jurisprudence, to which the principle of interpretation which I have thus advocated, would not necessarily apply.

If a code was so constructed that, while it formulated all the doctrines and rules of the common law and equity, with such alterations, amendments, and additions as were thought proper, it still retained in all its parts the distinguishing excellencies of those systems,—their elasticity, their power of expansion, of development, of continuous adaptation to the progressive condition of society; if such a code, in addition to the detail of doctrines and rules, also embodied all the leading *principles* of the common law and of equity, to be interpreted not according to the letter of their statutory expression, but as living and fruitful sources of doctrines and rules, to the same extent and in the same manner as before their being clothed with a statutory form; if such a code contained *all* of the existing doctrines and rules of the jurisprudence, stated in a complete manner, in consistent phraseology, with sufficient amplifications, explanations, illustrations, and applications; then the courts might look no further than the text of the legislation; might regard the code as the origin, the creation of a new era of jurisprudence. It was this kind of code and this alone which Austin advocated in all his writings, as capable of producing the benefits resulting from codification. It is this type of code which Lord Westbury, Sir James Fitzjames Stephens, and other leading law reformers in England have contemplated in all their discussions. It is such a code of the common law which Sir James Fitzjames Stephens prepared, and which is now pending before the British Parliament. Codes of this description have been established for the British dominions in East India. Having such precedents as these before them, which they might have followed, it is certainly a misfortune that the authors of the California code adopted, in place thereof, the work proposed by the New York commission, which was, at best, the mere outline of a civil code. The selection made by our state commissioners is now past remedy; the civil code must be accepted and acted upon as it is. The only mode by which its imperfections may be obviated, and the bene-

factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons *not having notice* of the actual ownership." In the chapter on "Pledges," there is the following: "§ 2,991. One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property, made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value." In Davis v. Russell, 52 Cal., 611, 616, the court cite § 2,991, and hold that it gives a factor the power to pledge. The court do not refer to the other sections above quoted, nor was their attention called to them by the arguments of counsel as reported. Even if by § 2,369 a factor has "ostensible" or implied power to pledge, that power is expressly confined to pledgees *not having notice* of the principal's rights of ownership. But the language of § 2,991 is so broad that it might seem to validate pledges made by factors to pledgees who had notice of the principal's rights, under some circumstances. Even if there be no direct conflict between these sections, there is an ambiguity as to their true meaning and operation, which judicial interpretation alone can remove.

fits of codification may be partially realized from it, is, I earnestly submit, by adopting, and strictly enforcing, this uniform principle of interpretation,—that all its provisions are to be regarded as simply declaratory of the previous common law and equitable doctrines and rules, except where the intent to depart from those doctrines and rules clearly appears from the unequivocal language of the text. This subject is, in my opinion, one of the highest practical importance. I respectfully commend the views stated in this essay, to the earnest consideration of every member of the bar who feels an interest in improving and perfecting the jurisprudence of his state.

It has been suggested to me that in giving § 55 of the civil code defining marriages as an example of uncertainty, in a previous article (*ante* p. 50) the remarks which I made concerning one mode of construing its language, might exert an influence upon the decision of any action which may be pending before the courts, involving the judicial interpretation of this section, and might thus be prejudicial to one or the other of the litigant parties. It is certainly unnecessary for me to say that no such effect was intended or suspected; nor shall I for a moment assume that suggestions, so casually made, *could* have the slightest influence upon the minds of judges in determining any pending controversies. The whole scope of my essay is apparent,—to point out various kinds of ambiguities and uncertainties which arise mainly from the phraseology, and mode of composition adopted by its authors, and which seem to require that a uniform system of interpretation should be followed by the courts, and to describe the system which, as it seemed to me, would produce the most beneficial results. All the examples selected, were given solely as illustrations or supposed illustrations of these positions. In speaking of § 55, the opinion, whether correct or not, was expressly given, that its true meaning and effect could only be determined by judicial interpretation. Nor could my remarks, I think, influence that interpretation in either way. When correctly understood, my remarks deal with the question, what reason or ground was there for altering the common law rule? rather than with the question, whether the common law has been altered? or the question, how or to what extent has it been altered? Still, since my comments may appear to some readers as dwelling mainly upon the difficulties or objections in the way of interpreting the section as changing the common law rule, the difficulties and objections in the way of a contrary interpretation might well have been presented more fully. Whatever weight may be due to the considerations before suggested in the former article, there are, in my opinion, equal, if not greater obstacles to an interpretation which treats the section as having made no material alteration in the rule as previously settled,—the common law rule. If, by the previous rule, after *verba in praesenti* the *copula* was sufficient to constitute a marriage, it seems almost impossible to suppose that in the phrase, "by a mutual assumption of marital rights, duties or obligations," the authors of the code and the legislature did not mean something more and different,—something additional. We may wonder at the employment of terms so unlike the usual phraseology of statutes, and may regret that words more definite and certain in their meaning were not selected; and still if we give any fair and reasonable signification to all the language, we can hardly escape the conclusion that "a mutual assumption of marital rights, duties or obligations," imports acts and conduct of the two parties towards each other, and rights and duties belonging to the marriage relation, which cannot possibly be embraced in the word "copula," or the word "consummation," or even, perhaps, the word "cohabitation." Exactly what is meant by the phrase, I repeat, only the courts can determine.

J. N. P.

CIRCUIT COURT, DISTRICT OF COLORADO.

S. S. WRIGHT ET AL. *v.* J. J. B. DUBOIS ET AL.

Filed, October, 1884.

PATENT OF MINERAL LANDS FROM THE UNITED STATES—RIGHTS OF PATENTEE—INTERFERENCE BY A STRANGER.—Where defendants have obtained a patent of mineral land, from the United States government, after all the preliminary steps required by statute had been duly taken, including the sixty days publication of notice, and where no adverse claim was filed by the complainants during such publication, but after the publication of notice had been completed the complainants objected before the local land office, and before the general land department, to defendants' right to a patent, and after hearings on said objections the defendants' title was sustained and a patent issued to them; *Held*, that the complainants not being connected with nor having any interest in the title cannot object to the patent on the ground of any alleged wrong which the patentees may have perpetrated against the government.

THE SAME.—The government as a land owner offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can complain. Publication of notice is a process bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the lands. Thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department and cognizable only there; if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy.

PETITION for a rehearing of an order made by the United States district judge denying an injunction. The facts appear in the opinion.

A. W. Rucker and *H. B. Johnson*, for the complainants.

L. C. Rockwell and *J. B. Bissell*, for the defendants.

BREWER, CIRCUIT JUDGE.—This case comes before me on a petition for rehearing on an order of Judge Hallett, denying an injunction. The defendants have a patent, and therefore hold the legal title. It is beyond question that, as a matter of fact, they discovered mineral wealth within the limits of their location. It is also beyond question that they complied with all the preliminary steps for obtaining a patent, including the sixty days' publication of notice; and that no adverse claim was filed by the complainants or their grantors during the pendency of such publication. It also appears that after the publication of notice had been completed, the complainants challenged before the local land office, as well as before the department at Washington, the right of defendants to a patent. That contest was protracted. Many hearings were had before the local land offices, as well as at Washington, and, as the result thereof, the title of the defendants was sustained, and the patent issued.

Question is made as to whether the defendants discovered mineral in their discovery shaft, and also whether the complainants had discovered mineral prior to the publication of the notice.

Now, some general propositions may as well be stated: first, the government, as the original owner, offers the title to these mineral lands, upon certain conditions, to whomsoever discovers mineral. The amount of land it will convey to each locator is limited, and certain forms of procedure are prescribed, but the primal fact is

that the lands are offered to those who discover the mineral. In this matter the government resembles a private land-owner who makes an offer to sell his land upon specified conditions. When the patent issues, the title passes from the government, and no one can question that title who has not prior thereto, by compliance with the conditions prescribed by the government, himself acquired an interest in the land. It matters not what wrong the patentee may have perpetrated upon the government—it, and it alone, can complain. In other words, when grantor and grantee are satisfied, a stranger has nothing to say. In Smelting Co. v. Kent, 104 U.S., 647, speaking of this question, the Court says: "This complainant cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands: Boggs v. Mining Co., 14 Cal., 271. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation." So whether or not it is essential, under the state law, that there be a discovery of mineral in the discovery shaft, no one can raise that question after the issue of the patent, unless he have prior equities in the land.

Indeed, as the primal fact is the discovery of mineral, I do not see how the government can avoid its patent on the ground that there was no mineral discovered in the discovery shaft, provided it was in fact discovered within the location, and this notwithstanding it may be conceded that the state law is operative and requires a discovery in the discovery shaft. This, like the time of publication of notice, the filing of the plat, etc., is mere matter of procedure, and if the substantive fact of the discovery of mineral exists, I do not see how the government, for any irregularities or defects of procedure, can equitably avoid its patent.

Again, it is, as stated, conceded that no adverse claim was filed by the complainants, and I think it follows therefrom that judgment has gone against them as to all claims which they may have had or supposed they had. The language of the statute is somewhat peculiar, and its peculiarities were commented upon by Judge Hallett in the opinion filed.

It reads: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2,325, revised statutes: "It shall be assumed that no adverse claim exists."

By whom assumed, for what purpose and to what extent? By the government, the owner of the land, the party offering it for sale; in order that the claims of all other parties to the land and the benefit of the owner's offer be presented and determined, and that thereafter the government may deal with the applicant alone, inquiring simply whether he had performed the prescribed conditions, and conclusively assumed. The proceedings before the land department are judicial, or *quasi* judicial at least. The publication is process. It brings all adverse claimants into court and failing to assert their claims, they stand at the expiration of the notice in default.

True, no adverse claimant or supposed claimant may be named in the notice, no process may be served personally upon him. But that does not avoid the notice or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated.

Unknown heirs are often thus brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases and many others present familiar illustrations.

The sufficiency of the notice in these cases is unquestioned, even though the adverse claimant be not named, and no personal service be had. And if the parties be brought in obviously it is that their claims be presented and determined. The succeeding section provides how such claims, if presented, shall be determined. Even without such section the purpose would be apparent. It would be grievous wrong to leave disputed claims unsettled, and when the owner of lands making such general offer prescribes time, place, tribunal and manner of settling adverse claims, such provisions are a part and condition of the offer, and should be vigorously insisted upon by the courts.

Conclusively assumed, any other rule would destroy the practical value of the provisions. If, notwithstanding his failure to adverse, a party may still present and litigate his rights, of what use to adverse? A failure to do so might give his adversary the advantage of a *prima facie* title, but the real question, the absolute rights, would remain undetermined The applicant would hesitate to improve and develop his property because ignorant of what contests were before him, what claims might be presented. And the contestant might wait till the evidence in favor of the applicant's right have ceased to exist or passed beyond his control and then unexpectedly come forward with his claims.

I do not mean that cases may not arise in which equity will interfere thereafter, if there be equitable grounds for interference, as where, by the acts of the applicants, those who might have adversed have been prevented, deceived or misled; but unless such equitable reasons exist, and none such appear in this case, he who fails to adverse until the expiration of publication is absolutely cut off and cannot be heard to say that he has prior rights.

Judge Hallett, in his opinion, finds that these complainants were in a position to adverse at the time of this publication. Notwithstanding the averments of the last bill, and affidavit of Mr. Wright, I think the general scope of the testimony sustains that finding.

But it is said by counsel that under the last clause of the statute quoted, any person may object that the applicant has failed to comply with the terms of the chapter, and why should they not have the same privileges as strangers? Have they forfeited their right by failing to adverse? It becomes necessary to see what rights this last clause gives; I think all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with.

He does not appear as a party asserting his own rights, but if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiæ*—a friend of the court—to suggest that there has been error and that the proceedings be stayed until further examination can be had. Such a protest does not bring the protestant into court for the assertion of his own title or rights; does not revivify rights lost by a failure to adverse.

True, if the protest or objection is sustained, the proceedings had will be set aside, new ones must be commenced and then the objector may be in a position to assert his rights, but if the protest or objection be not sustained, the objector, like an *amicus curiæ*, has nothing more to say in the matter. In other words, the right to protest is not the right to contest. The latter is lost by the failure to adverse. The former remains open to every one, holders of adverse claims as well as others. But the protest is only to the officers of the government, challenges only the applicant's claims and in no manner brings up for consideration any claims of the protestant.

Such a protest can be made only before the land department, and if there rejected, the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the courts, for the courts are only open to those who have rights to assert; they sit for the determination of controversies. They do do not, at the instance of strangers, review the regularity of proceedings between parties, who are competent to determine such regularity, and who do not themselves invite any judicial determination.

These in brief are my views, and without pursuing the discussion further I sum up these propositions.

First—The government as a land owner offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere.

Second—Publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented it is

conclusively presumed that none exist and that no third parties have any rights or equities in the land.

Third—Thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department and cognizable only there; if sustained by the department the proceedings had by the applicant are set aside; if overruled the protestant or objector is without further right or remedy. Entertaining these views I think the petition for rehearing must be denied.

SUPREME COURT OF COLORADO.

BOARD OF COUNTY COMMISSIONERS *v.* W. B. OWEN ET AL.

Filed October 1, 1884.

CONSTITUTIONALITY OF A STATUTE IMPOSING A TAX.—The following amendment of chapter 88, of the general laws of Colorado, was enacted by the legislature in 1879: "The board of county commissioners, of the respective counties of the state, may levy a property tax for road purposes, which shall not exceed one dollar on each one hundred dollars, to be levied and collected in the same manner, and at the same time, as other property taxes are levied and collected, in each year; but all property included within the limits of incorporated towns or cities shall not be subject to the tax." *Held*, that the last clause of this statute, purporting to exempt property within incorporated towns and cities, is unconstitutional and void, being in conflict with provisions of the state constitution, which declare that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax," and that "all laws exempting from taxation property other than hereinbefore mentioned, shall be void." And such statute must be construed and enforced as though such final clause had never been enacted.

APPEAL from the county court of Gunnison county. The facts appear in the opinion.

Rogers & Cuthbert, and *W. D. Beckett*, for the appellees.

HELM, J. By the single assignment of error presented in this case, we are called upon to determine the constitutionality of section 1 of an act to amend chapter 88 of the general laws.

This amended section reads as follows:

"The board of county commissioners of the respective counties of the state may levy a property tax for road purposes, which shall not exceed one dollar on each one hundred dollars, to be levied and collected in the same manner and at the same time as other property taxes are levied and collected in each year; but all property included within the limits of incorporated towns or cities shall not be subject to the tax." Sessions laws of 1879, p. 159.

This action was brought and must be determined under the statutes on the subject as they existed prior to 1883.

It is contended, and the county court held, that the last clause of the foregoing statutes is void, because it is in violation of sections 3 and 6 of article 10 of the state constitution; the former section of this instrument provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, etc., * * *"

"The latter declares that all laws exempting from taxation property other than hereinbefore mentioned, shall be void."

The property relieved from the road tax by the act of 1879 is not among the exemptions above referred to.

In this state there is no township organization; neither is there any road districting within the county, such as exists in some of the other states. By statute the county commissioners are commanded to divide their respective counties into suitable road districts. But this division of the county has no bearing or effect whatever upon the assessment and collection of the property tax in question, except that the district overseers perform certain duties when the same is delinquent. The county commissioners control exclusively the assessment thereof throughout the entire county; they also apportion and disburse the revenue therefrom as in their judgment is for the best interests of all the citizens of the county; the collection thereof is made in the same manner and by the same officer as in that of other county taxes. In short, under our laws, for the purpose of assessing, collecting and disbursing the "property tax for road purposes," each county constitutes but a single road district.

The county commissioners are "the authority levying the tax;" the boundaries of the county are the "territorial limits" of the "authority levying the tax."

The tax under consideration is strictly an *ad valorem* charge, and must be "uniform" upon all property within the county not exempt from taxation.

But realty and personalty within the corporate limits of a city or town are as much a part of the taxable property of the county as are farms and chattels outside such corporate limits. There seems to be no escape from the conclusion that a legislative declaration entirely exempting the former from the payment of the tax in question, is in conflict with the constitutional inhibition, and therefore void.

In Illinois this view was adopted with reference to the power of township authorities to levy a similar tax upon property located within a city located in the township: O'Kane v. Treat et al., 25 Ill., p. 557. See Fletcher v. Oliver, 25 Ark., 289; Wilson v. Supervisors of Sutter County, 47 Cal., 91,

Had the effort been made to relieve property within towns and cities from having its proportion of the cost of constructing a court house, or other county building, there would probably have been no disagreement as to the constitutionality of the statute. But it is argued that the city has to construct and keep in repair its streets, bridges and culverts; that for the expenses thus incurred, only property within corporate limits is answerable, and therefore that it is inequitable to tax this property for the maintenance of the county highways.

We may agree with counsel upon these propositions; and we may venture the opinion that the legislative intent in the provision we

are now considering, is beneficient and wise, but our answer to the argument must be, that the exemption *as declared* in the statute is forbidden by the constitution; and we should not, by misconstruction of the latter instrument, attempt to do away with the apparent injustice.

Had the legislature undertaken to commute this tax for an equivalent burden to be borne by the towns and cities; or had it declared that the tax thus collected from property within such corporation should be expended on the streets thereof; or that a similar and equal tax should be so collected and expended, the objection might have been obviated: See Baird et al. v. The People, 83 Ill., 387; Cooper v. Ash, 76 Ill., 17.

And it is possible that the statute prohibited the collection of this tax from property within towns and cities which "levy such taxes for the streets and alleys thereof, a different conclusion might be reached;" See Martin v. Aston, 60 Cal., 63.

Construing the law as we find it, however, we are constrained to hold the latter part of it void.

But, the unconstitutionality of one provision in a statute, does not necessarily render the entire statute or section void: Tripps v. Overnocker, vol 4, Colo. L. R., 405 and citations.

If from the amended section of 1879, before us, the objectionable sentence were stricken out, a perfect law remains; there would be left the identical statute adopted by the legislature in 1877. We do not feel justified in concluding that the legislature intended to have the whole section stand or fall with the exemption provision subsequently added. We think the valid portions thereof are not so connected with "or dependent upon" the void provision, as to fall with it. The statute may be regarded as if no such amendment or addition existed.

The county commissioners of Gunnison county did not so interpret and apply the law, however, and therefore the judgment in this case must be *affirmed*.

SUPREME COURT OF NEVADA.

LAKE v. LAKE.

Filed, September 24, 1884.

DIVORCE—NEW TRIAL OF PORTION OF ISSUES.—In an action for a divorce and a division of the community property, the lower court has power to order a new trial of the issues relating to the character and disposition of the property alone, if material error occurred in the trial of and affecting that branch of the case only, without ordering a retrial of all the issues presented by the pleadings.

HUSBAND AND WIFE—SEPARATE PROPERTY—RENTS, ISSUES AND PROFITS.—All the property owned by a husband at the date of his marriage, as well as that subsequently purchased by him, and the rents, issues and profits thereof, up to March 7, 1865, the date of the first statute governing the property rights of husband and wife, belongs to him as his separate property. Under such statute the rents, issues and profits of the separate estate of the husband did not become common property.

PROPERTY ACQUIRED DURING COVERTURE—COMMUNITY PROPERTY.—Property acquired during coverture presumptively belongs to the community, and the burden is on the person asserting the contrary to overcome such presumption by proof, sufficiently clear and satisfactory to convince the court or jury of the correctness of his claim.

CONSIDERATION OF DEED—PAROL EVIDENCE OF.—Parol evidence is admissible to show that the real consideration of a deed was other property given in exchange, instead of the money stated therein.

COMMUNITY PROPERTY—PROOF OF—HUSBAND AND WIFE.—It is not necessary to prove that property is, in fact, the product of the joint efforts of the husband and wife in order that it may be declared community estate. If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise or descent, or by exchange of his individual property, or from the rents, issues or profits of his separate estate, it belongs to the community, although the wife rendered no assistance in its acquisition.

SEPARATE AND COMMUNITY PROPERTY—PROFITS—LABOR AND SKILL OF SPOUSES.—The profits of separate property which accrue mainly from the property rather than from the joint efforts of the husband and wife, or either of them, belong to the owner of the property, although the labor and skill of one or both of the spouses may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of both, they belong to the community.

THE SAME—PROFITS RESULTING FROM HOTEL.—The profits resulting from the ordinary use of a hotel, the separate property of the husband, either from renting or carrying on the business himself, belong to the husband as his separate estate.

DIVORCE—DIVISION OF PROPERTY—DISCRETION OF COURT.—After a divorce has been granted the division of the property is left to the discretion of the trial court, and the exercise of such discretion will not be interfered with by the appellate court unless the same has been abused.

APPEAL from a judgment of the seventh judicial district court of Washoe county, entered in favor of the defendant, and from an order denying plaintiff's motion for a new trial, as to the property rights involved. The opinion states the facts.

C. S. Varian, for the appellant.

R. M. Clarke and *T. Coffin*, for the respondent.

LEONARD, J. This is an action for divorce on the ground of cruelty.

In her complaint, plaintiff alleges that there is a large amount of property belonging to the community, and prays for an equal division thereof between herself and defendant.

Defendant denies that any of the property described belongs to the community, and alleges that it is all his individual estate.

When the cause came on for trial, it was agreed by the respective parties, and ordered by the court, that the issues relating to the disposition of the property should be withdrawn from the consideration of the jury, and reserved for future consideration and determination by the court in case a divorce should be granted.

Upon the special findings and verdict of the jury, the divorce prayed for was granted. Subsequently, the court, sitting without a jury, tried the issues relating to the character and disposition of the property, and found that it belonged to the defendant individually.

Thereupon a formal decree was entered as follows: "Upon the verdict of the jury, heretofore returned in this case, and the order of the court made thereon, and in consideration of said verdict and order, it is adjudged and decreed that the marriage relation, heretofore existing between the said Jane Lake and M. C. Lake, be, and the same is hereby set aside and annulled, and the said parties be,

and they are hereby released therefrom. And upon the findings and decision of the court, heretofore made upon the issues, joined between the parties, concerning the property, * * * it is ordered, adjudged and decreed by the court, that the property, real and personal, described in the complaint, is, and that it be, and remain the separate property of the defendant, M. C. Lake, and that the plaintiff take no part thereof, or interest therein, except as hereafter specifically decreed."

Then follows an order that the defendant pay plaintiff monthly, so long as she shall remain unmarried, the sum of one hundred and fity dollars, and fifty dollars for the child, and that said sums be, and remain a charge and lien upon certain real property described. In the decree the court reserved jurisdiction to modify the allowance at any time

Defendant did not move for a new trial, or appeal from the judgment, or any part thereof, but plaintiff so moved, as to the issues, respecting the property rights alone. She did not ask for a new trial of the issues touching the alleged cruelty, and her right to a divorce.

The motion was denied, and this appeal is from the order denying a new trial, and from "that part of the judgment * * * affecting the questions of alimony, and the property rights of the parties to said action."

It is first urged by counsel for respondent that a new trial is a re-examination of all the issues of fact raised by the pleadings; that it could not have been granted, in this case, as to property rights alone; that a motion to re-try a part of the case was a nullity; and, consequently, the court did not err in overruling the motion made.

The question is squarely presented, then, whether the court below had the power to order a new trial of the issues relating to the character and disposition of the property alone, if material error was shown in the trial of, and affecting that branch of the case only; or, is it true that all the issues made by the pleadings, if any, must have been re-tried?

This question is not only exceedingly important in the matter of practice, but it is also of great moment in the case in hand, if, as claimed by appellant, the court erred in deciding that the property belongs to defendant individually; and, for the purposes of the present discussion, we must assume that the claim of error is well founded.

And, too, the legal presumption is, that the issues upon the principal branch of the case, the divorce, were tried and determined according to law.

Defendant is presumed to have known the law; and, if it is true, as claimed by him, that a new trial could not be had of one part of the case, then he knew that the court could not grant plaintiff's motion; and if he wanted a new trial of the other part, he should have applied upon the entire case. Failing to do so, or to appeal, the presumption is that the divorce was properly granted.

On the other hand, if the lower court had the power to grant a new trial of a part of the case, then defendant should have applied also for a new trial of the issues determined against him, and failing to do so, the presumption is as above stated.

It follows, therefore, that we must proceed upon the presumption that the principal issue was tried and determined without error, and, as to that issue, that there is no cause or ground for a new trial.

If it is true that, in this case, the district court could not grant a re-hearing of the issues touching the property rights, without disturbing the decision upon the principal issue, then it is certain that in every instance, where a new trial is granted, the order must embrace the entire case, however distinct the issues may be; and, although it may be admitted, as to one cause of action, that the trial was free from error or exception.

For here we have a case where plaintiff must show herself entitled to a divorce before she can claim any separate property rights, and that she has done already.

At another trial, before she could ask the court to retry the portion of the case wherein error is alleged, she would be obliged to establish a right which is already determined in her favor, without any suggestion of error. She would be obliged to take the risk of defeat at another trial, as to the principal issue, in order to obtain rights incident to those already established. She would have to do over again what is already well done, and then, if successful, establish such property rights as she might have, instead of commencing at the issue the trial of which, alone, is claimed to have been affected by error.

Plaintiff applied for a divorce and a division of alleged common property. There were separate trials, however, of the issues presented by the pleadings, those relating to the divorce by a jury, and those touching property rights by the court. The special findings by the jury, adopted by the court, established plaintiff's right to a divorce.

The verdict of the jury and the order of the court thereon were complete before the trial fixing the property rights, and if error crept in at the last trial, it could not have affected the result of the first.

The trial of the issues relating to the divorce was as unaffected by any errors that occurred at the trial had in relation to the property, as it would have been if plaintiff had filed her bill for divorce, prosecuted it to judgment in her favor, without any showing by either party of the existence of community property, and had afterwards brought an action to recover her share of such property.

That she could have pursued such a course we have no doubt: De Gody v. Gody, 39 Cal., 157. If she had, and the result of the trials had been the same as in this, she could undoubtedly have applied for a new trial in the case relating to the property, without making application also in the other; and yet there would have been just as

much reason in that case for a double application, in order that justice might be done, as there is now in requiring her to include in her motion a request for a new trial of the issues relating to the divorce.

It is urged by counsel for respondent that the practice of re-trying less than the entire case would result in splitting one cause of action into many parts, thus increasing expenses, multiplying trials, burdening courts, and producing confusion and uncertainty.

If these results would follow in a given case, they might be urged against such practice in that case; but the argument does not apply here.

In this case, if the decree granting the divorce is correct, what reason can be urged against allowing that to stand and correcting the balance affected by the error? There is none, unless the law prohibits such practice in every case.

Suppose the court had found in favor of plaintiff as to both issues—this is to say, had decided that plaintiff was entitled to a divorce, and that the property belonged to the community; that both parties agreed to the correctness of the divorce proceedings and decree, but that defendant, believing the court erred in its decision concerning the property, had applied for a new trial as to that only. In that case, plaintiff could not have had cause for or desired a new trial of the issues relating to the divorce, because the decision was already in her favor.

Would not the defendant have had the right to say: "I concede the correctness of the decree granting a divorce; but the court erred in deciding that the property belonged to the community. I desire a re-trial of that question." Could the plaintiff have opposed the application because it did not include a request for a retrial of an issue already decided in her favor? If such is the law, it ought to be changed, and yet that is the theory of counsel for respondent.

New trials are permitted for the correction of errors, whether they are ordered by the appellate or trial court. Undoubtedly, if an error affects the entire case, a new trial should be granted of all the issues; but when it could not have affected but one of several separate, independent causes of action, or when, as in this case, it occurred, if at all, in the trial of an issue not involving the main issue of fact in the case, and the error can be corrected without disturbing the verdict or decision not affected thereby, we think it can be done.

The statute provides that in case a divorce is granted, the court shall make disposition of the property as therein stated.

The division of property is but an incident to or consequence of a divorce upon which it depends; but the divorce does not depend upon the property.

It is the constant practice of the United States circuit courts in patent cases, first to settle the question of infringement; and if, upon that question, the decision is in favor of the complainant, a decree is entered that he shall recover the rents, profits and damages re-

sulting from infringement. The case is then referred to a master to ascertain the rents, etc., and upon the report coming in, it is either confirmed, if satisfactory, or re-referred to correct errors. But the decree settling the rights of the parties, upon which the accounting depends, is not disturbed. When the master's report is satisfactory it is added to the partial decree before made.

The statute provides that "upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside or confirm or modify, any or all of the procedings subsequent to, or dependent upon such judgment or order, and may, if necessary or proper, order a new trial."

"Under that section," says the supreme court of the state of California, "the appellate court has full power to do, or cause to be done, what, according to the rules of law and equity, ought to have been done in the lower court, as to any or all of the parties plaintiff or defendant": Ricketson v. Richardson, 26 Cal., 155.

If a new trial ought to have been granted by the lower court, the appellate court will reverse the order denying it, and order a new trial.

The statute permits this court to grant a new trial. Now, if a new trial necessarily means a re-examination of all the issues made by the pleadings, what power has this court to remand a case for new trial upon one or more issues, leaving the findings upon the other issues standing?

But that has been, and is, done in California under a similar statute: Soule v. Dawes, 14 Cal., 247: Soule v. Ritter, 20 Cal., 522; Marijon v. Pioche, 10 Cal., 545; Jungerman v. Bovee, 19 Cal., 364; Argente v. City, 30 Cal., 464; Billings v. Everett, 52 Cal., 663; Glasscock v. Ashman, id., 422; Watson v. Cornell, id., 91; Le Clert v. Oullahan, id., 254; Phipps v. Harlan, 53 Cal., 87; Evans v. Jacob, 59 Cal., 628.

The statute does not provide in terms that either this or the trial court may grant a new trial of a part of a case, but it permits both to order a new trial.

It does not provide whether the motion shall include the entire case or not. It is evident, however, that the motion should be as broad as the order, but it need not include more.

If, in this case, the trial court could have granted a new trial upon the second and dependent branch of the case alone, had the motion embraced the whole case, it could have done so upon the motion made.

It is idle to contend that the motion must include all the issues, if the court can grant it in part and deny it as to the balance. It would be a vain thing to require the applicant to ask for more than is or ought to be granted.

If counsel for respondent is correct, had the court below ordered a new trial upon the property issues alone, this court must have

reversed the order, on appeal therefrom, upon the ground that the trial court had not power to make it, although the appellate court could have made the same order, on appeal by appellant from an order refusing to grant a new trial upon that issue.

Unless the statute so provides, would it not be strange if a remittitur should go from the court directing a change in a judgment or order, when, had it been so made and entered below, it would have been reversed on appeal.

It is true that, in Coombs v. Hibberd, 43 Cal., 453, it was held that, when an application for a new trial has been made in due form, upon a settled statement, and the court has passed on the motion denying it, the court can not afterwards vacate the order and grant a new trial, although on appeal from the first order the appellate court might have reversed it and granted a new trial as the district court did.

The court said the plaintiff could not make two successive motions for a new trial upon identical grounds, and that to vacate the order denying a new trial was equivalent to a renewed motion for a new trial; that the time within which a new trial could be applied for was limited by statute, which would be practically enlarged if a new trial could be granted after it had once been refused. In short, it was held that the district court was prohibited by statute from making its second order for the reason given.

So, the same court has held that where the lower court has granted an injunction upon an order to show cause, it cannot afterwards dissolve the injunction, or entertain a motion for that purpose, although the appellate court, on appeal, may reverse the order granting the injunction, and direct it to be dissolved: Natoma Water Co. v. Parker, 16 Cal., 84.

The ground of the decision was that, by statute, the privilege of moving for a dissolution upon the filing of the answer was limited to cases where the injunction was originally granted without notice to the adverse party.

It is patent that those decisions do not militate against appellant's views of the law of this case; for here there is not an intimation in in the statute that the power of the trial court is not co-extensive with that of the appellate court in the matter of granting new trials.

But it is said by counsel for respondent that, under the common law, a new trial could not be granted for a part only of a case, and that the civil practice act provides no different rule, and, consequently, that the common law rule must prevail.

It is not necessary at this time to note the many changes wrought by the code as to court practice. It is enough to say that they are numerous and far reaching. Artificial forms and rules are abolished and simple methods adopted, with the view of dealing out justice between the parties, regardless or any error or defect in the pleadings or proceedings, which shall not affect their substantial rights.

It is also true that, under the common law practice, a new trial could not be granted in a civil case at the instance of one of several

defendants: Bond v. Spark, 12 Mod., 275; Berrington's case, 3 Salk., 362; Parker v. Godin, 2 Strange, 814; Bac. Abr., Trial, L.

It was held that, if the verdict was set aside, the case must come to trial, just as it did before, against all the defendants: Sawyer v. Merrill, 10 Pick., 18; Brown v. Burrus, 8 Mo., 28.

The ground of the rule was stated by Mr. Justice Lawrence, in Rex v. Mawbey, 6 T. R., 640, where he said: "Arguments drawn from civil cases are not applicable, because in those cases there is only one *venire* on the record, and one assessment of damages; but that is not so in criminal cases."

And commenting upon the rule in Bicknell v. Dorion, 16 Pick., 483, the court said: "This probably discloses the ground of the rule in civil cases. When a verdict is set aside, a *venire facias de novo* is awarded, and no notice is taken of the first *venire* and the proceedings under it, and there would be nothing on the record to support the verdict in favor of those who have obtained one. * * * But however this may be in the English courts, and in those courts which conform strictly to common law practice, we have no difficulty here, because from the earliest times we have departed from that practice; no *venire* is awarded in making up the record, and the record is made to exhibit a plain narrative and history of the proceedings, as they occur."

And the court held that it had power to set aside a verdict as to one defendant without disturbing it where it was in favor of the others, although there was no statute authorizing such action.

Another reason of the rule that a new trial could not be granted of a part of a case, was that every judgment was composed of an entirety of adjudication, and nothing less than the whole could be objected to on appeal or otherwise.

But under the code, the reason of the rule no longer exists, and consequently, in a proper case, courts are not bound by the rule: Lake v. Lake, 17 Nev., 336.

An appeal can be taken from some specific portion of a judgment on order.

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

In Lake v. Lake, *supra*, we said: "Under our practice, dissimilar judgments may be pronounced in the same action. For instance, in an action on two promissory notes, the final determination of the rights of the parties in the action may comprise a judgment in favor of the plaintiff upon one, and against him, and in favor of the defendant upon the other."

Under the present statute of Iowa, a new trial is defined to be "a re-examination in the same court of an issue of fact, or some part or portion thereof, after verdict by a jury, report of a referee, or a decision by the court."

The statute also provides that "the former report, verdict, or decision, or some part or portion thereof, shall be vacated and a new trial granted on the application of the party aggrieved, for the following causes. * * *:" Code of Iowa, 1873, section 2,837.

Section 2,849 provides that "every final adjudication of the rights of the parties in an action is a judgment, and such adjudication may consist of many judgments, one of which judgments may determine for the plaintiff or defendant on the claim of either as an entirety; or when a claim consists of several parts or items, such judgment may be for either of them on any specific part or item of such aggregate claim and against him on the other part thereof; or a judgment may, in any of these ways, determine on the claims of coparties, on the same side, against each other."

"Any party who succeeds in part of his cause, or in part of his causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other:" section 2,850. And see Revision for 1860, section 3,121.

These provisions are substantially like ours on the subject of judgments, although our statute does not provide, in terms, that a party who succeeds in part may have the entry express judgment for him for such part as he succeeds upon, and against him on the other part.

But the court may undoubtedly instruct the jury to designate upon what issue they find, and also how they find upon each issue: Tiffany and Smith's N. Y. Prac., vol. 1,566, and judgment must be entered in conformity with the verdict.

In actions tried by the court without a jury, the decision may embrace findings upon each issue, and the judgment must be entered accordingly. Upon the subject of judgments the code of Iowa for 1860 was substantially like that of 1873. It went into effect September 1, 1860. Prior to that time the code of 1851 was in force.

The code last mentioned provided that "all final adjudications of civil actions are judgments:" Section 1,814.

"Judgment may be rendered for or against one or more of several plaintiffs, or defendants, or the court, where practicable, may determine the ultimate rights of the parties on each side as between themselves and give judgment accordingly:" Section 1,815.

It will be seen that the sections just quoted are, in effect, like ours.

The only provision that we are able to find in the code of 1851 upon the subject of new trials, is that "motions in arrest of judgment, or for a new trial, must be made within a reasonable time, and at the term of court at which the trial took place: Section 1,808.

Now, in 1859, when the code of 1851 was in force, the supreme court of Iowa, in Woodward v. Horst, said: "It may be admitted that as a general rule, a new trial, when granted, is awarded for the entire case, and that ordinarily, courts will not dispose of a case by piecemeal. And yet, when not attended with too much confusion

or inconvenience, or where it can be done without prejudice to the rights of parties, there is no substantial or valid objection to departing from the general rule. In this case there need be no confusion, and certainly there is no prejudice. Defendant admits, in his answer, both accounts, but pleads in avoidance. The jury found properly that this plea was sustained as to one count, but erred in their finding upon the second count. What purpose is to be gained then by awarding a new trial as to a part of the case not necessarily depending upon, or connected with the other, and which has already been once properly decided."

(And see Dawson v. Wisner, 11 Iowa, 8; Berner v. Frazier, 8 Iowa, 77; Zaleski v. Clark, 45 Conn., 404; Holmes v. Goodwin, 71 N. C., 309; Menony v. McIntire, 82 N. C., 106; The People ex. rel. Coulter v. New York C. P., 19 Wend,. 118; Price v Harris, 25 Eng. Com. Law., 160; Kent v. Whitney, 9 Allen, 65; Patten et. al. v. City of Springfield, 99 Mass., 635; Hubbell v. Bissell, 2 Allen, 201.)

In Hodapp v. Sharp, 40 Cal., 69, the action was to recover possession of two distinct quarter-sections of land and for damages for its use. Plaintiff recovered judgment for restitution of both quarter-sections, together with two hundred and forty dollars damages.

Defendants moved for a new trial, which was denied, and the appeal was taken from the judgment and order denying a new trial. The supreme court decided that as to the southwest quarter, the plaintiff was not entitled to recover, and inasmuch as the record did not furnish the data for the apportionment in respect to the quarter-sections of the damages recovered for the use and occupation of the premises, the judgment would have to be reversed unless such damages should be remitted.

It was also ordered "that upon the plaintiff's remitting such damages * * * the judgment for the recovery of the possession of the northwest quarter * * * be affirmed; and that the judgment for the recovery of the possession of the southwest quarter of the same section * * * be reversed, and the cause remanded for a new trial, as to the last mentioned tract of land."

If the damages had been apportioned in the court below, it is plain that the court would have affirmed the judgment as to one tract and reversed it and ordered a new trial as to the other; and the result would have been that, as to one tract, plaintiff would have had judgment entitling him to possession, while a new trial would have been had as to the other.

Had the damages been apportioned, the court would have ordered a new trial of one cause of action and affirmed the judgment as to the other. The result in the lower court would have been precisely the same as though that court had granted a new trial as to the southwest quarter and refused it to the other.

The statute says the supreme court may order a new trial; so may the district court. But the supreme court may order a new trial as to a part of a case; then why may not the district court? What reason was there for compelling a litigant to go to the supreme court

in order to get his rignts as to a part of the case, but permitting him to get them in the trial court if the entire case is affected by error?

In considering an appeal from an order granting or refusing a new trial this court has the record before it that was before the court below, and in our decision we say whether or not, upon that record, the court below erred.

Since there is nothing in the statute concerning new trials authorizing the conclusion, how could we say, in any case, that the trial court erred in granting a new trial as to the entire case, or an independent part thereof, when, if it had done otherwise, we would have reversed its ruling and ordered it to proceed according to the order appealed from?

Our opinion is that the court below had power to grant a new trial of the issues relating to the property alone, if the statement showed error in the trial thereof, which materially affected the rights of plaintiff.

The court found that, at the time of marriage, plaintiff was without property, and that she has not since acquired any by gift, devise or descent; that at the time of marriage defendant owned and possessed, in his own right, valuable real estate and personal property, which embraces a large portion of the property in controversy, and which has yielded large rents, issues and profits, aggregating about two hundred and six thousand dollars; that defendant exchanged a portion of said real property, so owned by him at the time of marriage, for other real property, which he now owns, and a portion he has, since his marriage, sold, and invested the proceeds thereof, together with the rents, issues and profits, in other property, now owned by him; that since their marriage, plaintiff and defendant have neither jointly nor severally engagod in any profitable or remunerative business, out of which any of the money or property in controversy was acquired, and that there is now no common property; that the rents, issues and profits of the separate property of defendant, owned by him at the time of marriage, accruing since, after deducting therefrom all losses and depreciations suffered by defendant, aggregate more than the total cost of all the property acquired since the marriage, and more than the present total value of all the property in question, the title to which has been acquired by defendant since the marriage; that all the property in controversy, except that which defendant owned at the time of marriage, has been acquired by him by purchase or exchange, part by actual barter or exchange for real property owned by him at the time of marriage, and all the balance by purchase, with moneys arising from sales and rents of separate real estate and personal property, tolls arising from separate property, and interest received from loans of moneys that belonged to defendant alone; that at the time of marriage, defendant owned a toll road and bridge, and collected tolls thereon, conducted the Lake House hotel, and a merchandise business therein, cultivated some lands, and had certain moneys at interest; that after the

marriage, and until March, 1872, he conducted and maintained said toll road and bridge, and collected from tolls about seventy-five thousand dollars, net; that plaintiff contributed no labor, advice or assistance in the operation of said road or bridge, or in the farming business mentioned; that immediately after marriage plaintiff and defendant commenced to reside at the hotel, where defendant conducted the hotel business until the fall of 1868, when the premises were rented until January, 1870, at which time defendant resumed possession and conducted the business thereof, until the summer of 1871; that during all of said times plaintiff resided with defendant, and contributed, by her labor and advice, to the business; that defendant had his board and lodging out of the hotel business, and plaintiff was maintained, and her children, by a former husband, educated therefrom; that the crops raised by defendant, on his own lands, up to 1868, were either used in the hotel, or sold, and the proceeds had by him; that in 1866 defendant kept a hotel or eating-house, at Meadow Lake, California, for four or five months; that he constructed certain buildings necessary for use in the business, which were afterwards destroyed by fire; that plaintiff labored as a cook, and in serving upon the table, and contributed greatly to the business; that there was no profit in the hotel business at either place; that during all of said times defendant was engaged in loaning money at interest, collecting interest money, renting buildings and lands of his separate estate, selling such lands and investing the proceeds of such interest, sales and rents in loans, purchase of other lands, and in the construction of buildings; and that in these operations plaintiff contributed no labor or assistance; that since 1871 defendant has conducted farming operations on the lake ranch, consisting of nine hundred and seven acres of improved land, of the value of about forty thousand dollars; that thirty-three acres of this land was acquired by exchange of lands owned by defendant, before marriage, and the balance by purchase since marriage.

The evidence is undisputed that three hundred and fifty-four acres of this land was acquired by deed March, 1870, for a consideration of four thousand two hundred and fifty dollars; one hundred and sixty acres, September, 1871, for eight hundred and fifty dollars; thirty-three acres from Hatch, by exchange; eighty acres by patent from the state, May, 1874, and forty acres, also by patent, December, 1875, both in the name of plaintiff.

The court found that this property was the separate estate of defendant, evidently upon the ground that they were paid for out of his individual funds. Large crops have been raised on this ranch, which were fed to stock thereon or sold, and cattle and horses were raised and marketed. Plaintiff and defendant resided on the ranch several years, advised together and contributed their labor in their respective departments. Plaintiff faithfully performed all the duties of a wife.

We deem it unnecessary to state other findings.

The question presented to the court below was, whether, in law, the legal title to the whole or any part of the property described in the complaint was in the community or the defendant, and we are called upon to say whether or not the evidence is sufficient to support the findings.

Prior to the statute of 1865 (Stat. 1864–5, 239) the property rights of husband and wife were governed by the common law. That statute only affected property subsequently acquired: Darrenberger v. Haupt, 10 Nev., 46.

It follows that all property owned by defendant at the date of marriage as well as those purchased by him, and the rents, issues and profits of the same, up to March 7, 1865, the date of the first statute, belonged to defendant as his separate estate.

But it is claimed by counsel for plaintiff that, under that statute, the rents, issues and profits of defendant's separate estate, until the passage of the statute now in force (C. L., 151) became common property.

The statute of 1865 was passed pursuant to the constitution, which provided that "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed, more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband."

Under a similar constitutional provision, the legislature of California passed an act defining the rights of husband and wife (Stat. of 1850, 254), wherein, like our statute of 1865, it was declared that "all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be his separate property. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property."

But the California statute also provided that "the rents and profits of the separate property of either husband or wife shall be deemed common property."

This provision was left out of our statute, although the first part of the section of the California act containing it was copied *verbatim*.

In George v. Ransom, 15 Cal., 323, the supreme court held that the legislature had not power, under the constitution, to say that the fruits of the property of the wife should be taken from her and given to her husband or his creditors; that the sole value of property is in its use. Counsel for appellant admit the correctness of that decision, but they say there is no such constitutional provision as to the property of the husband, and inasmuch as the statute of 1865 did not make his rents, issues and profits separate estate, they

belong to the community, because acquired after marriage, and not by gift, devise or descent.

It is said, also, that the supreme court of California affirmed this theory of the law in Lewis v. Lewis, 18 Cal., 659. But it must be remembered that when that case was decided the statute of 1850, before referred to, was in force, except as affected by the decision in George v. Ransom. It was the law then that the rents, issues and profits of the husband's separate property should be deemed common property.

If we concede that the legislature might make the profits of his separate estate common property, still the fact remains that it did not do so, but, on the contrary, expunged the very words of the California statute that produced this result.

Again, since under the constitution the legislature could not lawfully make the rents, issues and profits of the wife's estate common property, in the absence of affirmative words making them such, the presumption is that there was no intention of doing so.

Now, the first and second sections of the statute of 1865 must be construed together. If, under the first, the profits of the wife's separate estate belongs to her, then we cannot say that, under the second, they belong to the community. And, if under the first, the profits of her estate belong to her, it cannot be said that a different rule should prevail as to him, for the language is precisely alike as to both. Besides, it would be unfair to take from one what is given to another.

And, too, it is evident from section 3 that the legislature intended that the wife's profits from her separate property should remain hers.

It provides that an inventory of the wife's separate property, except money in specie, should be executed and recorded, and thereafter a further inventory should be made and recorded of all other separate property afterwards acquired, excepting money whilst in specie and unconverted, and excepting the rents and profits of her separate property included in the original or any subsequent inventory, if the same was money, so long as it should remain in specie and unconverted. When the rents and profits of her separate property were converted into property other than money, it was her duty to record an inventory of the same, but the rents, issues and profits of her estate while in specie belonged to her without an inventory.

And, under section 5, all property belonging to her included in the inventory, as well as money in specie not so included, was exempt from seizure for the debts of her husband. Thus we find a plain recognition of the wife's right to the rents, issues and profits of her separate estate.

We are satisfied that under the statute of 1865, the rents, issues and profits of defendant's separate estate did not become common property: Williams et al. v. McGrade et al., 13 Minn., 51; Wells' Separate Property of Married Women, Sec. 112; Glover v. Alcott, 11 Mich., 482; Bishop on the Law of Married Women, Secs. 50, 94, 632, 776.

It is conceded that property acquired during coverture presumably belongs to the community. The burden is on the defendant in this case to overthrow this presumption by proof, sufficiently clear and satisfactory, to convince the court and jury of the correctness of his claim as in other cases.

Respecting the amount and character of evidence required to overcome the presumption mentioned, the supreme court of Michigan has expressed our views in Davis v. Zimmerman, 40 Mich., 27, where it said: "Some Pennsylvania cases are cited, in which the court has used somewhat strong language respecting the evidence which shall be required to make out a gift from husband and wife. Chief Justice Black said in Gamber v. Gamber, 18 Pa. St., 363, 366, that a married woman claiming property must show her right 'by evidence which does not admit of reasonable doubt.' This is a very strong statement, and lays down a much more severe and stringent rule than is applied to other persons. In this state, no such distinction is recognized. Convincing proof is required, but nothing more. No doubt the circumstances of the relation, and the facility with which frauds may be accomplished under the pretense of sales or gifts between husband and wife, ought to be carefully weighed in determining whether or not a gift has been made, but when all are considered the one question, and the only question, is, whether the wife has established her right by a fair preponderance of evidence; if she has, no court has any business to require more:" And see Bishop on the Law of Married Women, Vol. 2, Sec. 136, 138, 140; Tripner v. Abrahams, 47 Pa. St., 229; Seeds v. Kahler, 76 Pa. St., 267; Earl v. Champion, 65 Pa. St., 195; Glover v. Alcott, 11 Mich., 493.

The court did not err in admitting the testimony of witness Lake to show that the real consideration was other property given in exchange, instead of the money stated in the deeds from Crocker and Osbiston: Peck v. Brummagin, 31 Cal., 447; Ramsdell v. Fuller, 28 Cal., 37; Peck v. Vandeburg, 39 Cal., 11; Salmon v. Wilson, 41 Cal., 595; Higgins v. Higgins, 46 Cal., 259; Wedel v. Herman, 59 Cal., 516.

It is admitted that all property described in the complaint which was owned by defendant before marriage, remains his. It is equally true that property purchased with or taken in exchange for such property, is his also, as well as the rents, issues and profits of his separate estate. But the question arises, what are properly rents, issues and profits under the facts proven? The contention in this case comes mainly from a difference of opinion as to the proper solution of this query. The subject is beset with difficulties which must be met as the cases present themselves, and each must be decided upon its own, its peculiar facts. Extreme cases may be suggested upon both sides, in which it would be difficult to mete out exact justice by following the theory of either plaintiff or defendant. But such examples are not uncommon in the law, and

courts have never considered them sufficient to justify a departure, in an individual case, from well-established legal principles.

We are satisfied that it is not necessary to prove that property is, in fact, the product of the joint efforts of the husband and wife in order that it may be declared community estate.

If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise or descent, or by exchange of his individual property, or from the rents, issues or profits of his separate estate, it belongs to the community. Such property is common, although the wife neither lifts a finger nor advances an idea in aid of her husband. She may be a burden and a detriment in every way, or she may absent herself from the scene of his labors, know nothing of his business and do nothing for him; still it is common.

On the other hand, property acquired by either spouse in any one of the ways mentioned in the statute, that is to say, by gift, devise or descent, or by exchange of individual property, or coming from the rents, issues or profits of separate property, belongs to him or her, as the case may be, and the other has no more right to share it than a total stranger.

After marriage it was defendant's duty to support his wife, but he was under no legal obligation to accumulate community property. He could attend to his separate estate and support his family from that, if he was so inclined.

If common property is acquired, the wife has her statutory rights therein, but she has no vested rights in, or lien upon, his time or labor. If he is indolent, and barely supports the family, or if he spends his time in increasing his separate estate, instead of enriching the community, her remedy is an appeal to his better nature. The law furnishes no aid.

And since the law gives to each spouse the rents, issues and profits of his or her separate estate, it cannot be true that they become common property by reason, simply, of the marriage relation.

But the record shows, and the court finds, that the plaintiff assisted, in her department, in carrying on the Lake hotel business, the Meadow Lake hotel or eating house, and the Lake ranch; and after the old Lake house was destroyed by fire, the men employed upon defendant's toll-road boarded at his private house, and plaintiff cooked and washed for them. She also advised with defendant at times about his business.

Do these facts make the profits from the sources just named, if any there were, community estate, provided the property used, and out of which the profits came, belonged to defendant alone.

Most of the cases to which we shall refer upon this question involve the rights of a wife to claim profits arising from the use of her separate estate, as against creditors of the husband, when they have been increased by his labor and skill.

There are cases intimating, at least, that in a contest between husband and wife, where the husband has increased the income of

the wife's estate by his labor, she might claim the entire product, although she could not do so as against her husband's creditors: See Wells' Separate Prop. of Mar. Women, sec. 47; Hackett v. Bailey, 86 Ill., 77; Wilson v. Loomis, 55 Ill., 355; Skillman v. Skillman, 13 N. Y. Ch. R., 409.

But we think the principles of law that control those cases should govern this: Parrott v. Nimmo, 28 Ark., 358.

Such, also, is the opinion of counsel for plaintiff.

Lewis v. Chard, 24 Cal., 100, shows that wheat raised upon land of the wife was seized under an execution against her husband. He had employed men, purchased seed wheat, made contracts to be paid out of the crops, superintended the farm labor and performed some himself. After referring to George v. Ransom, *supra*, the court said: "That the husband can not, by any management, supervision or labor, acquire any interest in the estate itself, is conceded, and by parity of reason, he can not acquire any interest in the increase, for that is hers also, and upon the same terms—the latter being a corollary of the former proposition. There is no magic in the touch or manipulation of the husband by force of which separate, is transformed into community property. If he acquired, as contended by respondents, any right whatever, as agains this wife, by virtue of his supervision and labor, it is not his right in the nature of a lien in the thing supervised, or upon which the labor is bestowed, but merely a right to compensation, and his creditors could only proceed by the process of garnishment. In the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his services, and in either case there would be only an imperfect obligation which neither husband nor his creditors could enforce. The doctrine contended for would banish the husband from the premises of the wife, and deprive her of his counsel and guidance, for his presence there might bring ruin instead of affording protection."

In Webster v. Hildreth, 33 Vt., 457, it appears that Mrs. Hildreth, one of the defendants, became the owner of wild land by deed from her father. Hildreth and wife moved on to the land, and there lived until the suit. With the help of their children they cleared up a large part of it, erected buildings and made valuable improvements. The land was originally worth two or three hundred dollars, but at time of suit was valued at twelve or fifteen hundred, the increased value having been in part from the rise of the land in price, and part in the improvements. Hildreth contributed to the improvements by his labor and money; but during the whole time the title to the land was in his wife. This fact so appeared of record and was generally known.

The plaintiff having a judgment against Hildreth levied on seven undivided twelfth parts of the farm, claiming that the husband's labor, earnings and money had contributed to the improvements and made up that much of its value. The supreme court held that in the absence of an agreement in some legal form, that his labor

and improvement of the farm should vest in him some interest therein, or entitle him to compensation, he had no equitable claim upon the farm, and could claim nothing for his services, and that creditors had no greater right against the wife's estate than her husband had.

In Rush v. Vought, 54 Pa. St., 442, the evidence showed that the husband and wife lived on the latter's farm. She took the entire management, but he assisted somewhat, her children doing most of the work. He generally sowed the grain. The trial court charged the jury that, "the labor on the farm was bestowed by her husband and his children, and the grain, hay and other crops raised were the joint products of such labor and the land, and if the personal property now claimed by the wife was paid for out of the products the husband had an interest in it. It cannot, therefore, be said to have been purchased and paid for out of the separate funds of the wife."

Commenting upon that instruction, the supreme court said: "Thus the sowing of the grain, which was Jacob Rush's chief labor, mingling with the tillage, carried away from Mrs. Rush, not only all the products of the soil (hay as well as grain), but the stock purchased with their proceeds, when converted by Mrs. Rush into money or bartered. A deduction which leads to such wholesale destruction of the wife's rights of property cannot be founded in correct principle. The error arose from an oversight of the true foundation of the wife's right. This is not the case of property purchased during coverture, where the price of it presumptively, if not actually, came from the husband. But here the title to the products grows out of the title to the land itself. The ownership of the farm carries with it at law, and in equity, the right to its products. No change can take place in the title to the fruits of the soil without the owner parts with his title or possession, or permits its cultivation for the benefit of another. But the labor of others for the owner, though mingling in the production, creates no title to the products. The owner may be a debtor for the labor which tills his soil, or that labor may be given without a required equivalent, or for an equivalent in maintenance, which is consumed in its use; but this gives no usufruct or ownership in the product of the tillage. It matters not, therefore, whether the labor, when thus rendered, be that of a husband or another; without contract for the product, or cultivation, by the husband for himself, it confers no title or usufruct." To the same effect are Hanson v. Millett, 55 Me., 188; Holcomb v. Savings Bank, 92 Pa. St., 342; Silven's Executors v. Porter, 74 Pa. St., 451; Wieman v. Anderson and wife, 42 Pa. St., 317; Manderbach v. Mock, 29 Pa. St., 46; Hamilton v. Booth, 55 Miss., 61; Bongard v. Core, 82 Ill., 19; Garvin v. Gaebe, 72 Ill., 448; Coon v. Rigdon, 4 Colorado, 283; Russell v. Long, 52 Iowa, 250; Dayton v. Walsh, 47 Wis., 117; Feller v. Alden, 23 Wis., 303; Noe v. Card, 14 Cal., 607; McIntyre v. Knowlton, 6 Allen, 566; Knapp v. Smith, 27 N. Y., 279; Abbey v. Deyo, 44 N. Y., 348; Gage v. Douchy, 34 N. Y., 295; Whedon v. Champlin, 59

Barb., 65; Buckley v. Wells, 33 N. Y., 520; Picquet v. Swan, 4 Mason, 455; Well's Sep. Prop. of Married Women, sections 113, 162, 176.

In the case of Buckley v. Wells, *supra*, the property in question consisted of a stock of goods in a country store, of which the wife was the sole proprietor. The husband conducted the business in her behalf in the name of "L. Smith, Agent," and nominally, if not really, for her as his principal. The entire capital was contributed from her separate estate, except money borrowed in the name of "L. Smith, Agent," and the profits accruing from the use of such capital. The business was carried on for several years. The wife took no part in the management of the store.

The point was made that the goods belonged to the husband and were liable for his debts, since his labor entered into and formed a part of the property, and increased its value. The court held that the goods belonged to the wife.

In Abbey v. Deyo, *supra*, plaintiff, the wife, was engaged in the business of buying and selling flour, etc. Her husband was her agent, and, as such, bought and sold, and carried on the business for her. The decision in the court of appeals was the same as in Buckley v. Wells.

In Sheldon v. Champlin, *supra*, plaintiff, the wife, owned a boat and carried on the business of boating.

In Wieman v. Anderson and wife, *supra*, the proof was clear that the stock of goods in Anderson's store, in January, 1858, became the separate property of his wife, by gift from her brother. Those goods were sold and others purchased in her name, so that in November, 1859, when plaintiff levied his execution, issued upon a judgment against the husband, few, if any, articles of the original goods remained. The stock levied on was an entirely separate and distinct stock from that given to Mrs. Anderson, although it was purchased with the proceeds of the former stock. Mrs. Anderson did not do business as a sole trader.

Both husband and wife attended to the business. Most of the purchases were made in the name of the wife, but the husband continued to attend to the store. He made sales and received moneys.

The Pennsylvania statute then in force declared that property which accrued to a married woman should be owned, used and enjoyed by her as her separate property.

The court said: "The use and enjoyment here referred to must be such as are consistent with the nature and kind of property.

"A store of liquors and cigars cannot be used and enjoyed in the same manner as household furniture. They are merchandise, and it is the nature of such merchandise to be sold and exchanged. When, therefore, the statute authorizes married women to own, use and enjoy *merchandise* as their separate property, it legalizes trade by them. It makes them merchants."

In Manderback v. Mock, *supra*, the wife bought livery stock on credit, rented a stable and carried on the livery business in her own

name. Her husband and children attended to the stable, taking care of the horses and vehicles, but she controlled the business. The court sustained her claim to the property.

In most of the other cases cited it was held that the title to crops followed the title to the land, although they were produced by the joint effort of the husband and wife, or the husband alone, if the wife owned the land.

But under our statute the sole question is, whether property claimed by either spouse belonged to him or her at the time of marriage, or has since been acquired by gift, devise or descent, or has come from the rents, issues or profits of separate estate. And in this or any other case, if profits come mainly from the property rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor and skill of one or both may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community. It may be difficult in a given case to determine the controlling question, owing to the equality of the two elements mentioned, but we know of no other method of determining to whom profits belong. In the use of separate property for the purpose of gain, more or less labor or skill of one or both must always be given, no matter what the use may be; and yet the profits of property belong to the owner, and in ascertaining the party in whom the title rests, the statute provides no means of separating that which is the product of labor and skill from that which comes from the property alone.

In this case we are not burdened with the only question involved in the case of Glover v. Alcott, 11 Mich., 480, wherein the court said: "But it does not necessarily follow that, because the statute has secured to her (the wife) the income and profits of her separate property, it has therefore authorized her to engage in any and every kind of general business which might be carried on with it or upon it, and given her the profits and income of the business as well as the property. Here is a distinct element entering into the product, beyond that of the income of her separate property."

In that case the only question was, whether the wife had legal capacity to carry on the general business in which she was engaged; while here it cannot be doubted that defendant had that power.

In relation to the decision in the case referred to, as well as in Glidden v. Taylor, 16th Ohio St., 509, and similar decisions, we content ourselves with a reference to Mr. Bishop's criticism, at sec. 465, vol. 2, of his work on the Law of Married Women.

The old hotel with its furniture, including the bar and its fixtures, belonged to defendant. The new one was built from the proceeds of his separate property. Part of the time they were rented, and it is admitted that the rents belonged to him. At other times he carried on the business himself. In either case, if there were profits, they were the result of the ordinary use by him of the prop-

erty belonging to his separate estate: Estate of Higgins, 3 West Coast Rep., 358.

Having the hotel, he was obliged to rent it or run it himself. If he could make more from it by one use than another, surely there was no legal incapacity to prevent him from using it in the most profitable way; and the profits of the business belonged to him, if they came mainly from the property, rather than from his personal efforts, or those of himself and wife.

Any other conclusion would compel a husband, under certain circumstances, to remain idle, or make him divide profits, which the law gives to him alone.

Without further discussion, our opinion is, that the rents, issues and profits, which accrued from the toll-road and bridge, the lake house and the lake ranch belonged to defendant. Such profits, if any there were, came from the ordinary use of his individual property.

The Meadow Lake venture was in 1865-6. Prior to that time there had been no community business, in the sense that the proceeds thereof belonged to the community. Defendant went there to keep a hotel. Whatever expense was incurred in the beginning, must have been borne by him out of his separate funds.

He carried on business there five or six months, and during the time built a hotel, or boarding house.

The record fails to show the extent of the outlay, or the amount of business done; we are, therefore, unable to say that the profits belonged to defendant.

He testified, however, that "the hotel there made no money; we came out about even, owing to the fire."

From this it is argued that, prior to the fire, they must have made money, and that, if any property was purchased with such profits, it belongs to the community.

Defendant advanced money, or obtained credit for the business, and received the proceeds. The building of the hotel was as much a legitimate expense, chargeable to the business, and to be paid from its proceeds, as was the cost of supplies, or the wages of hired help. Defendant had as much right to re-pay his advances, or satisfy any indebtedness incurred by him for the business, as he had to pay any other demand.

The advances were made, or the indebtedness was incurred, for the business, and it is fair and proper that they should be paid from the proceeds.

The meaning of defendant's testimony is, that the proceeds of the business were about as much as the entire expense, including the cost of property burned; that by reason of the fire, there were no profits; in other words, that the property burned represented the profits.

By reason of the Meadow Lake enterprise, defendant, at no time, had more money to invest in property, than he had before engaging in it, or than he would have had if it had not been undertaken.

If we are correct so far, it cannot be said that the court erred in its findings, as to the balance of the property in controversy.

In view of the result now reached, it is urged by counsel for appellant, that this court may and should order a division of defendant's separate property.

After divorce granted to plaintiff, the law imposes upon the defendant the duty of supporting her according to his ability and condition in life.

The court allowed plaintiff one hundred and fifty dollars a month for herself, and fifty dollars a month for the child, and retained jurisdiction to increase the allowance at any time, upon proper showing.

We deem it unnecessary to decide, in this case, whether or not, upon granting a divorce, on the ground of cruelty, courts have power to divest the husband of the title to his separate estate.

The division of property, by the statute, is left to the legal discretion of the trial court, and this court ought not to interfere, unless the discretion given has been abused.

Upon the evidence before us we cannot so say.

It appearing by the records of this court that defendant, M. C, Lake, has died since the taking of the appeal in this case, and that by order of the court, C. T. Bender, administrator of his estate, has been substituted as defendant and respondent in the place of said deceased, the said C. T. Bender, administrator, is hereby substituted herein as party defendant and respondent, and the judgment and order appealed from are affirmed.

HAWLEY, C. J., dissenting. I agree with the conclusions reached by the court that the court below had the power, and it was its duty, to grant a new trial of the issue relating to the property rights of the parties, if there was any error which materially affected the rights of the plaintiff; that all property owned by the defendant at the time of his marriage, and all property which has since been acquired with funds derived from the rents, issues and profits of such property, and all property acquired by an exchange of property owned by him at the time of his marriage, is his separate property.

But I am unwilling to give my assent to the proposition that the profits, if any, derived from the hotel and saloon business in which the defendant was engaged would be his separate property. I am of opinion that the profits, if any, made in the hotel and saloon business would belong to the community.

There is a distinction that must be kept constantly in view between a business which does not necessarily derive its profits from the fact of the ownership of the property in which it is conducted and a business which depends entirely for its profits upon the fact of the ownership of the property. If the owner rents a house the money collected for the rent belongs to him because of his ownership of the property.

The profits from the property in such a case do not necessarily depend upon the efforts or skill of either spouse, although some

labor would be required. If, instead of renting the house, the owner thereof engages in a business which is in a great degree dependent upon the skill and labor of the parties, or either of them, the profits (or a portion thereof, at least) realized from that business would be community property.

Several authorities are cited to sustain the proposition that the fact that the property was acquired by the joint efforts of the husband and wife does not necessarily make it community property. This is true with reference to cases where the accumulations of property derived from conducting and carrying on the farming business and other businesses of like character. In such cases it is almost universally held that the crops growing upon, and produced from lands which are the separate property of the wife, do not become community property by the mere fact that the husband gave his time, labor and skill in the production thereof. Why? The reason given is that in the absence of any agreement to the contrary, the title to the products belongs to the owner of the land; that the ownership of a farm necessarily carries with it the right to the products grown thereon. In such a case the skill or labor of either spouse has nothing to do with the question of the ownership of the crops. It is also held, in many cases upon the same reasoning, that the increase of personal property follows the ownership.

In Rush v. Vought, the court of common pleas was of opinion that the fact that the labor on the farm was bestowed by the husband and his children necessarily gave the husband an interest in the products of the soil; but the supreme court took a different view, and said that the error of the court below arose from an oversight of the true foundation of the wife's right. "This is not the case of property purchased during coverture, where the price of it presumptively, if not actually, came from the husband. But here the title to the products grows out of the title to the land itself. The ownership of the farm carries with it at law and in equity the right to its products. No change can take place in the title to the fruits of the soil without the owner parts with his title or possession, or permits its cultivation for the benefit of another. But the labor of others for the owner, though mingling in the production, creates no title to the products. The owner may be a debtor for the labor which tills his soil, or that labor may be given without a required equivalent, or for an equivalent in maintenance which is consumed in its use; but this gives no usufruct or ownership in the product of the tillage. It matters not, therefore, whether the labor, when thus rendered, be that of the husband or another; without a contract for the product or cultivation by the husband for himself, it confers no title or usufruct:" 55 Penn. St., 443.

This is the key-note of the entire decision; it is the reasoning upon which the opinion is based and the ground upon which the conclusion is reached. The authorities cited are all alike. They declare that the title to the crops follow the title to the land, even if produced by the joint labor of both husband and wife, or by the

labor of the husband alone, if the wife owns the land; that the care, control and management by the husband of his wife's property, and his labor upon it, does not change the title to the land.

Thus it is said: "A husband may devote his time and skill to the management of his wife's property, and the products will belong wholly to the wife, because they are but the accretions of her property, and he has a right to give her his labor:" Hamilton v. Booth, 55 Miss., 62.

The fact that her husband may have done some work about raising the crops "does not affect her title to the property:" Garvin v. Gœbe, 72 Ill., 448. "The rights to the profits and natural increase of tangible property is incident to and results from the ownership:" Williams v. McGrade, 13 Minn., 52.

But the principle upon which these and kindred cases were decided does not apply to cases where a business is conducted, the profits of which are derived by means of the joint labor and skill of the husband and wife, or either of them, independent of the title to the property. It does not apply to a business caried on in the wife's name, with her money, where "the profits arose in part from his time and skill."

So held in relation to the business of buying and shipping grain and stock: Wortman v. Price, 47 Ill., 23; the lumber business: Wilson v. Loomis, 55 Ill., 355; and the foundry and machine business: Glidden v. Taylor, 16 Ohio St., 5 9.

In Wortman v. Price, the court said: "We have no hesitation in saying that if she advances capital to her husband, with which he engages in trade, such capital and its fruits in the business will be subject to the husband's debts, even though he may claim to be acting as his wife's agent and doing business in her name." Referring to a former case, where the court had said the husband might act as agent for his wife, the court said this simply meant "that he may act as her agent for a particular transaction, or, generally, for the control of her property or the investment of her funds. He may lease her property and collect the rents, or invest her money, or change the character of her investments, if authorized by her, and he may do this without subjecting her property to his debts. But we did not say * * * that she could make him her agent for the purpose of engaging in trade, to be managed by him, and to which all his time and energy might be devoted, and that the property embarked in such trade, and its profits, would be beyond the reach of his creditors. Such is not the law."

In Glidden v. Taylor the court said: "Disrobing, then, the transaction of all matters of form, and looking at the naked facts, it appears that Mr. Taylor, being skilled in the business, established a manufactory for the manufacture and repair of various kinds of machinery, which was conducted under his sole charge for several years; that, under his energetic, skillful and prudent management, the business was profitable: that, after applying so much of the profits as was necessary to keep up the establishment, he applied

the remainder to the purchase, in his wife's name, of the real estate described in the petition; * * * that the entire accumulation from the business, above expenses, amounted to $6,000 or $7,000; and that, in establishing and conducting the business, he had used the money of Mrs. Taylor, his wife. The foregoing is the substance of the transaction, and the question is whether the title of Mrs. Taylor to the property, thus acquired, is, in equity, unimpeachable by the plaintiffs, who are antecedent creditors of the husband. The property in controversy can, in no just sense, be said to be either the income, increase or profits of the money given to Mrs. Taylor.

In New Jersey, the court, in deciding that the wife is entitled to the rents and products of her farm or other property, and the products of the labor of herself and minor children, distinguishes these from the proceeds of trade, carried on by her with her separate property: Johnson v. Vail, 14 N. J. Eq.; 459; Quidort v. Pergeaux, 18 N. J. Eq., 480.

In Quidort v. Pergeaux the court said: "The law was intended to protect the property and earnings of a married woman, and not the property and earnings of her husband against his creditors, and when, as in this case, they mix up the earnings of the wife with those of the husband, so that they cannot be separated, the husband cannot make a clear, distinct gift, of her own earnings to his wife, and they remain, as at common law, his property."

Numerous other cases might be cited, but the above are sufficient to show that a distinction, such as I have stated, exists.

This distinction should not be lost sight of in applying the principles of law to the special facts of the case.

The profits, if any, of the hotel and bar business, would come in part, from the fact of ownership of the property in which the business was conducted; but the success of the business would, in a greater degree, depend upon the tact, time, skill, labor and efforts of the husband, or wife, or both.

In my opinion, the evidence in this case does not justify the findings of the court that no profits were realized from the hotel and saloon business conducted by the defendant and his wife. It is true that the defendant testified in general terms that the Lake House, as conducted by him, "did not pay expenses;" that "the hotel did not make anything." Why? When the testimony is carefully reviewed it will be ascertained that the hotel business, in the opinion of the defendant, was conducted for the benefit of his toll road, and hence, in his estimation of receipts, he gives the toll road, instead of the hotel, the credit of all the profits.

With reference to the property purchased after the marriage, the defendant testified as follows: "In making purchases of property which I have purchased since my marriage with plaintiff, I did not borrow any money, but used my own money." He further testified that when they were married he was possessed of considerable property, which afterwards became of great value, and from which he

derived large sums of money, and that at the time of his marriage his wife had nothing but her clothes.

The inference to be drawn from this testimony is that the property purchased after his marriage was acquired by his separate means; but it is questionable, to say the least, whether it is, independent of the question of profits in the hotel business, of so positive, clear and convincing a character as to overcome the presumption of the law that all property acquired during coverture is community property.

In Schmeltz v. Garey, 49 Tex., 60, the court decided that the mere fact that at the time of the marriage the husband had considerable money, and the wife had nothing; that after the marriage the parties lost money—without explicitly tracing the purchase money, or consideration, to the separate property of the husband—will not rebut the statutory presumption that property purchased during the marriage is community property.

Winter v. Walker, 37 Penn. St., 156, is substantially to the same effect. But, be that as it may, it is apparent that defendant's testimony, in this respect, is based upon his assertion that the hotel business did not make any money, and hence his testimony upon this point must be considered subject to the question whether or not there were any profits derived from the hotel business.

I am of opinion that the testimony shows that there might, and would, have been a profit in that business if it had been credited with the business which it transacted. If there were any profits legitimately arising from the hotel and saloon business, the money was mingled with the receipts from the toll-road, and from the rents, issues and profits of defendant's separate property, and the receipts of money were so blended together as to prevent the community property, or the amount of it, from being traced. It would, therefore, be impossible to tell what proportion of the community funds, or the funds of defendant's separate estate, was thereafter used in the purchase of other property, and the result would be that it (the property so purchased) should be treated as community property.

In Meyer v. Kinzer, 12 Cal., 251, the court said: "The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property except that owned previous to marriage or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved. * * * This invariable presumption which attends the possession of property by either

spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of the property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion and fraud. In vain would creditors or purchasers attempt to show that the particular property seized or bought was *not* owned by the claimant before marriage, and was *not* acquired by gift, devise or descent, or was *not* such property under a new form consequent upon some exchange, sale or investment. In vain would they essay to trace through its various changes the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration."

I am of opinion that the judgment and order appealed from should be reversed.

SUPREME COURT OF CALIFORNIA.

No. 9,734.

BAILEY v. SUPERVISORS OF SAN JOAQUIN COUNTY.

In Bank. Filed October 8, 1884.

JUSTICES OF THE PEACE—TERM OF OFFICE OF—ELECTION.—The act of 1880, amending section 110 of the code of civil procedure, fixing the term of office of justices of the peace at two years from the first day of January next succeeding their election, is constitutional. Such officers are to be elected in the year 1884.

MANDAMUS to compel the defendants to provide for the election of justices of the peace at the general election of the year 1884.

J. J. Burt and *J. A. Hosmer*, for the petitioner.

McAllister & Bergin and *J. C. Campbell*, for the respondents.

THE COURT. We are of the opinion that the act of 1880, stats. of 1880, p. 35, amending C. C. P., sec. 110, fixing the terms of office of justices of the peace at two years from the first day of January next succeeding their election, is constitutional, and that these officers are to be elected this year.

Let the writ issue as prayed for.

No. 9,692.

COUNTY OF MERCED *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA.

In Bank. Filed October 10, 1884.

COUNTY BONDS—FORM OF AFTER ACT OF 1883.—One who has contracted to purchase county bonds, issued after the passage of the county government act of March 14, 1883, cannot be compelled to take such bonds, unless the same are in the form prescribed by such act.

APPEAL from a judgment of the superior court for Merced county, entered in favor of the plaintiff.

John B. Mhoon, for the appellants.

Frank H. Farrar, for the respondent.

MYRICK, J. The act of March 14, 1883, to establish a uniform system of county and township governments, sec. 25, subd. 14, repealed section 4,048, political code, at least so far as the latter required the bonds to refer to the political code, and directed that bonds should refer to it (the act of 1883). Without considering any question as to the validity of bonds, reciting their issue under the political code, it is sufficient to say that the act of March 14, 1883, gives the form of the bonds, and the defendants should not be compelled to take them unless they are in conformity with that act. The former class of bonds might, perhaps, be good, as against the county, in the hands of a purchaser; but the defendants should not be compelled to take any risk. They are justified in standing on the form prescribed in the act of 1883.

Judgment reversed, and cause remanded.

MORRISON, C. J., THORNTON, J., and MCKINSTRY, J., concurred.

No. 8,057.

LAKE COUNTY *v.* SULPHUR BANK QUICKSILVER MINING COMPANY.

In Bank. Filed October 10, 1884.

ASSESSMENT OF REAL PROPERTY—MISTAKE IN NAME OF OWNER.—In a suit against the owner of real property to recover the tax levied on it, a mistake in the name of the owner in the assessment of the land upon which the tax is based, does not render the assessment thereof invalid, nor furnish any defense to the suit.

ASSESSMENT OF PERSONAL PROPERTY—MISTAKE IN NAME OF OWNER.—But a mistake in the name of the owner in the assessment of personal property upon which a tax is based, unless the mistaken name is legally equivalent to the true name, does invalidate the assessment, and constitute a defense to a suit brought against the owner to recover such tax.

THE SAME.—Tax proceedings must be in strict accordance with the statute. Without an assessment all subsequent proceedings are nullities. An assessment of personal property to a named person, other than the owner, it absolutely void.

THE SAME.—An assessment of personal property was made to "Sulphur Banks Q. M. Co., F. Fiedler, agent." *Held:* that this was not equivalent to or the same thing as "Sulphur Bank Quicksilver Mining Company," the true name of the owner, and the assessment and tax based thereon were void.

ASSESSMENT OF REAL PROPERTY—DESCRIPTION OF THE LAND.—Under secs. 3,650, 3,628 of the political code, it would seem to be a sufficient assessment of a tract, where such tract does not contain more than 640 acres, to describe it by stating the congressional subdivisions contained in it where it has been sectionized. The description, "a tract of land entered by Frazier in section 13, township 13, range 7," is fatally defective.

LEVY OF TAXES BY BOARD OF SUPERVISORS.—When a board of supervisors duly adopted an order "that they have this day fixed the rate of county and district tax to be levied and collected upon each one hundred dollars of the assessed valuation of the county, etc., * * * as follows, to wit: state fund, 0.64; general county fund, 0.40; county school fund, 0.37, etc. * * * Total state, county and district tax, 1880-81, $2.75." *Held:* that the omission of the word "cents" from the various items of the levy did not invalidate the order levying the tax nor render the levy ineffectual. Taking all the order together these various items plainly mean so many "cents" upon each one hundred dollars.

ORIGINAL ASSESSMENT ROLL—EVIDENCE.—Where a board of supervisors have dispensed with a duplicate assessment roll, the original assessment roll is *prima facie* evidence in the same manner that the duplicate would have been.

APPEAL from a judgment of the superior court of Lake county. The facts appear in the opinion.

J. C. McCeney, D. M. Hanson, and *Welsh & Britt,* for the appellant.

R. W. Crump and *Rutledge & McConnell,* for the respondents.

MCKINSTRY, J. 1. The assessment put in evidence shows property assessed to "Sulphur Banks Q. S. M. Co." Section 3,628, of the political code, provides: "No mistake in the name of the owner, or supposed owner, of real property, shall render the assessment thereof invalid." There is nothing in the language of the section to indicate that the clause quoted can be given effect only when an attempt is made to enforce the *lien* for the tax. The effect of the clause in section 3,628 is but to give a more enlarged operation to a rule already established. Prior to the adoption of that clause, it had been frequently held that a defendant sued for a tax, assessed to "unknown" owners, could not be permitted to prove that the assessor might, with more diligence, have ascertained the real owner of the property. On behalf of the defendant, in those cases, it was urged that unless inquiry was permitted, with respect to care and diligence of the assessor, that officer would have it in his power entirely to neglect his duty, and assess to *unknown* owners property, the ownership of which he should use no effort to ascertain, or which he might even know to belong to a particular person. So, here, it is said that, if he is allowed to assess the property to a person, other than the real owner, he may abuse the power. But the ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned.

In the case before us the defendant was sued as the owner of the property assessed to the "Sulphur Banks Q. S. M. Co." If the defendant is not the owner of such property, it had full opportunity to establish that fact, but it is not a defense to the payment of the taxes upon the *real estate* that the assessor mistook the name of the owner of it.

Section 3,628 of the political code, however, only declares that a mistake in the name of the owner of *real* property shall not avoid the tax. A portion of the taxes here sued for is upon personal property. We have further to inquire, therefore, whether the assessment of personal property is invalid.

Unless we can take judicial notice that "Sulphur Banks Q.S.M.Co." is the equivalent or an abbreviation of "Sulphur Bank Quicksilver Mining Company," or unless there was evidence tending to prove that the corporation defendant was known by the name "Sulphur Banks Q. S. M. Co.," the assessment of the personal property cannot be upheld. Tax proceedings are *in invitum*, and, to be valid, must be in strict accordance with the statute. Without an assessment all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity: Cooley on Tax., 259-60; Moss v. Shear, 25 Cal., 46; People v. Mahoney, 55 *Id.*, 288. The statute seems to require all property to be assessed to the *owner*: Pol. C., 3,650. So far as relates to *real* property a mistake in the name of the owner does not invalidate the tax, as we have seen above: Pol. C., 3,628. But with respect to personal property it would seem to be the duty of the assessor to assess it to the owner. Even, however, if section 3,636 of the political code (which speaks only of absent owners), can be held to apply to an owner not absent, personal property must be assessed to the real owner, or to "unknown owners." An assessment of personal property to a named person, other than the owner, is absolutely *void*: Smith v. Davis, 30 Cal., 537; Blatner v. Davis, 32 *Id.*, 328; Kelsey v. Abbott, 13 *Id.*, 609; People v. Whipple, 47 *Id.*, 591; Crawford v. Schmidt, *Id.*, 618.

"Sulphur Banks Q. S. M. Co., F. Fiedler, agent," is not the same thing as "Sulphur Bank Quicksilver Mining Company." We may conjecture or very strongly suspect, that the assessor *meant* to assess the defendant as the owner of the personal property, but he did not assess the defendant. If the case showed that the defendant had been usually known, or was even sometimes called "Sulphur Banks Q. S. M. Co," it may be conceded, for the purposes of this decision, that the assessment of the personal property to defendant would be good: see People v.Sierra Butte's Q. M. Co., 39 Cal., 514. But in the transcript before us there is no evidence that defendant was called, or called itself by that name. It is plain we cannot identify the name to which the personal property was assessed as an abbreviation of the name of defendant, even if an assessment to an abbreviation would be valid.

We are forced to the conclusion that the assessment of personal property cannot be enforced against defendant.

2. It is insisted by appellant that the assessment of real property is invalid because it departs from the requirements of section 3,650 of the political code, which makes it the duty of the assessor to enter in his book, under an appropriate heading, "Land by township, range, section or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres (not exceeding in each and every tract six hundred and forty acres), locality, and the improvements thereon. When any tract of land is situate in two or more school, road, or

other revenue district of the county, the part in each district or township must be separately assessed, together with the improvements thereon."

It is claimed by appellant that the statute requires a separate assessment of each "section or fractional section" whenever the land has been surveyed into congressional subdivisions, and exceeds 640 acres in area. And appellant urges that the intent of section 3,650 is made more apparent by the language used in section 3,628: "Land shall be assessed in parcels or subdivisions not exceeding 640 acres each, and *tracts of land* containing more than 640 acres, which have been sectionized by the U. S. government, shall be assessed by sections and fractions of sections." It is said that in the face of the code requirements *a tract* of 3,500 acres, sectionized by the government, has not been assessed in sections or fractional sections.

But the statement that the 3,500 acres constitute a single tract is not borne out by the record. There is no evidence of the fact. Nor does it appear that subdivisions exceeding in aggregate quantity 640 acres are assessed as a single tract. It is true the west fractional half and the southeast quarter of section 5, township 13, range 7, containing 436 acres, is assessed with the whole of fractional section six, in the same township and range, containing 133 acres. But the subdivisions thus assessed as one tract contain together but 569 acres. So also, fractional sections 1, 2 and 3, township 13, range 8, assessed as one tract, aggregate but 500 acres. Reading sections 3,650 and 3,628 of the political code, it would seem to be a sufficient assessment (at all events where a tract does not contain more than 640 acres), to describe such tract by stating the congressional subdivisions contained in it.

We think, however, the attempted description of "a tract of land entered by Frazier" in section 13, township 13, range 7, is hopelessly defective. This is neither a description by "township, range, section or fractional section," nor is it description by "metes and bounds," nor is it otherwise sufficient to identify the land.

4. The description, "west fractional half and southeast quarter of (mine) section 5, township 13, range 7, 436 acres, all of fractional section 6, township 13, range 7, 133 acres," is sufficient. It is in effect a statement that all of the subdivisions are a mine. As the assessment was good of itself, the oral testimony of the assessor did not prejudice any right of defendant.

5. It is contended by appellant that the order of the board of supervisors, dated October 4, 1880, is, as a levy of taxes, ineffectual. The order is in words and figures following:

"Ordered unanimously by the board of supervisors of Lake county, California, that they have this day fixed the rate of county and district tax to be levied and collected upon each one hundred dollars of the assessed valuation of the property of the county of Lake, California, to raise the specific amounts required to be raised for the thirty-second fiscal year 1880–81, as follows, to wit:

State Fund	0.64
General County Fund	0.40
County School Fund	0.37
Salary Fund	0.25
General Road Fund	0.50
County Hospital Fund	0.08
Public Building Fund	0.04½
Bond Fund	0.12½
Total state and county levy, 1880–81	$2.41
Wagon Road District Fund, Lake county	0.14
Old Road District Fund six, Lake county	0.20
Total state, county and district tax, 1880–81	$2.75

(Signed, by the members of the board).

Section 3,714 of the political code provides:

"The board of supervisors of each county must, on the first Monday of October, fix the rate of county taxes, designating the number of cents on each hundred dollars of property, levied for each fund, and must levy the state and county taxes upon the taxable property of the county; *provided*, that it shall not be lawful for any board of supervisors of any county in the state to levy, nor shall any tax greater than fifty cents on each hundred dollars of property be levied, and collected in any one year, to pay the bonded indebtedness, or judgment arising therefrom, of this state, or of any county or municipality in this state."

It will be observed the section just recited requires the supervisors to "fix *the rate* of county taxes, designating the number of *cents* on each one hundred dollars," etc. The order of the board of supervisors does fix the rate and designate the number of cents, etc., unless the omission of the word "cents" vitiates the order. But the sixty-four-hundredths (for example) is undoubtedly intended to bear a relation to one hundred dollars, and it is a natural, if not necessary, interpretation to say that it is sixty-four one-hundredths of one dollar. The language of the order is to be referred to the power which the board were authorized to employ and they were attempting to employ—a power to designate "the number of *cents* on each one hundred dollars." The cases in this state in which it has been held that figures in an *assessment* must be accompanied by a dollar mark, or other character, showing what they represent, are not conclusive of the question now before us. The order, read in the light of the law clearly indicates what is meant by the figures and *decimal points*.

6. Was the admission in evidence of the *original* assessment-roll erroneous?

The political code and the act of April 23, 1880, except so far as the former is impliedly repealed by the latter, are to be read together. The law, 1880, does not provide for the making of a duplicate assessment roll. 3,732 of the political code requires the auditor

to deliver a duplicate assessment to the tax collector, and the law of 1880 provides that a certified copy of *such* duplicate shall be *prima facie* evidence of the plaintiff's right to recover "in any action that may hereafter be commenced." Section 3,738 of the political code authorizes the board of supervisors of any county, in their discretion, to dispense with the making or use of any duplicate assessment book, and in all cases where such duplicate assessment is referred to, "it shall be lawful to use and consider the original assessment book in all the requirements of every part of *this code* referring to the same," etc. An order to dispense with the duplicate was in fact made by the supervisors of Lake county. The words used in the act of 1880 are "*the* duplicate assessment," and there can be no doubt these words referred to the duplicate provided for by the political code, but the same code authorizes the duplicate to be dispensed with, and when dispensed with gives equal effect to the original. The law of 1880 was passed in view of the existing provisions of the code, and it would seem too narrow a construction to say it did not make the original (when the duplicate is dispensed with) *prima facie* evidence."

7. The judgment allows two per cent. per month upon the amount of taxes allowed from December 28, 1880. This is error. Manifestly section 3,803 of the political code refers to the "delinquent taxes" mentioned in the sections immediately preceding, and which remain unpaid until the third Monday of March: section 3,797. In the case at bar the action was commenced on the second day of March.

8. Comparing the act of 1880 and sections 7 and 11 of the act "concerning county officers of Lake county," etc.: Stats. 1875-6, p. 599, we think the district attorney was entitled to recover his percentage.

9. The judgment is irregular, in that the judgment is for a gross sum, not distinguishing between the amounts due the state and county respectively: Sacramento v. C. P. R. R. Co., 10 Pac. C. L. J., 315-16. It is not a judgment which can be construed sufficient in form: *Id.*

Judgment and order reversed and cause remanded for a new trial.

SHARPSTEIN, J., ROSS, J., MORRISON, C. J., and MYRICK, J. concur.

THORNTON, J. I concur in the judgment and in the views expressed in the foregoing opinion, except that I think there was evidence that the corporation was known by the name by which it was assessed.

No. 20,033.

EX PARTE FINLEY on HABEAS CORPUS.

Filed October 11, 1884.

PETITION FOR A DISCHARGE ON HABEAS CORPUS DENIED.

Application for a discharge on habeas corpus, before Morrison, Chief Justice.

C. B. Darwin for the petitioner.

J. D. Sullivan, contra.

MORRISON, C. J. Petitioner prays to be discharged on *habeas corpus*. It appears, from the return of the officer having the defendant in custody, that he is held under an information charging him with forgery.

I do not deem it a proper exercise of authority to discharge the defendant under the circumstances of the case.

Writ dismissed, and prisoner remanded.

No. 8,263.

DONOHOE *v.* MARIPOSA LAND AND MINING COMPANY ET AL.

In Bank. Filed October 15, 1884.

WHERE THE TRANSCRIPT ON APPEAL CONTAINS NO INDEX, as required by the rule, the appeal may be dismissed.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

Winans Belknap & Godoy, S. Heydenfeldt, Jr., and *J. W. Brumagim*, for the appellants.

Doyle, Barber & Scripture, for the respondents.

THE COURT, No *index* is prefixed to the transcript, which contains over *eight thousand folios*. Under the rule the court is authorized to dismiss the appeal; but,

The submission of the cause is set aside, with leave to appellants to prepare and print proper index to be prefixed to each copy of transcript, within ten days.

WEST COAST REPORTER.

WHOLE No. 44. OCTOBER 30, 1884. VOL. IV. No. 5.

HUSBAND'S SEPARATE ESTATE.

"RENTS, ISSUES AND PROFITS."

The case of Lake v. Lake, recently decided by the supreme court of Nevada, and reported in the last number of the West Coast Reporter,[1] involves a very interesting and important question: Where a husband has only his own separate estate at the time of marriage, and this separate estate he uses as the capital or foundation of his business, and carries on a business during the marriage upon such capital, and by his labor, skill, management, and enterprise in carrying on such business, the whole amount of his property is increased, perhaps largely increased, what portion of this increase, at his death, should be deemed his separate estate, and what portion, if any, should be deemed community? Of course, the original capital, or an amount equal to it, would undoubtedly remain his separate estate. Can any general rule, reasonable and just, and capable of being practically applied to all conditions of fact, be laid down, which shall furnish an answer to this question? The supreme court of Nevada in the case above mentioned, have adopted a general rule as follows: "The profits of separate estate which accrue *mainly* from the property rather than from the joint efforts of husband and wife, or either of them, belong to the owner of the property, although the labor and skill of one or both of the spouses may have been given to the business. On the contrary, if the profits come *mainly* from the efforts or skill of both, they belong to the community." In this case, the husband owned a hotel as his separate estate; and, applying the foregoing rule, the court held that the proceeds resulting from the ordinary use of the hotel, either from renting it, *or from carrying on the business himself*, belonged to the husband as separate estate.

With all respect, this rule, in my opinion, is too vague as a practical guide to the courts; and would often work injustice and violate the theory which underlies the law as to community property.

[1] *Ante*, p. 159.

The civil code says: "§ 163. All property owned by the husband before marriage, and all that acquired afterwards by gift, bequest, devise or descent, with *the rents, issues and profits thereof*, is his separate property." In § 162, a similar definition is given of the wife's separate property. By § 164, "All other property acquired after the marriage, by either husband or wife, is community property."

All the decisions which have discussed the nature of community property, agree in stating this fundamental theory;—that all property, not falling within the definition of separate property, acquired after the marriage by the labor either of the husband or of the wife, *is nevertheless deemed to be acquired by the labor of both the spouses*. Upon this theory the wife of the mechanic is legally deemed to contribute *her* share of labor, skill, and industry in earning *his* wages, which are therefore community property. The wife of a lawyer or of a physician is legally regarded as jointly aiding in earning his professional increase. The wife of a clergyman, professor, or public officer, is legally regarded as earning a joint portion of his salary. The wife of a merchant or of a farmer is legally regarded as assisting in his business and as contributing to increase its profits. This theory is applied without exception, whether as a matter of fact the wife does assist in carrying on the husband's business and in thus actually increasing its proceeds, or whether her attention is solely confined to the domestic affairs of the household, or even when her attention is solely directed to spending the money which her husband makes. This theory should never be lost sight of. The code nowhere makes the community property to depend upon the fact that the *joint* labor of the two spouses *actually* produced it; their *joint* labor may be theoretical as well as actual.

In Lewis v. Lewis,[2] one Lewis married in 1854, then possessed of separate property in cattle, horses, and money to the amount of $20,000. He died in 1859 possessing cattle, horses and money valued at $40,000. His sole business at his marriage and down to the time of his death, was that of dealing in such stock. Of the stock owned by him at the time of his death, a portion, worth about $4,000, consisted of certain cattle which he owned when married; the residue consisted of the increase of stock owned at the time of his marriage, and of other stock bought with the proceeds of the sale of his original stock, or with the proceeds of the sale of the other stock by which the original stock had been replaced. The court held that as the deceased was engaged in no other business, the fair inference was, that the community property was the difference between the original value of the property owned by him at his marriage, and the value of the property possessed by him at the time of his death, after deducting the amount of the community debts. In other words,

[2] 18 Cal., 654.

all the increase made upon his separate property as a capital, was declared to be community property.

This increase was held to be community property, because under a statute, existing at that time, "all the rents, issues, and profits," of separate property, were declared to become community property. But this provision of the statute itself, had been held unconstitutional and void, so far as it affected the "rents, issues, and profits" of the wife's separate estate, as early as the case of George v. Ransom.[3] If the decision in the case of Lewis v. Lewis, is based upon the notion that the rents, issues, and profits of the husband's separate estate became community property, under the then existing statute, it certainly would not be law under the code, which expressly declares that the "rents, issues, and profits" of the husband's separate estate continue to be his separate property.[4]

I cannot believe, however, that the phrase, "rents, issues, and profits," as thus used in the code, is intended to include *any* of the increase and products, made by a husband in carrying on a business, in which he is constantly buying and selling and exchanging, and is using his own labor and skill in producing the increase from his separate property, as his original capital. Otherwise there could hardly ever be any community property, where the husband had a separate estate at his marriage, if the provision of the code should be so construed. The phrase, "rents, issues, and profits," is undoubtedly a broad one; but its true meaning is only to be ascertained by a reference to other parts of the general system, established by the code, and especially by a reference to the limitations, imposed by the provisions, concerning community property.

Suppose a man, at the time of his marriage, is engaged in a mercantile business, owning a small capital stock as his separate estate, and he goes on conducting his business through life, and amasses a large fortune, by the ordinary means in which such business is carried on. Is it to be said that all of this increase, at the time ot his death, is to be considered as the "rents, issues, and profits" of his original separate estate, and, therefore, to be his separate property, in which his wife has no certain interests? The more consistent view, and the one more in harmony with other clauses of the code, seems to be, that when a husband has a separate property at the time of his marriage, and by his skill and labor, in carrying on a business, trade, or occupation, exerted upon this separate property as a capital, enlarges and adds to the total amount, this increase is not "the rents, issues, and profits" of the separate estate, within the meaning of the code, but some portion of it, at least, becomes community property; and the question is not whether

[3] 15 Cal., 322.
[4] Civil Code, § 163.

this increase was *mainly* the result of his labor, or of the joint labor of the two spouses. The "rents, issues, and profits" of the separate estate, which are intended by the code to remain separate property, should be confined to those proceeds which arise without the husband's *active* use of the separate property, as a capital, in carrying on some business, trade, or profession, and, therefore, without the husband's *direct* labor as the agency or means for their production. Familiar illustrations are the rents, arising from lands belonging to his separate estate, which have been leased; the dividends, and other such income, which arise from funds belonging to his separate estate, which are invested in stocks, government bonds, and other like securities; interest arising from monies loaned upon notes, mortgages, and the likes, and all similar forms of income and profits, which do not result from the husband's labor, directly expended in producing them.

If this be a correct interpretation of the phrase "rents, issues and profits," we are now in a position to suggest a general rule applicable to all cases coming within the description given at the commencement of this article. Such rule should be simple and practical, capable of being applied under all circumstances, and it should have regard to and make provision for the interests represented by the husband's separate estate, as well as for the interests represented by the community property.

The following rule seems to possess all these qualities. Suppose, for simplicity and clearness of statement, the husband at his marriage had a separate estate of $10,000, which he used as the capital in his business. Carrying on a business with this capital, he dies leaving a total property of $60,000, and there has been no other property or source of property during the marriage. As the original $10,000 of separate estate is included in this total sum, and as it continues to be the husband's separate estate, it should of course be deducted. Is the residue $50,000 all separate property, or all community property? In my opinion it is all of neither kind, the only fair, equitable and practical rule to determine the portions which belong to each kind is substantially as follows: A sum which would equal the income upon the the original separate estate ($10,000) if invested at a fair, reasonable, average rate of interest during the entire period of the marriage, would represent the portion of this entire increase which belongs to the separate estate; the balance, being due to the husband's labor, and therefore, in contemplation of the law, to the labor of both the spouses, would represent the portion belonging to the community property. It might be proper, at least under some circumstances, in calculating the portion of the increase representing the separate estate, according to this rule, to make rests at stated intervals, perhaps even annual rests, and thus give the effect of compounding the interest. *J. N. P.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

J. J. SCRIVNER ET AL. *v.* THE OAKLAND GAS COMPANY.

September 1, 1884.

PROCESS AN INVENTION DISTINCT FROM MECHANISM PRODUCING THE PROCESS.—A process by which a new result is obtained, is a different thing from the mechanism by which it is carried out, and is a distinct, severable and independent patentable invention.

REISSUE ENLARGING THE PATENT AFTER LONG DELAY VOID.—The original patent was for the mechanism by which a new and useful result was produced. The patent, after eleven years delay, was reissued in such form as to embrace a claim for the process as well as for the mechanical means, by which the process was carried out. *Held*, that the reissued patent for the process is void.

M. A. Wheaton and *J. J. Scrivner*, for the complainant.

Jno. H. Boalt, for the defendant.

SAWYER, CIRCUIT JUDGE, delivering an oral decision. This is a suit in equity upon a reissued patent. The patent was reissued eleven years after the date of the issue of the original patent, and it enlarges the claims of the patent very materially. The reissued patent embraces a claim for the process, as well as for the mechanical means by which the process is carried out.

The original patent contained no claim, whatever, for the process. Not only, the claim is enlarged, but a whole page of descriptive matter, as to the character of the process, is inserted in the reissue; and it is upon these new claims that this suit is prosecuted.

In the case of James v. Campbell, 104 U. S., 357, it was held, that a process is a very different thing from the mechanism by which it is carried out, and is a different, and distinct, patentable invention.

I am unable to take this case out of the rule laid down in Miller v. The Brass Co., 104 U. S., 350, which holds, that, after so long a period of time, a patent cannot be enlarged by a reissue so as to embrace matters not within the original patent.

When that case was first decided, I was uncertain how far the supreme court intended to go, but they have affirmed it, and reaffirmed it, I suppose half a dozen times since, down to the very last part of the present term of the court, showing, that they intended to hold, rigidly, to the strictest rule laid down in that case. In some of the cases only five years had elapsed, but, in this, there were eleven; I am unable to take it out of the rule in that case, without, utterly, disregarding the decisions of the supreme court.

On the part of the complainants here, it is sought to take the case out of the rule cited on the principle stated in Morey v. Lockwood, 8 Wal., 240, and Russell v. Dodge, 93 U. S., 461.

In Russell v. Dodge, the patent was issued in 1869, and reissued in 1870, within a year. No such question as this, is involved in that case. That patent was for tanning a certain kind of leather with hot fat, and it is nowhere intimated in the specifications of the patent, or the claim, that cold fat could, or would, perform the same offices, and be equally practicable as hot fat; but it turned out, that

cold fat was as good as hot fat, or, at least, that it, practically, answered the same purpose, and the patentee thereupon applied for, and, afterward, obtained, a reissue covering cold fat. The supreme court held the patent to be void, as covering matters not suggested, or indicated in the original specifications, and patent; and said that, that was not a case like Morey v. Lockwood, quoting a passage from the decision in the latter case, wherein the party, who applied for the reissue, had endeavored to obtain a patent for the whole invention in his original application; and the patent office had refused to grant it to him, and compelled him to strike out of his original application and claim, the parts which were, afterward, inserted in the reissued patent, and for this reason it was the fault of the office, that he did not get his patent for his entire invention. The question there was, not as to the time within which the application for a reissue must be made, but related to the extent to which the patentee could go, under the circumstances, in inserting new matter. The court said, in Russell v. Dodge, that it is not a case like the former one of Morey v. Lockwood, and quote the passage referred to, saying that under the circumstances of this case, the rule adopted in the former would not authorize the patentee to broaden his claim, because he had not put it in his original application. It never was suggested that cold fat would answer the required purpose, until it was stated in the amended specifications, on the application for a reissue, and it was, therefore, held that it did not come within the case of Morey v. Lockwood. That case was decided as far back as 8 Wallace. The patentee, in that case, had applied, originally, for a broader claim, but, he was compelled to cut it down, and take such as the patent office was willing to grant to him. Some years afterward, he applied again to the new commissioner, reinserting his original claim, and got his patent reissued covering it. The court said in that case it was not the patentee's fault. He did the best he could to obtain his patent, and a reissue was sustained; but there was no question, then, as to the time, when the application must be made. It was long before this decision in the Brass Company case was announced. The decision in the Brass Company case has been recognized by the bar, at least, as a departure from the rule that had theretofore obtained, so that, that question never was raised in the case of Morey v. Lockwood. Since the Brass Company case, the question has been raised, and decided, over and over again, that if a party fails to, promptly, pursue his right to a patent covering his whole invention, he, thereby, abandons it to the public. Where the party examines the patent, and sees that it does not cover all he claims, he should apply, promptly. It is claimed, here, that the party sought to get a broader patent in his original application. I am by no means certain, that the original application is as broad as the present, but conceding it to be so, it seems to me, it makes it under the later decisions a stronger case against him, instead of a weaker one, because, not only, by the reading of the patent, could he see that his patent did not cover his whole invention, but he did,

in fact, know, that it was defective because he sought to obtain a broader patent, and it was rejected; and having been rejected, he, not only, had an opportunity of knowing by reading his patent, but he knew, in fact, that he had not obtained, as much as he claimed, and, yet, neglected to take any means by appeal, or, otherwise, to enlarge his claim for eleven years. The case seems to me clearly within the rule laid down in the cases cited.

I am, therefore, unable to take it out of these cases, and I must hold the patent void in those points in which it was claimed to be infringed; and the bill must, therefore, be dismissed.

WILLIAM SHARON v. SARAH ALTHEA HILL.

October 16, 1884.

DUPLICITY IN PLEA IN EQUITY.—Duplicity and multifariousness in a plea, in a suit in equity ,renders it bad.

ABATEMENT—DIVORCE--FRAUDULENT MARRIAGE CONTRACT.—A suit in equity by one party to a marriage contract in writing, alleged to have been entered into in pursuance of section 75 of the civil code of California, to annul the contract as fraudulent and for an injunction, is for a different cause from one by the other party to the contract, for a divorce arising upon the same alleged marriage contract, and a suit for the latter object pending in one court, will not abate a suit of the former character subsequently brought in another court.

ABATEMENT—DIFFERENT JURISDICTIONS.—The state and United States courts are courts of different jurisdictions, and a suit pending in a state court, will not abate a suit, subsequently, brought in a United States court for the same cause.

EQUITY RULE 69—BURDEN OF PROOF.—Where the time of taking testimony has expired under equity rule 69, and the case is heard on the bill, plea and replication to the plea, without evidence to support the plea, the plea will be overruled for want of evidence. The burden of proof is on the party pleading the facts relied on to oust the jurisdiction.

See decision on demurrer in this case, Sharon v. Hill, 2 West Coast Rep., 164; 9 Saw., showing character of the suit.

W. H. L. Barnes, for the complainant.

Tyler & Tyler, for the defendant.

SAWYER, CIRCUIT JUDGE, delivering an *oral* decision.

There is but one thing to do in this case; and that is, to overrule the pleas. There are, in fact, two pleas; one is, that another suit is pending in a state court for the same cause of suit. The other is, that the complainant, Sharon, is a citizen of the state of California, and, therefore, that this court has no jurisdiction in the case. If the complainant had objected to the plea on the ground of duplicity, and multifariousness, and set it down for argument instead of replying, the court would have been obliged to overrule it on that ground. But one plea can be set up in equity without express leave of the court: Sto. Eq. Pl., sec. 653–4; 2 Dan. Ch. Pr., 681–2, Perkins' Ed. The plea is bad on that ground. The plaintiff's counsel did not see fit to set it down for argument on that ground. Admitting the facts as alleged in the plea of another suit pending to be true, the plea must be held bad, because the two causes of suit are not the same. The suit in the state court is for a divorce and a division of the community property. The suit in this court is for a

decree declaring the written instrument set out and claimed to be a contract of marriage made in pursuance of section 75 of the civil code of California, to be fraudulent and void; for cancelling it on that ground, and for a perpetual injunction restraining defendant from claiming any rights under it. It is true the same principle issue will arise in both cases, but the bills of complainant in the respective suits call and pray for entirely different and inconsistent relief. They are, therefore, not the same cause of suit; nor is the relief sought in the two suits by the same party. The first plea would be bad in substance on that ground: 2 Danl. Ch., 720–1. The whole effect sought in the second suit could not be had in the first, nor by the same party. A cross bill at least would be necessary, which would, in effect, be another suit. It is also bad on another ground—that the suit set up is not pending in a court of the same jurisdiction. (Ib.) It is well settled by the supreme court of the United States, that a cause of action pending in another jurisdiction can not be pleaded in abatement of a suit in the United States courts; and that the courts of the states and of the United States are courts of different jurisdictions: Stanton v. Embrey, 93 U. S., 548, 550; Gordon v. Gilfoil, 99 U. S., 169, 178. Here there are two jurisdictions—jurisdictions of two distinct governments. One is state jurisdiction, and the other is the jurisdiction of a national court. If it were a fact, that a suit is pending for the same cause in the state court—a court of a different sovereign jurisdiction,—it would not abate the suit here. The plea is bad, in substance, on that ground; and this objection is taken in the replication. This plea conceding the facts set up to be true in fact, still affords no ground for abating the suit. But a replication having been filed, taking issue on the plea, to the jurisdiction, the case is submitted for decision on the pleadings without any evidence. The plea was filed April 24, 1884. The plaintiff joined issue by filing his replication on May 3, 1884, taking issue on the facts alleged in the plea. The party under equity rule 69, prescribed by the supreme court of the United States, had a certain prescribed time within which he could take testimony. "Three months, and no more, shall be allowed for the taking of testimony after a cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing." No extension of time was given, or even applied for. That rule is specific. The filing of this plea to the jurisdiction that Mr. Sharon is a citizen of California, and the replication to it presented issues of fact. The plea was filed early in May. Over five months have elapsed since the case was at issue on the plea. No testimony has been taken and no application for an extension of time was made. The three months having expired, no testimony can now be taken. It was on that ground that the case was submitted on the pleadings without evidence by complainant's counsel on yesterday, as he had a right to do, it having been regularly set down for hearing on the calendar for that day, and

having been regularly called in its order for hearing. The burden of proof is on the party making the allegations of the plea. As she has no testimony, necessarily, her plea is not supported. The plea must, therefore, be overruled on that ground, there being no testimony to support it. These are the points that are submitted for decision now. I call attention to the other question, also, to show, what must be the result as to the first plea on the ground of duplicity. The real points in the case, as now submitted, are, that there is no evidence in the case to support the second plea, consequently, the affirmative being on the party pleading the matter to the jurisdiction, the plea must be overruled for want of evidence, and the other plea in abatement is bad in substance. The plea is, therefore, overruled with costs, with leave to answer to the merits within thirty days.

McFADDEN ET AL. v. ROBINSON ET AL.

October 20, 1884.

REMOVAL—CONTESTED QUESTION OF LAW.—Where a case has been removed to the Circuit Court under the act of Congress of 1875, on the ground that the suit arose under the constitution, or laws of the United States, it will be remanded to the State Court, unless it affirmatively appears from the facts alleged in the record, that some contested question of law will arise, upon the constitution, or laws of the United States.

MOTION to remand to the State Court, whence the case was removed under the act of 1875.

A. L. Rhodes for the complainants.

Wm. Matthews for the defendants.

SAWYER, CIRCUIT JUDGE.—The suit is in equity, to quiet title to a tract of land which is covered by two patents, issued upon confirmations of two Spanish grants, one for the Santa Ana Rancho, and the other for the Las Bolsas Rancho.

The petition for removal states as follows: That the action arises under the act of March 3, 1851, and under the treaty of Guadalupe Hidalgo; that the claim of plaintiff is based on a right and title which originated under Spain, while California was a province of Spain, and, also, upon an expediente made by the authorities of Mexico, while California was a part of the domain of the Republic of Mexico; that the grant was presented by Bernardo Yorba to the tribunals of the United States for confirmation, under the act of 1851; that the claim was, subsequently, confirmed, and a patent issued upon the confirmation, December 21, 1883; that the patent includes all the land in controversy; that the complainants have acquired, and they now hold, all the title to the land in controversy, which passed by said Spanish and Mexican titles, and said patent; and that they now claim the same under said title, and under no other title; that the defendants are owners in fee of the lands in controversy; that

their rights arise under a title granted by Spain, and a further grant by Mexico, while California was still a part of the domain of those countries, respectively; that the title is other and different from that held by complainants; that the title was held in 1852 by Ramon Yorba, et al.; that, in that year, it was presented to the Board of Land Commissioners for confirmation, and was afterward, finally confirmed; that patents thereto were issued, as follows: for one undivided half to Ramon Yorba, et al., on June 9, 1874, and the other half to Justo Murillo, et al., August 27, 1877; that defendants hold all the title passing by both these last-named patents, and they hold no other title; and that the matter in dispute depends upon, and will be determined by, the weight and force in law of the respective patents, and titles therefrom derived, held, as aforesaid, by complainants and defendants.

The case as stated in the petition for removal, in my judgment, does not appear to present any disputed question of law arising under the constitution, or laws of the United States. So far as appears, neither party questions the right of the Spanish and Mexican governments to make either grant—either the grant under which the complainants claim, or that under which the defendants claim. Neither party appears to question the right of the grantees of either grant to the protection accorded by the treaty. Both parties rely upon the binding and obligatory force, and effect, of the treaty. Neither party denies the validity of the act of March 8, 1851. Neither party denies to the other any right claimed under that act. Neither party gives a different construction to the act, or any of its provisions, from that claimed by the other. Neither party denies the validity of the proceedings of the other for a confirmation of the title under which they claim. Nor the correctness of the survey. Nor of the patent.

In respect to the above matters, there does not appear to be any contested question of law arising under the constitution, or laws of the United States in the case. The only question in the case seems to be this: Conceding that both parties had grants of tracts of land; that each grant was confirmed; that a patent issued for each rancho as confirmed; and that the tract in controversy in this case is covered by grants and patents—which party acquired the title to the tract in controversy? And that depends upon which, in fact, acquired the oldest effective grant? That question is to be determined by an examination of the proceedings of the Spanish and Mexican governments in making the inchoate grants to the respective parties, and upon the subsequent acts of the parties, and Mexican government under the grants, and before the cession of California to the United States; or upon the facts and laws of Mexico, in force in California before its acquisition by the United States. It should affirmatively appear, that there will arise some contested point of law depending upon the constitution, or laws of the United States, and what the question is. Nothing of the kind affirmatively appears in the petition or records. It appears to me that this case falls

within the rule adopted in Trafton v. Nougues, 4 Saw., 178, substantially affirmed by the United States supreme court in Gold Washing Co. v. Keyes, 96 U. S., 199, and within the case of Romie v. Casanova, 91 U. S., 379, also McStay v. Friedman, 92 U. S., 723-4.

The cases cited by defendants do not appear to me, to conflict with the doctrine of those cases. In Hills v. Houston, 4 Saw., 198, the whole case turned upon a disputed construction of the two patents. There was, clearly, a contested question of law, arising under the constitution, and laws of the United States. The other cases do not appear to determine, or discuss, any question arising in this case. It is not enough that a question may, possibly, arise under the constitution, and laws of the United States. It should be made to appear from the facts stated, that such a question will arise, and, what the question is, and how it will arise. Should one arise in the course of the trial in the state court, the ruling of the state court may still be reviewed by the United States supreme court, on writ of error in favor of the party against whom the ruling is made.

Upon the views expressed, the case must be remanded to the state court, and it is so ordered.

CIRCUIT COURT, DISTRICT OF COLORADO.

O'RORKE v. UNION PACIFIC RAILWAY COMPANY.

October 8, 1884.

NEGLIGENCE—WORK DANGEROUS IN ITSELF—MASTER AND SERVANT.—A railroad company whenever it calls upon an employee to perform work under dangerous conditions, is bound to provide him with the ordinary means of protection, and its failure so to do is negligence, unless the right to have such means of protection furnished has been waived by the employee.

THE SAME—ASSUMPTION OF RISK BY EMPLOYEE.—Where an employee has been accustomed to do such work, day after day, for several months, knowing the same to be dangerous, but without making complaint or demanding the ordinary means of protection, it must be presumed that he assumed the risks of his employment, and if he is injured therein, the company is not liable.

MOTION for a new trial. The opinion states the facts.

Markham, Patterson & Thomas, for the plaintiff.

Teller & Orohood, for the defendant.

BREWER, CIRCUIT JUDGE. In No. 1,176, Michael O'Rorke v. The Union Pacific Railway Company, a motion was made for a new trial. It was an action for personal damages, and a verdict was found for the plaintiff. The substantial facts are these: This plaintiff was a car repairer, engaged in repairing cars along the line of the defendant's road. On the day of the accident, he went to the station at Malta, I believe, and found there three cars standing on a side track with a freight train on the main line. The conductor of the freight

train told him that the rear car of the three side-tracked cars needed repairing, and that he should wait there about twenty minutes, which would be time enough to do the work. He went under the car to repair it, and while there parties in charge of the freight train switched a car on to the side track, which started the other cars on the track, and they pushed the car under which he was at work, moving it some few feet, and injuring him. He had no red flag out with which to signal to the engineer, and no assistant to notify parties moving the train that he was at work under the car, and the engineer, moving the train, did not know there was anyone under the car. He had no reason to suppose that anyone was under it, and switched off his freight car on to the side track without any knowledge, or reason to believe there was any danger in so doing.

Indeed, so far as the action of the engineer is concerned, no negligence can be affirmed in his conduct; the complaint is that the railroad company was negligent in not furnishing to one engaged in that business, and necessarily compelled to go under cars, and liable to be there injured, a red flag, which he might station out as a signal, or furnish him with an assistant, to give notice of his position, and that the railroad company was negligent in not so doing. I have no question, whenever they call upon an employee to go into such a position as that, I think it is their duty to provide him with the ordinary means of protection, which, we are informed by the testimony, is a red flag. It cannot be expected that an engineer, in switching cars, can send a man forward to see whether or not some one is under any car, and the red flag, being the ordinary signal of danger, should have been furnished to this man.

But the troublesome question lies back of that. This plaintiff was an old railroad man, fully aware of the dangers of such work as he was then engaged upon; he had been employed on this road, in such work, for seven or eight months, and was in the habit of going under cars under just such circumstances. He had no flag, and he asked for none. Now, the railroad company insists that he waives his right to recover for any injury received in consequence of that fact. This doctrine of waiver, upon which the company relies, is a doctrine which has been developed within the last few years. It has been carried by some courts to a dangerous extent, one which, I think, cannot be finally sustained.

It has been said, and I think there is force in it, that there is really no such thing as a separate and distinct defense of waiver, and that what is called waiver is simply one form of "contributory negligence;" that the difference between waiver and contributory negligence, is the difference between passive and active negligence, and that what is meant by waiver is passive negligence, in omitting to do a thing which the employee ought to have done; and, in this case, it would be said that the plaintiff omitted to call for a flag,—omitted to take precautions which he ought to have taken,—and that is nothing more or less than passive negligence.

As I said, this doctrine of waiver has been carried by some courts to a great extent. They have affirmed that an employee, whenever he finds suitable precautions have not been taken for his safety, ought to stop at once, and if he continues on, he assumes all the risks. I don't think that can be held to be law.

A case was presented to me in Des Moines, last spring, where that claim was very urgently pressed by the railroad company. In that case, a common laborer, who had been employed for some time as a section hand, was, on this particular day, employed to load railroad iron. It appeared that the railroad company had substituted steel rails for iron rails, and simply thrown the iron rails to one side, and then sent a train along to pick them up. The train was constantly in motion, at first, at a low rate of speed; as two rival gangs, one on each side of the train, worked together, and became more interested in their work, and worked more quickly the train moved more rapidly; finally, a flat car, having been loaded too high, and the sides having been insufficiently protected, a rail which was thrown on fell off, and this laborer was caught and hurt, and the company tried to insist upon the doctrine of waiver. That this man had been working all the day, the accident happening about two or three o'clock in the afternoon; that he was willing to do the work, and that he waived his right to compensation in view of that fact; he saw the danger he was in, and, seeing it, continued to work.

I held that the company was liable. I don't think that the urgency can be forced upon an employee so quickly as that for deciding that he cannot be called upon at the instant to stop work if he sees there is danger. Suppose an engineer, running a train between the point of departure and the point of terminus, finds that his engine is out of order, can he stop right here and say he will stop until the injury is mended?

It would not be safe to do this; he must carry the defective engine to its point of destination. No other rule would be safe. And so, generally, a man cannot be called upon, at the moment to say, there is a defect, or there is danger, and I will stop; he has a right to wait a reasonable time; to consider the circumstances of the case, and to give notice to his employers that he is in danger; time enough to see whether the employer means to have the defect remedied; time enough to see the general way in which he conducts his business; and if he finds that his employer intends to use machinery with defects, or to conduct his work in a dangerous manner; finds that is to be his habit, finds that, after he has been notified, he still intends to conduct his business in that way, and then goes on and continues in the work, it is fair to assume that he takes the risks; of course, there can be no question, where it is expressly agreed upon.

Suppose, for instance, that I own a mill; suppose the machinery in it is clearly defective, and I say to an employee, "I am running a mill, in which there is defective machinery," and I point out to him the defect, "are you willing to work here and take the risks?"

If he says he is, he cannot afterward recover, if he is injured; and so, in order that there should be an implied agreement, the facts should exist for so long a time that the employee has opportunity to see that his employer means to let the machinery remain in that condition, and carry on his business in that way, as a general rule; and if he then continues at work, he may be presumed to consider the compensation sufficient to justify him in taking the risk.

In this respect, it appears that this plaintiff had been for seven or eight months in the employ of the company, along this line of road; that he had done this work day after day without a flag, knowing its necessity, making no complaint, asking for no change, and it seems to me that after we consider this, and all the circumstances of the case, it must be said that negligent although the company was, the man assumed the risks of the danger, knowing what it was, and cannot now hold the company responsible.

I think the motion for a new trial must be sustained.

GILLETTE ET AL *v.* CITY OF DENVER.

October 16, 1884.

TAXATION—ASSESSMENT FOR SEWER—NOTICE OF APPORTIONMENT—DUE PROCESS OF LAW.—The legislature, under the constitution of Colorado, has power to provide for an assessment of a tax for a sewer upon the property within a given district according to the area, and not according to the value of the property. In such case the apportionment of the tax is a mere mathematical calculation, and a failure to give the taxpayer notice thereof, when an opportunity to be heard concerning all other steps in the tax proceeding is given, is not a denial of due process of law.

ENFORCEMENT OF TAX WHEN ENJOINED—IRREGULARITIES IN TAX.—Equity will not enjoin the enforcement of a tax, for mere irregularities in the exercise of a constitutional taxing power, or for excess in the amount of the tax, unless it be alleged and shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered, without demanding a receipt in full.

DEMURRER to a bill for an injunction. The opinion states the facts.

J. O. Charles and *J. W. Webster*, for the complainants.

L. M. Cuthbert, for the defendant.

BREWER, CIRCUIT JUDGE. In the case number 1,217, Gillette against The City, a bill has been filed to enjoin the collection of certain sidewalk and sewerage taxes. So far as the sidewalk taxes are concerned, the question as to them has been settled by the supreme court of the state, and is now pressed for consideration.

The special demurrer runs only to the sewerage tax. It is claimed by the complainants that this tax is void, because the act of the legislature under which the proceedings are had is unconstitutional in two respects. First, it provides for an assessment of the tax upon the property within the district according to the area, and not according to the value of the property, ignoring all improvements placed upon it; and the question involved is whether it is within the power of the legislature under your constitution to assess

these special taxes upon property according to the area. In the case which went to the supreme court of your state, involving the sidewalk tax, where the act provides for collecting the tax, according to the frontage, the act was sustained. I am unable to see any distinction in principle between the two, if you can collect a sidewalk tax by a levy upon the adjacent lots according to their frontage, which of course ignores all question of value or improvements, I can see no reason why you could not collect a sewerage tax upon property according to the area. In both cases all matter of improvements, all question of value, is ignored, and so, without discussing the question, it seems to me under the decision of your supreme court that that objection must be overruled.

The second objection is, that under the act there is no such notice provided for as will create due process of law; and in reference to the sidewalk ordinance and the proceedings thereunder, the supreme court have held that there was not due process of law, and have set aside those taxes. A distinction is sought to be made between sidewalk proceedings and those in reference to the sewerage. What is due process of law is one of those questions which it is more easy to ask than it is to answer. The supreme court of the United States have very carefully said that there is as yet no full and definite answer to the question. In the case of Davidson v. New Orleans, 96 U. S., 97, the court, by Mr. Justice Miller, uses this language: "But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. * * *

"As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us:

"That whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden, is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law."

And in a subsequent case, Hagar v. Reclamation District, 111 U. S., 708, the court, by Mr. Justice Field, uses this language, after discussing more generally what due process of law may be, "but where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of rev-

enue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley in his concurring opinion in Davidson v. New Orleans: "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

And again: "Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things, or persons, or occupations. In such cases, the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter." And then goes on to speak of where a tax is levied on property not specifically, but according to its value to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, and holds that a different principle comes in.

Now, in this case, the tax is levied by the area, no question of value, no matter of judgment, a mere mathematical calculation; and of what earthly profit could it be to a taxpayer to have notice of that calculation?—he can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be.

In the proceedings to assess this tax and to do the work, there are three steps: first, there is the making of the contract for the building of the sewer; second, there is the building of the sewer, the performing of the work; and, third, the mere mathematical calculation, the apportionment of the cost. As to the latter, no notice can be required, because notice would be of no avail; as to the first, the statute provides that the city council may not act except upon the petition of a majority of the property holders, or a recommendation of the board of trade; it acts only by ordinance; the contract can be let only on advertisement. Every citizen is bound to take notice of the ordinances of the city, so that, anterior to the making of the contract, he has all the notice which can be required; and the statute also provides, in reference to the doing of the work, that while the work is proceeding, on the complaint of any citizen or taxpayer that any public work is being done contrary to contract, or the work or material used is imperfect or different from what was stipulated to be furnished or done, the council shall examine into the complaint, may appoint three commissioners, etc., so that, in reference to the making of the contract, the performing of the contract, there is provision for notice, and as to the mere apportionment of the tax, it is one of those matters as to which, in the nature of things, no

notice can be required, because no notice would be of value. So that within the definitions laid down in these cases, in the supreme court of the United States, it seems to me that it must be held that there was no violation in that statute of that provision of the federal constitution forbidding the taking of property without due process of law.

But that only advances us one step. It is charged in the bill, and on demurrer, it must be taken to be true, that there were irregularities in the exercise of this power, that tax warrants have been issued for a sum largely in excess of the cost of the sewer; and this statute provides that the cost of the sewer shall be charged upon the lots in dispute; and the question now arises: what is the duty of the court in this equitable case, where work is irregularly done, defects appear in the proceedings of the council, and an excess in the amount of the warrants? In reference to that, this is the rule laid down, in a very carefully considered case by the supreme court on these general questions, in the State Railroad Tax cases, 92 U. S., 575. (This, it must be borne in mind, is an equitable action to restrain the collection of the entire tax levied upon these lots). In the syllabus it is stated: "While this court does not lay down any absolute rule limiting the course of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection."

And in the fourth proposition, "no injunction, preliminary or final, can he granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full.

And in order that it may be seen that that is not the language of the reporter and an improper deduction from the opinion, I turn to the language of the opinion itself, where, on page 613, Judge Miller says: "It has been repeatedly decided that neither the mere illegality of the tax complained of nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity," quoting half a dozen cases; and then further: "But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity."

"It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years of litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity.

It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

"We are satisfied that an observance of this principle would prevent the larger part of suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases."

Applying that rule here, it is alleged in the bill that these sewers had been constructed, that their cost was a certain sum, that the area within the district is also of a certain extent. Now, conceding, and it must be under the allegations of the bill, that there were irregularities in the proceedings sufficient in an action at law to defeat the title transferred by a conveyance, yet the complainants stand in the attitude of saying to this city, "You shall not collect a dollar of the cost of this sewer because you have tried to collect more than you were entitled to, because of some irregularity in the proceedings to collect that tax; while we admit that the sewer has been built, that it really cost so much, and that as must be conceded under the provisions of the statute and the ordinance, our property has been benefited to that extent." It seems to me that equity will not interfere in such a case. There is no allegation in the bill of payment and tender. I think the bill in respect to that matter is therefore defective, and the demurrer to that portion of the bill which seeks to sustain the collection of the sewerage taxes will be sustained.

BROWN *v.* CITY OF DENVER.

October 16, 1884.

DEMURRER SUSTAINED on authority of Gillette v. City of Denver, *ante.*

DEMURRER to a bill for an injunction.

J. H. Brown, for the complainant.

L. M. Cuthbert, for the defendant.

BREWER, CIRCUIT JUDGE. In the case of Brown v. the City, which presents the same questions substantially, there is this additional fact: The plaintiff is a citizen of Colorado, and comes into this court invoking the jurisdiction of the federal courts, on the ground that

his property is being taken without due process of law, in violation of the provision of the fourteenth amendment. I do not think it is necessary to say any more than I have said. It does not seem to me that under the allegations of the bill, it can be held that there was a lack of due process of law, and I do not think that a citizen of the state can come into the federal courts, and litigate with a citizen of the state any other than a federal question. So I have not considered several questions made by counsel as to supposed infractions of other portions of the constitution.

The special plea to the jurisdiction will be sustained.

SUPREME COURT OF COLORADO.

SMITH v. FAIRCHILD ET AL.

Filed October 1, 1884.

SALE OF REAL ESTATE BY BROKER—COMMISSIONS FOR SALE.—A broker, employed by the owner of certain real estate to sell the same at a stated price, if the sale be made within "a short time," is entitled to his commissions upon finding a purchaser within two weeks after the date of his employment, and before the property is withdrawn from the market.

APPEAL from the county court of Arapahoe county. The opinion states the facts.

Harmon & Ellis, for the appellants.

Benedict & Phelps, for the appellee.

STONE, J. No legal question appears to be involved in this case; the judgment seems to be founded on matters of fact, and the assignments of error raise simply a question of the sufficiency of the evidence to support the judgment.

The appellees were ordinary real estate brokers, and as such were authorized by appellant to sell a certain number of town lots at a stipulated price, upon which a commission was to be paid by appellant.

Appellees found a purchaser who agreed to take the lots at the price fixed by appellant and a small sum was paid down to appellees to bind the bargain. Upon applying to appellant for a deed to the lots, he refused to convey saying that the lots had increased in value and he had withdrawn them from market. Suit was brought by the appellees for the amount of their commission and a finding and judgment had in their favor by the court below, for the sum of one hundred dollars, from which judgment this appeal is taken.

Appellant did not dispute the employment of appellees, or that he authorized them to make a sale or find a purchaser at the price stated, nor did he dispute the amount or reasonableness of the commission in case of sale.

The only ground upon which he refused to carry out the sale by making a conveyance, was that the property had increased in value.

This was no valid defense, since he had himself put the price upon the lots at which he authorized them to be sold, and had not definitely limited the time within which they might be sold at such stipulated price.

In his own testimony appellant stated that he authorized them to be placed upon the market by appellees at the price named "only for a short time." Admitting this to be true, the time was not limited to any definite period, and the purchaser in question was found within two weeks from the time appellees where authorized to sell the lots; which time may be regarded as very fairly coming within the definition of a "short time."

No notice of a change of terms, or of a withdrawal of the property from sale was given to appellees previous to their informing appellant that they had found a purchaser who had agreed to take the lots at the given price and requested a deed therefor.

If at that time the offered price was inadequate, it was the fault of appellant and not of appellees.

We think the judgment is supported by the facts in evidence as disclosed by the record, and it will be accordingly affirmed.

Judgment affirmed.

IRWIN ET AL. *v.* WOOD ET AL.

Filed October 1, 1884.

DEMURRER TO COMPLAINT—MISJOINDER OF DEFENDANTS.—A demurrer to a complaint on the ground of a misjoinder of parties defendant should be disregarded unless it specifies in what the misjoinder consists, and which of the defendants are misjoinded.

JOINDER OF DEFENDANTS SEVERALLY LIABLE—FORM OF JUDGMENT.—Under section 13 of the code of civil procedure several promisors under a written contract, who promise to do certain acts, "each for himself and not for the others," may be joined in an action for a breach of such contract. The judgment in such action should be entered against the defendants severally, in proportion to their respective liabilities.

APPEAL from a judgment of the district court for Gunnison county, entered in favor of the defendants. The opinion states the facts.

Thomas, McDougal & Thomas, for the appellants.

Belford & Reed, for the appellees.

STONE, J. The point relied upon by appellants for reversal of the judgment is, that the court erred in sustaining the demurrer to the complaint on the ground of misjoinder of the defendants.

The suit was upon a written contract, one clause of which was as follows: "That the said Burchinell, Wood and Clark, parties of the first part (each for himself and not for the others, and in so far as his interest may appear in said claims,) agree to furnish provisions to said Irwin and Jerome, the parties of the second part to this contract," etc.

The complaint was demurred to on the ground (among others) of a misjoinder of parties defendant, and the demurrer was sustained by the court upon that ground expressly. We think this was error.

Section 56 of the code (revision of 1883) provides that a demurrer may be disregarded which does not distinctly specify the grounds upon which any of the objections to the complaint are taken.

I. In this case the demurrer should have specified in what the misjoinder consisted, which of the parties defendant were misjoined, and why, since if it was on the ground alone that a joint action would not lie, it must be admitted, nevertheless, that under the code practice the action was good against some one of the defendants; at least, if the complaint set out a good cause of action against any one of the defendants, a joint demurrer by all on the ground of misjoinder was bad: Pomeroy's Remedies, Secs. 289, 290, 291.

II. The ground in support of the demurrer, presented in argument, and upon which the court below appears to have sustained it, is, that the contract, which was the foundation of the action, expressed a several liability of the defendants, and that therefore they could not be joined in the same action.

The only authorities cited in support of the ruling of the court upon this point, are those under the practice at common law. This rule of practice has been swept away by the codes of civil procedure in most of the states where the code practice prevails. Section 13 of our own code (revision of 1883) declares that "persons jointly *or severally* liable upon the same obligations or instrument, including the parties to bills of exchange, and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action at the option of the plaintiff."

The case of Wilde & Co. v. Haycraft et al., 2 Duvall (Ky.) 309, where the contract was a guaranty, in which the defendants each expressly bound himself in a separate liability for a specific amount less than the aggregate sum of the guaranty, is in point. The defendants were all joined in one action upon the contract, and the petition was dismissed in the court below upon a demurrer specifying, among other causes, that a joint suit could not be maintained.

The supreme court reversed the judgment and in passing upon this point, under a provision of the civil code of that state (Ky.), substantially the same as the one quoted from our own, say: "In this case there is but one contract and it is the same contract between the same parties, but several as to its obligations, and neither the language, nor the presumed object of the quoted section of the code can be constructively restricted to a several contract including each separate obligor for the whole amount of their aggregate liabilities. The letter of the section certainly authorizes no such restriction, and the policy of avoiding a vexatious multiplicity of actions for a breach of the same contract would apply equally to every contract made at one and the same time by the same parties severally liable upon it. The joint action, as chosen is, therefore, in our opinion, a proper legal remedy."

That the same construction is given to similar provisions of the codes of procedure of other states, see the following cases: Decker v. Trilling *et als.*, 24 Wis., 610; The State *ex rel.* etc. v. Roberts, 40

Ind., 452; The People v. Lone *et al.*, 25 Cal., 520; Parker v. Jackson, 16 Barb., 33; Pomeroy's Remedies, sec. 292.

This construction of the provision in question is undoubtedly in accord with the reform spirit and express purpose of the code practice in seeking to avoid the multiplicity of suits under the former practice, wherever the respective rights and liabilities of parties arising out of the same contract might as justly, conveniently and with less expense be determined in one action as in two or more.

In the case at bar, the liabilities of each and all of the parties joined as defendants arise out of the same contract embodied in the one instrument of writing as averred by the complaint, and the latter therefore was not obnoxious to the demurrer on the ground of misjoinder of parties.

III. As the case will be remanded for trial it is not out of place to observe that if the trial should eventuate in a judgment against the defendants, a separate judgment against each found liable would be proper, inasmuch as the liability of each is expressed in the contract to be not only several but differing in extent, proportionate to the respective and different interests of each in the property specified: Civil Code, sec. 199–200 (Rev. '83).

A several judgment is proper, it seems, and may, in some cases, be necessary, whenever a several suit might have been brought: Parker v. Jackson, 16 Barb., 33; Decker v. Trilling, 24 Wis., 610; People v. Edwards, 9 Cal., 286.

The judgment is reversed and the cause remanded.

BARTH ET AL. *v.* JONES ET AL.

Filed October 1, 1884.

LESSOR AND LESSEE—ABANDONMENT OF LEASE—RECOVERY OF AMOUNT.—A lessee, under a contract of lease, by the terms of which possession of the premises is to be given him at a future day, who pays the rent in advance, may recover back the same, if, after demand, the lessor refuses to deliver the possession, and the parties thereupon abandon the lease by mutual consent.

WHEN THE EVIDENCE IS CONFLICTING A VERDICT will not be disturbed.

APPEAL from a judgment of the district court for Arapahoe county. The opinion states the fact.

Harmon & Ellis for the appellants.

Browne & Putnam for the appellees.

BECK, C. J. The appellants, Barth & Bro., on the 8th day of October, 1880, leased to the appellees, Thomas and Robert Jones, for the term of three years, a certain lot and premises in the city of Denver, to be used in establishing and carrying on the grocery business. By the terms of the lease, certain improvements were to be made by the lessors, and possession was to be delivered to the lessees on the first day of November following. Lessees were to

pay two hundred dollars per month as rent for the premises, monthly in advance, and at the time of making the contract paid thereon the sum of two hundred and forty dollars in full for the month of November.

The premises were not ready for occupation at the stipulated time, and the lessees, after demanding possession, and the lessors being unable to give it, hired other premises. This action was brought to recover back the money advanced upon the contract.

The defense is that Barth & Bro. are under no legal obligation to refund the money advanced, since they expended a large sum of money in making the stipulated improvements; and that they were prevented from completing them by the time agreed upon, by the acts of Jones & Co., the lessees. Also, that the lease was cancelled by mutual consent of the parties, without any agreement to refund the money advanced.

Upon trial of the issues in the court below, Jones & Co. obtained a verdict and judgment for the sum of two hundred and sixty-six dollars, for the money advanced upon the lease, and interest thereon.

At the conclusion of the plaintiff's testimony on the trial, defendants moved the court for a non-suit, on the ground that the testimony showed a cancellation of the lease by agreement, no part of which required the refunding of any money. This motion was overruled, and the ruling being duly excepted to, now constitutes the first assignment of error.

Upon examination and consideration of the testimony adduced in behalf of the plaintiffs, we think the ruling of the court was correct.

This testimony shows that the lease was abandoned by both parties, but it does not show that any agreement was reached concerning the money previously paid by Jones & Co.

The testimony of Robert N. Jones is to the effect that negotiations were abruptly broken off, without arriving at any agreement about the money.

He says (speaking of the attempted negotiation with William Barth): "After he saw his brother * * * he said they had agreed to cancel the lease. After he agreed to cancel the lease, then said I: 'Mr. Barth, I want my money.' 'No,' said he; 'we can give you no money back,' and I left him there and then, and took a house on Blake street."

This was the substance of all that passed at the interview. The lease was not produced. No release of the contract in writing was executed then, or any other time. The previous testimony of the witness shows a request on his part to be released from the contract because Barth & Bro. could not deliver possession of the premises, and that William Barth said he would see his brother, and then give him an answer.

Having seen his brother, he gave for answer that they had agreed to cancel the lease. Up to this point nothing appears to have been said by either party about the two hundred and forty dollars pre-

viously paid on the lease. The fact that Barth promptly refused to pay it back when it was then and there demanded by Jones, indicates strongly that a repayment of this money was not contemplated by the defendants, in the announcement that they had agreed to cancel the lease.

The foregoing circumstances, coupled with the subsequent conduct of the parties, as detailed by the witnesses of the plaintiffs, show a default on the part of Barth & Bro., to comply with the terms of the lease on their part. They show a compliance and a demand of possession by the plaintiffs, and a subsequent abandonment, but not cancellation, of the lease by the mutual consent of both parties. They likewise show that no agreement was reached concerning the money advanced by the plaintiffs.

There was no discharge from all the terms and conditions of the contract as in the case of Winton v. Spring, 18 Cal., 452, cited by defendant's counsel. On the contrary, the legal effect of the plaintiff's testimony is that the negotiations for cancellation were abruptly terminated by the demand and refusal to pay the two hundred and forty dollars.

Upon this testimony, there was a good cause of action against the defendants, for which reason the motion for nonsuit was properly denied. Respecting the other errors assigned, we discover no sufficient ground for reversing the judgment.

If the case was to be considered on the testimony of the defendants and their witnesses only, there would be no cause of action; but their testimony being in direct conflict with that of the plaintiffs', it was the province of the jury to determine to whom credit should be given.

The jury determined the conflict in favor of the plaintiffs below, and returned a verdict in their favor. We cannot say that this verdict is clearly opposed to the weight of the evidence. It was found under proper instructions as to the law governing the case, and this court would not be warranted, under the circumstances, in disturbing it. The judgment is affirmed.

Judgment affirmed.

PEOPLE EX REL. BARNES ET AL. *v.* DISTRICT COURT, ETC., ET AL.

Filed October 1, 1884.

PETITION FOR WRIT OF PROHIBITION DENIED, for the reason that the relief asked had already been granted on appeal.

PETITION for a writ of prohibition. The opinion states the facts.

L. M. Hulburd, for the petitioners.

Charles H. Wenzell, for the respondents.

STONE, J. This is an original application to this court, by petition, for a writ of prohibition, to restrain the further action of the

district court, of the fourth judicial district, and others, from further proceeding in the matter of a temporary injunction, issued by the judge of said court, and to prevent the appointment of a receiver by said court, in respect to certain property and matters in litigation, in a certain suit, then pending in the court, entitled R. L. De Lay, and others, appellants, against The Leadville Improvement Company, appellee, numbered 1,091 on the docket of this court, and to restrain all further proceedings, under and by virtue of the order of the judge of the district court aforesaid, in granting the said temporary writ of injunction, etc.

An inspection of the records of this court discloses the fact that, subsequent to the filing of the petition for the said writ of prohibition, and the answer thereto, to wit, on the fourth day of December, 1883, an order was entered in this court in the words following, to wit:

"R. L. De Lay et al., appellants, v. The Leadville Improvement Company, appellee.

"Appeal from district court of Lake county: At this day, this cause coming on to be heard upon the motion of said appellee and written stipulation of parties filed herein, it is ordered by the court, in pursuance of said stipulation, that the injunction heretofore issued in this cause be and the same is hereby dissolved without prejudice; and that the judgment of said district court be and the same is hereby affirmed at the cost of said appellants. It is further ordered by the court that both parties have leave to withdraw from the files the abstract of title and other title papers heretofore filed herein."

The judgment of the district court above referred to as affirmed by the foregoing order, is the judgment of the district court of Lake county, from which the appeal was taken to this court, but the injunction in question was issued by the judge of the fourth judicial district upon an application therefor by reason that the judge of the Lake district court who was presiding at the time of the making of the application for injunction had previously been of counsel in the case, and therefore said application was made to the judge of the fourth district, who thereafter allowed the temporary writ to go, and the petition to this court for the writ of prohibition was based upon the ground of want of jurisdiction in the district court or judge thereof to interfere in the case while the same was pending on appeal in the supreme court.

From this state of facts it is obvious that the order of this court dissolving the injunction, and determining the principal case by affirming the judgment therein of the Lake county court, from which the case was appealed to this court, has also accomplished all that was sought by the petition in the case now before us, and the said petition will therefore be ordered dismissed at the cost of the relators.

SUPREME COURT OF CALIFORNIA.

No. 9,375.

LUKES v. LOGAN, SUPERIOR JUDGE.

Department Two. Filed October 21, 1884.

PAYMENT OF JURY FEES—SETTLEMENT OF BILL OF EXCEPTIONS.—After a judgment of non-suit, in a civil action tried by a jury, the court may, by virtue of section 17 of the act of March 28, 1868, refuse to settle the plaintiff's bill of exceptions, until the plaintiff has paid the jury fees. The settlement of a bill of exceptions is a proceeding in the action within the meaning of such section.

APPLICATION for a writ of manda mus. The opinion states the facts.

Tyler & Tyler for the petitioner,
J. M. Lesser for the respondent.

THE COURT. The return shows that a jury was duly impaneled and sworn to try the case of Lukes v. Bernheim, et al., and that, after the plaintiff had introduced evidence and rested, the defendants moved for a non-suit, which was granted; and the jury was discharged by the court, which made an order that the fees of the jury be paid by the plaintiff. The plaintiff refused to comply with that order, and the court thereupon ordered that no further proceedings be allowed in the action until said fees were paid. The plaintiff prepared and presented to the respondent for settlement a bill of exceptions, which respondent refused to settle, on the ground that plaintiff had not paid said jury fees.

Section 17 of an act entitled "an act to regulate fees of office,' approved March 28, 1868 (Stats., 1867–8, p. 436), provides, "If, in any trial, in a civil case, the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the plaintiff * * * and until they are paid no further proceedings shall be allowed in the case."

If the settlement of a bill of exceptions was a proceeding in the action, respondent was clearly justified in refusing to act. We do not doubt that the settlement of a bill of exceptions, is a proceeding in an action, within the meaning of the statute.

Writ dismissed.

No. 7,666.

HARNEY v. MCLERAN ET AL.

Department Two. Filed October 21, 1884.

STREET ASSESSMENT—DENIAL OF OWNERSHIP—NON-SUIT—DEMURRER.—In an action to enforce a street assessment, if the answer denies the allegations of the complaint as to the defendants' ownership of the property assessed, and the plaintiff introduces no evidence in support thereof, a non-suit should be granted. A denial of such allegation, on information and belief, if not sufficiently certain, should be objected to by demurrer.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. M. Wood, for the appellant.

William Leviston, for the respondents.

THE COURT. There is no evidence to support the allegation of the complaint that the defendants, McLeran and Porter, were owners of the premises assessed for street work, and if that allegation was denied in their answer, the motion for a non-suit, as to them, was properly granted. The denial that McLeran was the owner of the premises or any part thereof is explicit. The ownership of Porter is not positively denied, but while admitting that he claims to be the owner of an interest in the premises, the defendants allege that they have not any information or belief on the subject sufficient to enable them to answer the allegation of his ownership and on that ground, solely, deny it.

No motion was made to have this matter stricken out of the answer. But the appellant insists that the decision of the court on the motion for a non-suit must be viewed as it would be if no attempt had been made to deny the ownership of Porter.

None of the cases cited go to that length. Harney v. Corcoran, 60 Cal., 318, decides that if objection had been made to the filing of an amended answer with this clause in it, the court might, in its discretion, have sustained the objection.

The denial of the ownership of Porter is not irrelevent. If not sufficiently certain, it might have been demurred to. And we think this was the plaintiff's proper and only remedy in this case.

Where a plaintiff is nonsuited findings are not required: Reynolds v. Brumagim, 54 Cal., 254.

Judgment and order affirmed.

No. 8,224.

NICOLL v. NICOLL.

Department Two. Filed October 21, 1884.

CHANGE OF VENUE—TIME FOR FILING AFFIDAVIT OF MERITS AND DEMAND.—In an application for a change of venue the affidavit of merits and demand that the trial be had in the proper manner, filed by the defendant before he answers or demurs, are of no avail. Such affidavit and demand must be filed when the defendant appears and answers or demurs.

THE SAME—AFFIDAVIT OF MERITS MADE BY ATTORNEY.—Such affidavit may be made by the attorney for the defendant if it states a sufficient reason for the defendant's not making it.

APPEAL from an order of the superior court granting the defendant a change of the place of trial. The opinion states the facts.

Eyre & Frank, for the appellant.

J. W. Freeman, and *Flournoy & Mhoon*, for the respondent.

THE COURT. The affidavit of merits and demand that the trial be had in the proper county, which were filed before defendant answered or demurred, were wholly inconsequential. To be of

any avail, such affidavit and demand must be filed when the defendant appears and answers or demurs: C. C. P., 396.

In this case, we can only consider the order made on the motion which was based upon the affidavit and demand filed at the time the defendant appeared and demurred. And if the affidavit of merits is sufficient, the order must be affirmed. The affidavit was made by one of defendant's attorneys.

In Johnson v. Lynch, 15 How. Pr., 199, Bacon, J., after reviewing cases decided before and since the adoption of the code, said: "In view of these cases, I think it must be conceded that the affidavit of the attorney of a party will be sufficient where it swears to merits, and shows an adequate excuse for its not being made by the party; absence beyond seas or out of the state will usually be deemed sufficient." An examination of the cases has brought us to the same conclusion. Bailey v. Taaffe, 29 Cal., 422, does not hold the contrary. In that case the affidavit of the attorney was held to be insufficient in several respects, one of which was that no reason was given why the defendant himself did not make it. That, of itself, was sufficient objection.

In this case, the affidavit states a sufficient reason for defendant's not making it. The attorney who made it bases his belief that that the defendant has a good and substantial defense to the action upon the merits, on a statement of the case in writing made by defendant to said attorney and on "the affidavit of the defendant filed in this cause." Under the New York rule it would have been sufficient on that point to have said, "from a statement of the case in this action, made to deponent by defendant, deponent believes," etc.

On the whole, we think the affidavit of merits sufficient.

Order affirmed.

No. 9,115.

IN RE LASWELL, IN INSOLVENCY.

Department Two. Filed October 21, 1884.

JUDGMENT AFFIRMED.

APPEAL from a judgment of the superior court for San Joaquin county.

George E. McStay for the appellant.

Joshua B. Webster for the respondent.

THE COURT. We have not been aided by any brief or points and authorities on behalf of appellant. We see no error in the judgment appealed from; the judgment is therefore affirmed.

No. 8,204.

MILIKEN v. HOUGHTON ET AL.

Department One. Filed October 21, 1884.

AMENDED COMPLAINT—SERVICE OF ON DEFENDANTS.—Where a plaintiff amends his complaint in matter of substance, he must serve his amended pleading upon all the defendants, including those in default.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff.

Tobin & Tobin, for the appellant.

J. M. Wood, for the respondent.

THE COURT. On the authority of Diggins v. Reay, 54 Cal., 525; Harney v. Applegate, 57 Cal., 205, and Thompson v. Johnson, 60 Cal., 295, judgment as to defendant, the Hibernia Savings and Loan Society, reversed and cause remanded for further proceedings.

No. 8,266.

PELTRET v. FRANK.

Department Two. Filed October 21, 1884.

MOTION MADE AFTER JUDGMENT—APPEAL FROM ORDER—IDENTIFICATION OF PAPERS—Copies of papers used on a motion made after judgment, will not be considered on appeal, although contained in the transcript, unless the same are identified by the certificate of the judge, or otherwise, as having been used or considered on the hearing.

APPEAL from certain orders of the superior court for the city and county of San Francisco, made after judgment. The opinion states the facts.

E. J. Linforth, for the appellant.

Robinson, Olney & Byrne, and *F. J. Castlehun*, for the respondent.

THE COURT. Appeal from orders made after judgment. In addition to a copy of the judgment roll, the transcript contains what purports to be copies of affidavits, and of the official reporter's notes of the oral evidence of two witnesses. These are not incorporated in a bill of exceptions, nor are they identified by a certificate of the judge, or otherwise, as having been used or considered on the hearing of any motion in the case. Under the circumstances we cannot consider anything except the judgment roll, and as that discloses no ground for a reversal of the orders appealed from, they are affirmed: Baker v. Snyder, 58 Cal., 617; Angel v. Delmas, 60 Id., 254; Walsh v. Hutchings, Id., 228, and White v. Longmire, XI Pac. C. L. J., 154.

Orders affirmed.

No. 7,865.

VOGT v. COPE ET AL.

Department One. Filed October 21, 1884.

MARKET VALUE OF STOCK, HOW SHOWN—REPORTS OF SALES BY EXCHANGE BOARD.—The market value of shares of stock cannot be shown by evidence of the "report of sales" made by a stock exchange board, in the absence of evidence showing how such "reports of sales" were made up, where the information they contained was obtained, and whether the quotations of prices made were derived from actual sales or otherwise.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the plaintiff a new trial. The opinion states the facts.

E. Bartlett, for the appellant.

Jarboe & Harrison, for the respondents.

ROSS, J. Action for the conversion of certain mining stocks. The plaintiff recovered judgment, but only for nominal damages, inasmuch as there was no proof of the value of the property converted. The record shows that the plaintiff "offered to read in evidence from the published reports of sales of mining stocks in the San Francisco Stock Exchange Board for the month of September, 1878, to show the highest market value of said stock since the conversion of the same, and which it was agreed might be read with the same effect as the original records of said stock exchange, subject to such objections as might be otherwise made. The plaintiff then offered to prove by these reports" that the stocks converted by the defendants sold at certain prices between the date of conversion and the bringing of the suit. The defendants objected to the introduction of the proffered evidence on the ground, among others, that it was irrelevant, immaterial and incompetent. The court sustained the objection, and the plaintiff submitted his case without making any proof of the value of the stocks converted.

As the case was submitted in the court below, that court could only award the plaintiff nominal damages. And if this ruling with respect to the plaintiff's offer was correct, we must affirm the judgment. There was nothing to show, or tending to show, how or in what manner the "reports of sales" were made up; where the information they contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. In the absence of some such proof, the "reports of sales" offered by the plaintiff were incompetent, and the court below was right in its ruling: Whelan v. Lynch, 60 N. Y., 474. It would have been a very simple matter to have proved the value of the stocks in question, but, simple as it was, the proof was not given. We must affirm the judgment and order.

So ordered.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 7,064.

SWEETLAND v. SHATTUCK.

Department One. Filed October 21, 1884.

PAROL EVIDENCE—STATUTE OF FRAUDS—OBJECTION IN SUPREME COURT.—An objection to parol evidence of an agreement required to be in writing by the statute of frauds, cannot be made in the supreme court for the first time.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

T. F. Crowley and *Alex. Campbell, Jr.*, for the appellant.

John A. Stanly, for the respondent.

ROSS, J. Assuming that the agreement upon which the plaintiff relied on for a recovery was required to be evidenced by writing, the plaintiff was permitted in the court below to give proof of the agreement without objection that it was not in writing. Such objection cannot be made here for the first time: Reed on the Statute of frauds, vol. 2d, secs. 540, 541, and authorities there cited.

The evidence upon which the verdict was based was substantially conflicting and there were no exceptions taken in the court below to the instructions of the court.

Judgment and order affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 9.476.

BANK OF CALIFORNIA v. DUNN, CONTROLLER, ETC.

Department Two. Filed October 23, 1884.

THE BONDS ISSUED UNDER THE ACT OF APRIL 4, 1864, ARE VALID, and the interest due thereon must be paid by the state to the holders thereof.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the plaintiff.

W. W. Foote and *McCune & George*, for the appellant.

S. C. Denson and *S. W. Sanderson*, for the respondent.

THE COURT. The court below rendered judgment that the defendant draw his warrant for the amount of an interest coupon on a bond issued under the act of April 4, 1864: Stats., 1863–4, p. 344. We are of opinion that none of the matters presented on behalf of defendant are sufficient to justify the withholding of the warrant. The act above referred to pledged the faith of the state to the payment to the holder of the bonds, mentioned therein, of such interest as is involved in this action

Judgment affirmed.

NOTES.

The distinction between a creditor's bill and a bill to set aside fraudlent conveyances of real estate was clearly stated in the recent case of Wadsworth v. Schisselbaur. In delivering the opinion of the court, Mitchell, J., said:

"There are two classes of cases, both commonly called creditor's suits, which, although closely allied, are clearly distinguishable. The first, a creditor's suit strictly so called, is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which could not be reached on execution. The general rule is that such an action cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution and its return unsatisfied. This was required because equity would not aid the creditor to collect his debt until the legal assets were exhausted, for until this was done he might have an adequate remedy at law. The execution had to be issued to the county where the debtor resided, if a resident of the state. Its issue to another county would not suffice: Reed v. Wheaton, 7 Paige Ch., 663.

"The second class of cases is where property legally liable to execution has been fraudulently conveyed or incumbered by the debtor, and the creditor brings the action to set aside the conveyance or incumbrance as an obstruction to the enforcement of his lien; for, though the property might be sold on execution, notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases, the prevailing doctrine is, that it is not necessary to allege that an execution had been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to him the conveyance is void, and he has a right to have himself placed in the same position as if it had never been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent; but if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed: Botsford v. Beers, 11 Conn., 370; Weightman v. Hatch, 17 Ills., 281; Vasser v. Henderson, 40 Miss., 519."

WEST COAST REPORTER.

WHOLE NO. 45. NOVEMBER 6, 1884. VOL. IV. NO. 6.

RIPARIAN RIGHTS.

Perhaps no case, since the celebrated San Francisco Pueblo case, has ever been decided by the supreme court of California, of more importance, or more widely affecting private interests in all parts of the state, than the case of Lux v. Haggin, decided a few days ago, and reported in the present number of the West Coast Reporter.

The case has long been under advisement, and has evidently received the most careful consideration from the court. Having been favored with copies of the printed briefs on each side, we know that all the legal questions, directly or indirectly, involved in the controversy, were argued with the utmost learning and ability, and in a most exhaustive manner. Every assistance which the research and ability of counsel can furnish to a court was rendered in this case.

It will be seen that the decision fully confirms all of the most important and material conclusions which were reached in our series of articles upon Riparian Rights,—conclusions which were based upon the previous decisions of the court, extending through almost the entire period of the state's existence as a commonwealth, and upon the title concerning water rights, contained in the civil code.

It holds that the doctrine of "prior appropriation" is confined to streams running wholly through the public lands of the United States, or of the state; that, unless a prior appropriation had been made of a stream while it was thus running wholly within the public lands, the riparian rights of private proprietors, owning lands situated on its banks, are those conferred, regulated, and protected by the common law; that as soon as a private proprietor acquires title to a tract of land, situated on the banks, or bank of a stream, where no prior appropriation of it had been made, while it was wholly public, his common law riparian rights at once attach and become vested, and they cannot be lawfully destroyed or interfered with by any subsequent appropriation of the stream, even though he has not yet made any actual artificial appropriation of its waters, so as to divert them upon his own land; and, finally, that these common law riparian rights, of private proprietors on a stream, are fully and intentionally saved, reserved, and protected by §1,422 of the civil code, so that the preceding affirmative provisions of the same title are

practically restricted, in their operation, to streams which flow wholly through the public lands of the United States, or of the states.

These are the very same propositions which were maintained as the law of the state, necessarily resulting from previous adjudications, in our series of articles upon this subject.

The conclusions thus reached by the court may have been unexpected by many, and may be disappointing to some parties whose supposed interests are affected. In our opinion, however, no other conclusion was possible, unless the court should directly overrule an unbroken line of decisions, reaching from the earliest period of the state's history down to the present time, which had uniformly recognized, declared, and upheld the common law riparian rights of private owners as established in the law of California.

While the case of Lux v. Haggin thus decides that private proprietors of lands on the banks of a stream have natural and primary riparian rights in and over the waters thereof, which natural and primary rights must be respected by any legislation upon the subject matter; it does not decide, in our opinion, that such private riparian proprietors necessarily have a full and *exclusive* right in and over—that is, to use and consume—*all* the waters which naturally flow through the channel of the stream, without regard to its size or amount. While the case decides that the private proprietor of lands situated at a distance from a stream and not upon its banks, cannot by an appropriation of its waters, invade or interfere with the natural and primary riparian rights of those private owners who have already acquired title to lands situated on its banks; it does not, in our opinion, necessarily decide that the surplus waters of such a stream, after these natural and primary rights of the riparian proprietors have been reasonably supplied, cannot in any manner be utilized, diverted, and appropriated for the benefit of non-riparian tracts of land and their owners.

There is room then, for legislation which can now recognize and protect the interests of all classes of persons, much more clearly and perfectly than was possible before this decision had established the natural rights of one class. Such legislation must be based upon the fact that private riparian proprietors have certain natural rights over the stream, which are vested and of which they cannot be arbitrarly deprived. Without invading *these* rights, it may also recognize the great and growing needs of private owners whose lands are non-riparian, and it may provide, under some circumstances at least, for satisfying these needs by diverting and utilizing the surplus waters of streams, after the primary demands of the riparian proprietors are reasonably supplied. This is the system of legislation suggested and described in the concluding articles of our series, and it is, in our opinion, eminently just and perfectly practicable. J. N. P.

CIRCUIT COURT, DISTRICT OF COLORADO.

SANDERS v. BARLOW ET AL.

Filed October 13, 1884.

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—POSTPONEMENT OF PRIOR MORTGAGE.—A promise, in writing, by a prior mortgagee to a subsequent mortgagee, that, in consideration of the latter's refraining from enforcing his mortgage, the former "will be responsible for whatever he (the mortgagor) owes you (the subsequent mortgagee), and will see that the same is paid," whether valid under the statute of frauds, as a promise to answer for the debt of another, or not, has the effect, in equity, of postponing the lien of the prior mortgage, to that of the second. *Held*, also, that such promise, under the Colorado statute of frauds, was binding; that forbearance to enforce the mortgage was a good consideration; that the consideration need not be named in the promise, and that the description of the debt was sufficiently definite.

ON final hearing. The opinion states the facts.

Wells, Smith & Macon, for the complainant.
H. C. Dillon, for the defendants.

BREWER, Circuit Judge. In the case of Sanders v. Barlow, the facts are these:

Mr. Sanders, in his life-time, executed two chattel mortgages, one to the father of his wife, and one, a few days later, to Mr. Jackson—that to the father of his wife being transferred by him to Mrs. Sanders. Neither mortgage was placed on record, or on file, prior to the death of Mr. Sanders, yet, for the purposes of this case, both must be taken to have been given for value, and to have been valid as against the mortgagor and those claiming under him.

Pending the last sickness of Mr. Sanders, and after the Jackson mortgage became due, Mrs. Sanders executed this paper. It is addressed to Mr. Jackson, and reads as follows:

"DEAR SIR:—Mr. Sanders is too sick to attend business, and I wish to say that I will be responsible for whatever he owes you and the El Paso County Bank, and will see that the same is paid." And this is signed by her.

The case was submitted on the testimony, then taken to my brother Hallett, at the last term, I believe, who, finding both mortgages to be valid as against the mortgagor and those claiming under him, said that in reference to this paper the testimony and pleadings were not sufficiently full to determine whether the effect of this instrument was to subordinate the claims of Mrs. Sanders to this of Mr. Jackson; that is, to postpone her mortgage to his, and therefore directed some additional pleadings to be filed, and gave the parties leave to take additional testimony to explain the circumstances which attended the making of this letter. Such pleadings were filed and testimony taken. Mrs. Sanders denies ever giving that letter, but, comparing her signature to the deposition with the signature to the letter, there is very little reason to doubt but what she did sign the letter. Farther than that, other testimony is to the effect that she did execute it; and it must be held that she did sign and send it. But, denying this, she gives no explanation of the circumstances under which it was written. From the testimony of Mr. Jackson

and Mr. Barlow, it appears, and in some measure the testimony of Mr. Jackson is corroborated by that of Mr. Aux, that Mr. Jackson, after the maturity of the note secured by his mortgage, while taking no legal measures, having commenced no suit, yet went to the place where the stock mortgaged was and took an inventory, and was preparing to institute proceedings.

At this time Mr. Sanders was sick with what proved to be his final sickness, and Mrs. Sanders went to the bank to see Mr. Jackson, but, not finding him in, told Mr. Barlow that Mr. Sanders was very much worried about his indebtedness to Mr. Jackson; that he was very nervous, and if any one called at the house he at once asked if it was Mr. Jackson; that he was too sick to attend to business, and she wanted to do something about it; he told her he would see Mr. Jackson and let him know. In this interview she said she was possessed of some means, and that whatever Mr. Sanders owed to Mr. Jackson she would pay.

Mr. Barlow told Mr. Jackson of the interview, and he said it was all right if she would sign a paper to that effect; he went to her and told her, and she was satisfied, and executed this paper and Mr. Jackson desisted from all further proceedings or effort to enforce his claim.

Now the question is, whether the effect of this agreement postpones her claim to his; the validity of such an instrument under the statute of frauds has been carefully argued by counsel, it has been said that it is not valid under such statute for three reasons.

First, the parties did not specify the amount of the promise, but it is a promise to pay whatever he owes you, and it is said that it is not valid, because it leaves open to parole testimony the amount which the party promised to pay, and, secondly, that no consideration is expressed in the letter, and, third, that there was no consideration.

Reversing the order of these questions, we think there was a consideration, forbearance to enforce a debt is a consideration for a promise; that Mr. Jackson might have taken legal means to enforce his right is unquestionable, but he forbore and the act of forbearance is consideration for a promise.

Secondly, it is not necessary in a promise of this kind that the consideration should be named.

The language of this section of the statute is "any promise must be in writing," not any agreement as in some other portions and as to which there have been wide differences of opinion in the decisions of courts for many years. So far as the first question is concerned, *i. e.* as to the failure to state the sum which she promised to pay, my own judgment is that even as an obligation under the statute of frauds the contract would be good. "Whatever can be made certain is certain."

That whenever a party promises to pay whatever is owed by one to another, it is sufficient, although no sum is named, just as a promise by one party to convey all the real estate he owns in a

county is as good as a contract; although it takes testimony to prove what that real estate is. But it is not necessary to go so far as this in this instance; it is only necessary to say that this is an agreement which, whether good or not under the statute of frauds, is binding, so far as to postpone her rights to his, and it is plain to me that her claim should be postponed.

This is an equitable action, and I think it is enough to hold that equitably she is bound by that agreement.

Generally, it is equitable that a party perform his promises, and it is inequitable that he be released from their obligations by reason of any mere technicality. So, it is equitable that she, having written this letter, and made these promises, with knowledge of what it imported, can not now be permitted to repudiate it.

It is always a presumption that one making a promise like this to pay an indebtedness knows all that is included in that promise.

But further we have the testimony of Mr. Barlow that she did know of the debt and mortgage. Hence no question of misunderstanding or mistake arises, and equitably she is bound by this promise.

My conclusion, therefore, is that equitably she is bound by this letter, and that thereby she postponed her rights in the property to Mr. Jackson, and that in accordance with the conclusion reached by Judge Hallett in a prior opinion, the bill must be dismissed.

SUPREME COURT OF COLORADO.

HEREFORT v. CRAMER.

Filed October 1, 1884.

ATTACHMENT LAW—AFFIDAVIT, WHAT MUST CONTAIN.—To authorize the issuance of an attachment under the fourteenth subdivision of the attachment law (Civil Code, 1883, p. 30), the affidavit need only state the ground therein mentioned. Such subdivision was intended to create a separate and distinct cause of attachment.

DEMURRER TO SEPARATE ALLEGATIONS IN PLEADING.—Disconnected averments in a pleading cannot be separately demurred to.

FRAUDULENT REPRESENTATIONS—SALE—RIGHTS OF DEFRAUDED VENDEE.—One who has been induced by false and fraudulent representations to purchase a business and stock in trade need not upon discovery of the fraud take steps to rescind the contract. He may retain the property and prosecute his claim for damages either by an original action, or as a counter-claim to an action against him for the purchase price, brought by the party committing the fraud. If such contract of purchase was an entirety, the separate value of the stock, aside from the value of the good will of the business, need not be alleged in the answer.

FRAUDULENT REPRESENTATIONS—SALE—MEASURE OF DAMAGES—PLEADINGS.—The measure of damages in an action for fraudulent representations in the sale of both real and personal property is the same. It is the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be. Such damages need not be separately pleaded.

ERROR to the county court of Lake county. The opinion states the facts.

A. S. Weston, for the plaintiff in error.

No appearance for the defendant in error.

BECK, C. J. This case is submitted *ex parte* by plaintiff in error upon a rather meagre brief, considering the fact that the points raised involve important questions of practice.

The first error assigned is, that the court erred in issuing an attachment on an insufficient affidavit.

The affidavit was made under the fourteenth subdivision of the attachment law (Civil Code 1883, p. 30), and merely states as ground for attachment, that the demand is due on express contract "for the direct payment of money, to wit: upon three several promissory notes now overdue, amounting to the sum of seventeen hundred ninety-seven and 50-100 dollars, besides interest."

The *quere* suggested is, whether it is sufficient to authorize the issuing of a writ of attachment, that the affidavit state merely the ground mentioned in this fourteenth subdivison of the act, or whether some other ground must be stated?

This question was passed upon by this court at the December term last, in the case of Simmons v. California Powder Company, 2 West Coast Rep., 517; 4 Colo. L. R., 512, wherein it was held, that notwithstanding the awkwardness of the phraseology, and the misplacing of said *fourteenth* subdivision in the attachment act, and the error in numbering, it was intended to define a separate and additional cause of attachment.

The *first* error, therefore, is not well assigned.

The *second* and *third* errors assigned are more serious. They question the rulings of the court below, in sustaining the plaintiff's demurrer to portions of the defendant's answer.

A brief summary of the pleadings is necessary to an understanding of the points involved.

The plaintiff below, Joseph C. Cramer, sued the defendant, Lewis Herefort, upon three promissory notes; one for the sum of one thousand dollars payable to David Ringle, and signed by both defendant and plaintiff.

The other two notes were for the sum of five hundred dollars each, were payable to the order of J. C. Cramer & Co., and were signed by the defendant only.

The complaint alleges that the plaintiff signed the first note as surety, for the defendant, to enable the latter to borrow of the payee the sum of one thousand dollars; that the defendant paid the accrued interest thereon, less the sum of fifteen dollars, and no more; and that the plaintiff was compelled to pay the principal sum and balance of interest, and now holds the note, etc.; that the two five hundred dollar notes were transferred to him by the firm of J. C. Cramer & Co., and that plaintiff is the owner thereof.

The portion of the answer covered by the *first* and *second* grounds of demurrer, alleges, in substance, that the obligations mentioned were executed by the defendant in consideration of an agreement entered into between him and the firm of J. C. Cramer & Co., whereby the said firm sold and transferred to the defendant their entire water-cart outfit, together with the good-will of the water

supplying business theretofore carried on by said J. C. Cramer & Co., in the city of Leadville. The property used in connection with the business consisted of seven water carts, fourteen horses, and necessary equipments. By the terms of the agreement the defendant became obligated to pay for said business and property the sum of four thousand five hundred dollars.

He alleges that he was induced to enter into this agreement by means of representations made to him by the plaintiff J. C. Cramer; that the business was paying his firm six hundred dollars per month, clear of running expenses; that it would pay the defendant at the same rate, clear of running expenses; and that defendant could easily pay for the property out of the net proceeds of the business, before the maturity of the notes for the purchase money.

Defendant alleges that these representations were false and fraudulent, and were wilfully made by the plaintiff for the purpose of defrauding and injuring him: that the property and business did not pay anything above running expenses, either to the firm of J. C. Cramer & Co. or to the defendant, and that it was incapable of being made to pay any more.

He avers that the one thousand dollar note was executed for the purpose of obtaining a loan of the sum mentioned, to be applied as a cash payment upon the contract, and that it was obtained and paid over to the said firm, and that the plaintiff and his co-partners had the full benefit thereof. He further states it was part of the agreement with said firm that the plaintiff should execute said note as surety.

The defendant avers that he was induced to execute said note for the purpose of procuring the loan aforesaid by the false and fraudulent representations of the plaintiff, and that he was induced to execute the two five hundred dollar notes by the same fraudulent conduct, and that in consequence of said fraudulent representations he has been injured in the sum of two thousand dollars.

A demurrer was sustained to this portion of the answer, and the defendant elected to stand by the answer

The correctness of this ruling is now questioned by the *second* and *third* assignment of error.

There was a trial upon an issue raised upon another portion of the answer which set up a different ground of defense, and a finding and judgment for the plaintiff.

We are not advised wherein the defense or counter-claim stated was supposed by the court to be defective, save by the demurrer itself, which says, referring to a part of the defense, designated by certain words and lines, "that the same does not state facts sufficient to constitute a cause of action, nor does the same constitute any defense to plaintiff's cause of action, or to any of the causes of action set forth in plaintiff's complaint."

The residue of this defense is separately demurred to upon the same grounds.

We observe in the first place, that whatever defects may exist in the portion of the answer under consideration, the demurrer is still more defective. The attempt thus made to separate the averments descriptive of the fraud practiced upon the defendant into two distinct offenses, seems to be wholly without pretext. This portion of the answer does not purport to state two grounds of defense, but the single ground that the defendant was induced to enter into the contract of purchase through fraud, and that he has been injured thereby in the sum stated.

Treating it, however, as two distinct defenses, the language of the demurrer is "comes now the said plaintiff and demurs to all that part of the defendant's said answer made and filed herein from and including the fourteenth line, &c.," and assigning the ground of demurrer above stated. It then proceeds: "And the said plaintiff further demurring to said answer, demurs to all that part of the said answer from and including the words "that said note," in line number ten, &c., and concludes with the same objection above stated.

The connected structure of a pleading cannot thus be destroyed or disjoined at the pleasure of a pleader and its disconnected averments separately demurred to. Such a practice is not to be tolerated. We will, however, proceed to inquire whether this portion of the answer contained sufficient facts to constitute a cause of action or ground of defense.

In Bliss upon Code Pleading, section 425, it is said of a demurrer for the objection here made, that the pleading to be subject to demurrer "must present defects so substantial in their nature and so fatal in their character, as to authorize the court to say—taking all the facts to be admitted—that they furnish no cause of action whatever."

Now, regarding the averment of the answer to be true, there is presented as a counter-claim to the cause of action, the following facts:

The defendant was induced by representations made by the plaintiff, to purchase what he was led to believe was a highly remunerative business, obligating himself to pay therefor, together with the stock necessary to operate the same, the sum of four thousand five hundred dollars. The representations were not true, and the plaintiff knew them to be false when he made them. He represented that the business was paying his firm and would pay the defendant six hundred dollars per month over and above running expenses, whereas the fact was that it was not paying the proprietors anything at the time of the sale and could not be made to pay anything over running expenses. The representations were fraudulently made for the purpose of inducing the defendant to purchase a worthless business and the property connected therewith.

Being a private business enterprise the facts whether or not it was a profitable enterprise and to what extent, were peculiarly within the knowledge of the plaintiff and the partners whom he represented. The defendant is not presumed to have had any

knowledge on the subject except as obtained from the owners. He relied upon the statements made to him on their behalf, as he had a right to do, and dealt with him as with honest men. The result was that he was grossly deceived and defrauded. Instead of getting what he contracted for, an established and remunerative business, he found himself encumbered with an enterprise that yielded no profit whatever, and with property, a considerable portion of which was useless for any other purpose than the water supplying business, for which specified purpose he had purchased it.

As a consequence of the deception practiced upon him the defendant says he is damaged in the sum of two thousand dollars.

The foregoing are all material averments, and we discover nothing omitted which is necessary to be stated in order to entitle the defendant to recover by way of counter-claim, such damages as are the natural and necessary consequence of the fraud complained of. It cannot be said that upon discovery of the fraud he should have taken steps to rescind the contract, for he had his election to rescind the sale and return the property or to retain the property and prosecute his claim for damages, either by original action or as a counter-claim to an action against him for the purchase money brought by the party committing the fraud: Whitney v. Allaire, 4 Denio, 556; Lilly v. Randall, 3 Col., 298.

Nor is it a valid objection that this portion of the answer contains no averment of the separate value of the stock, aside from the good will of the business. The contract was an entirety, and the sum of four thousand five hundred dollars contracted to be paid was the consideration for the whole property, which included the good will of the water supplying business.

The defendant was entitled to the benefit of the entire contract as it was made, contemplating the *res*, or thing purchased, as it was represented to be, not as it actually proved to be.

It is well settled that the good will of a business may have a property value, and form the subject matter of contract and sale: Corness v. Fessler, 39 Cal., 336; Morse v. Hutchins, 102 Mass., 439.

The plaintiff could not relieve himself of liability by proving that the stock alone was worth the sum of four thousand five hundred dollars. The question is not what was the value of the *stock*, but how much less was the value of the good will of the business, and the stock, at the time of the purchase, than it was represented to be by the defendant: Miller v. Barber et al, 66 N. Y., 558.

If the property is more valuable than the consideration named in the contract, the profits of the bargain legitimately belong to the purchaser. So also if the seller falsely and fraudulently represents the property to be more valuable than it really is, and the purchaser is thereby deceived and induced to enter into a contract of purchase, he is entitled to the benefits which he would have derived therefrom if the representations had been true.

In Morse v. Hutchins, *supra*, Mr. Justice Gray says: "To allow the plaintiff * * * only the difference between the real value

of the property and the price which he was induced to pay for it, would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer."

It is clear that no material facts respecting the value of the property were omitted. The averment that the defendant was injured to the extent of two thousand dollars is equivalent to an averment that the property purchased was in fact worth that much less than it was represented to be worth. If the averment should be duly proven on trial the defendant would be entitled to an allowance of the sum stated.

The rule for the estimation of damages resulting from fraudulent representations in the sale of both real and personal property, is the same. It is to ascertain the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be. It is thus stated in a case involving the sale of a farm:

"The true rule as now settled, is the difference between the value of the farm as represented, and the actual value as it was when conveyed. In other words, how much more would the farm have been worth if the several representations made by the defendant, which were proved to be at once false, fraudulent and material, had been true?" Wright v. Roach, 57 Me., 600, citing Stiles v. White, 11 Met., 356; Ledg. on Damages (5 ed.), 333, 655, 658. See also, Miller et al. v. Barber et al., 66 N. Y., 568; Page v. Wells, 37 Mich., 415; and White v. Smith, 54 Iowa, 233.

The case of Morse v. Hutchins, 102 Mass., 439, was very similar in its principal features to the case before us. It was an action for damages arising from false and fraudulent representations touching the business and profits of a firm of which the defendant was a member, by means of which the plaintiff was induced to buy the interest of the defendant in the stock and good will of the firm.

Upon the subject of damages the jury was instructed that "the measure of damages would be the difference between the actual value of the stock and good will purchased at the time of the purchase, and the value of the same had the representations been true." It was held that the correct rule was announced in the instruction.

Perhaps in the present case the court thought the facts stated did not sufficiently indicate the nature of the damages claimed to prevent surprise at the trial, and that the defendant could not be permitted, as against an objection, to introduce testimony on the subject.

The answer to this objection is, that it is only necessary to particularly specify the items when the damages claimed are not the direct and necessary consequence of the wrong complained of.

This rule is not applicable to a claim for general damages, such as here presented. On the contrary, when the pleading contains a claim for general damages, supported by a statement of facts showing that the damages claimed are the natural, necessary and direct

consequences of the wrong complained of, it is sufficient and not subject to demurrer.

Should proof of special damages be offered on trial, the objection can be raised there that the complaint or answer, as the case may be, contains no such claim.

If, for example, the defendant in this case should offer to prove under this answer, that by reason of the purchase of the business and stock mentioned he had lost six months of his time, which was of the value of one hundred dollars per month, an objection that no such facts were stated in the answer would be good. But proof that the things purchased were not as represented, and were less valuable, by a certain sum of money, than they were represented to be, would naturally and necessarily follow from the statements of the answer.

Mr. Chitty says "damages are either general or special. *General* damages are such as the law *implies* or presumes to have occurred from the wrong complained of. *Special* damages are such as *really* took place and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing:" 1 Chitty Pldg., * 411.

In Jutte v. Hughes, 67 N. Y., 268, which was an action for injuries alleged to have been occasioned to plaintiff's premises by the flow of water and filth from defendant's premises adjoining, in answer to the objection that special damages should have been alleged, the court say: "This doctrine might well apply in actions of slander, and of a kindred class under the common law practice, which requires that special damages should be specially alleged. Where, however, the damages necessarily result and naturally flow from the injury complained of, they may be recovered without any special averment."

In Rice v. Coolidge, 121 Mass., 393–398, which was an action for a tort, the court say: "Another ground of demurrer is, that the declaration does not contain any allegations of damage, sufficient to constitute a legal cause of action. The acts charged upon the defendants are such that the natural and necessary consequences of them are to injure the plaintiff. Under the general allegations of damage, she may recover damages for this injury, and no allegation of special damage is necessary to enable her to maintain her cause of action:" See, also, Shaw v. Hoffman, 21 Mich., 151–158; Miller v. Barber et al., 66 N. Y., 564; Roberts v. Graham, 6 Wall., 578.

We are of opinion that the averments of the answer show a direct damage, resulting to the defendant, from the wrongful acts of the plaintiff.

It does not affect the issue in this case, that the plaintiff sues for a portion of the purchase money. In legal contemplation, the en-

tire consideration was paid when the defendant executed his obligations to that effect. The defendant is entitled to a single satisfaction of his damages, and, as above stated, he may either bring an original action therefor, or set up his demand as a set-off, or counter claim, to any action brought against him by the party who committed the fraud.

The fact that the demands sued on were assigned to the plaintiff, does not exonerate him. It is charged that the false representations were made by him, and he must be held personally responsible for the consequences: Eaton & Co. v. Avery, 83 N. Y., 31.

The remaining errors which have been assigned, relate principally to matters concerning which the court was vested with large discretion, and we cannot say that it is not properly exercised.

The judgment is reversed, and the cause remanded.

PEOPLE *v.* JOBS.

Filed October 1, 1884.

CHARTER OF GEORGETOWN—VALIDITY OF—SPECIAL LEGISLATION.—The charter of Georgetown having become a law prior to the adoption of the constitution, remains in force after such adoption, so far as not inconsistent with the latter instrument. The fact that it is local or special legislation does not affect its validity.

THE SAME—AUTHORITY OF POLICE JUDGE.—Whether the declaration in such charter, clothing the police judge of Georgetown with power to act as justice of the peace, is valid, *quære?* Conceding, however, that such extension of power is unconstitutional, the authority of the police judge, as such, is not affected thereby. The right of such officer to preside at meetings of the selectmen, and to exercise other powers, usually devolved upon the mayor, is not abrogated by the constitution.

ERROR to the district court of Clear Creek county. The opinion states the facts.

W. T. Hughes and *L. C. Rockwell*, for the plaintiffs in error.

R. S. Morrison, for the defendant in error.

HELM, J. The demurrer in this case was properly sustained. Under the legislative enactments existing, of which the court takes judicial notice, the complaint does not state a cause of action.

The charter of Georgetown became a law prior to the adoption of the constitution; so far, therefore, as not inconsistent with the latter instrument, this charter remained in force after the adoption thereof.

The fact that it is local or special legislation does not, under the circumstances, affect its validity: The People ex rel. v. Commissioners of Grand County, 6 Col., 202.

Relator claims that the declaration in this charter, clothing the police judge of Georgetown with power to act as a justice of the peace for the entire precinct, is void; he argues that it is inconsistent with one of the constitutional provisions relating to justices of the peace.

The correctness of relator's position might be conceded; for the purposes of this case, however, it is unnecessary to decide the question. If we assume that he is right, it by no means follows that the charter is void, wherein it created the office of police judge, and clothes him with power to dispose of cases arising under the town ordinances.

The two offices and jurisdictions are entirely distinct; the provisions relating thereto are in no way dependent upon each other. The princpal purpose of the legislature, unquestionably, was to create the office of police judge, and give the person elected thereto power to punish for violations of the town ordinances; thus far the provision is not in the slightest degree inconsistent with the constitution; on the contrary, that instrument authorizes the creation of this office: See art. 6, sec. 1.

Since, therefore, the objection of special legislation is not good, so far the charter provision under consideration is perfectly valid. The addition thereto of a clause, authorizing the police judge to fill the office, and perform the duties of justice of the peace, would not, even if such extension of power were obnoxious to the constitution, render the whole section void; such addition might be regarded as surplusage.

This is clearly one of those cases where the valid enactment does not fall with the void provision, if such there be: Trippe v. Overacker, 4 Col. L. R., 405; The Board v. Owen (unreported).

The complaint declares that respondent disclaims the right to fill the position, and discharge the duties of justice of the peace; it charges him only with occupying the office and performing the duties of police judge, as provided in the town charter. It entirely fails to state facts, showing a usurpation of the latter position by him.

Relator's argument questions the existence of the office; he does not contend that if there is a *de jure office*, his complaint is sufficient to impeach respondent's right to fill it.

The fact that respondent is also authorized to preside at the meetings of the selectmen, and to exercise other powers, usually devolved upon the mayor, is not material. Georgetown has, under the charter, no mayor, and we are aware of no constitutional declaration, which renders void the prior territorial legislative enactments, requiring the police judge to fill this office also, and perform the duties connected therewith.

The foregoing conclusions render unnecessary a discussion of the further questions presented.

The judgment will be affirmed.

D. S. P. & P. R. R. *v.* RILEY.

Filed October 1, 1884.

STIPULATION IN BUILDING CONTRACT FOR ARBITRATION—CONSTRUCTION OF CONTRACT.—A stipulation in a contract for building a railroad, that in case any disputes or differences arise between the company and contractors "as to the construction or meaning of the agreement or specifications, or sufficiency of the performance of any work to be done under it or price to be paid, the same shall be referred to the chief engineer of the company, who shall consider and decide the same, and his decision shall be final," is valid, and the decision of the engineer on any of such matters is binding on the parties, in the absence of fraud or mistake on the part of such officer. *Held*, however, that a dispute as to the amount of work done by the contractor was not included within such stipulation.

APPEAL from the district court of Arapahoe county. The opinion states the facts.

Teller & Orahood, for the appellant.

Brown & Putnam, for the appellee.

HELM, J. Appellee brought this action in the court below to recover from appellant a balance claimed to be due for grading seven sections of its railroad. This work was done under a written contract, similar in form to those generally adopted in like cases. Among other provisions in the contract is the following:

"And it is further agreed that, in case any disputes or differences shall arise between the company and contractor *as to the construction or meaning of the agreement and specifications, or sufficiency of the performance of any work to be done under it, or price to be paid*, all such disputes or differences shall be referred to the engineer, who shall consider and decide the same, and his decision shall be final to the parties, who hereby submit all and singular the premises to the award and arbitration of the engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever; and it is further agreed that the submission to the engineer, touching all matters herein contained, agreed to be submitted to him, shall be deemed, considered and taken as an essential part of this agreement, and not revocable by either of the parties thereto."

This specification is perfectly valid and binding. It is simply the declaration which contracting parties have a right to make as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case disputes arise upon certain matters contained in the contract; provided the evidence so stipulated for be not illegal: McMalone v. N. Y. and E. R. R., 20 N. Y., 463; Smith v. Briggs, 3 Denio, 73; U. S. v. Robeson, 9 Peters, 371; Wilson v. York and M. L. R. R. Co., Gill and Johnson, 73.

Appellee claims that the total amount of work done by him, was underestimated by the engineer, and that consequently his compensation was less by several thousand dollars than it ought to have been.

His position is and must be, that the aggregate amount of work under the contract, is not one of the matters as to which the engineer's decision was to be final and conclusive. Upon this view of

the contract, adopted by the court below, he obtained his verdict. Upon this view alone, could he have maintained his action; for the engineer had passed upon the measurements and fixed the amount of grading done. Appellee charges no fraud against the officer, nor does he aver or attempt to prove any such mistake on the latter's part as will vitiate his determination of the question; these things being true, the engineer's decision would be final if the matter is covered by the italicized phrases in the above paragraph taken from the agreement: Howard v. The Alleghany Valley R. R. Co., 69 Pa. St., 489; Reynolds v. Caldwell, 51 Pa. St., 298; O'Reilly v. Kerns, 52 Pa. St., 214; Condon v. South Side R. R. Co., 14 Grattan, 302; Vanderwerker v. Vermont Cent. R. R. Co., 27 Vt., 130.

Our decision upon the errors assigned in this case, must therefore be controlled mainly by the construction we shall give to this portion of the contract. The engineer mentioned, is the chief engineer of the appellant company.

The chief engineer of a company engaged in the construction of an extended line of railway, cannot be personally on the ground superintending the work of each of a number of grading contractors. As shown by the record in this case, he is obliged to leave the immediate daily supervision of this work to deputy or assistant engineers; these deputies make the necessary measurements and computations from time to time, and report the same to their chief.

They represent the company, however, and disputes between them and the contractor, concerning the work, are disputes between the *company* and contractor. Such disputes, when referring to the specified matters, are, therefore, among the disputes or differences submitted to the chief engineer for arbitrament.

With this explanation, let us discover the true intent of the contracting parties in the foregoing language of the agreement.

It will be noticed that measurements of the amount of grading done, are not specifically mentioned. It will also be observed that while the "engineer in charge is to make a final estimate of all the work done," differences concerning this "final estimate" are not in words submitted to the final decision of the chief engineer; are these matters so submitted, by a fair and reasonable implication from the above language employed in the contract?

Disputes on three questions or classes of questions are referred to the engineer for decision:

First. As to the construction or meaning of the agreement and specifications. It would not be contended for a moment that this includes differences concerning a final estimate of the amount of grading done.

Second. Sufficiency of the performance of any work to be done. This evidently relates to the character and not the quantity of work performed under the contract; there might be no dispute whatever concerning the number of cubic yards in a given piece of grading, yet very great difference of opinion as to whether the work was done in the manner provided by the specifications.

Third. The price to be paid. Four different kinds of work in connection with the grading were mentioned in the contract, and a different price was payable for each, viz: "for earth excavation twenty-three cents per cubic yard; for loose rock, thirty-five cents per cubic yard; for solid rock, one dollar per cubic yard; for extra hauling and over one hundred feet, two cents per cubic yard per one hundred feet."

It is obvious that in every section to be graded, there would probably be more or less of each of these different kinds of excavation and also a quantity of the hauling mentioned. The expense of constructing a section depended very largely upon the relative amounts of these different kinds of excavation. It was therefore, of the first importance to determine this question, and settle which of the foregoing prices should be paid for a particular piece of grading. This was also a matter about which there was likely to be differences of opinion between the contractor and the assistant engineer inspecting the work.

It seems to us the most reasonable conclusion, that the word "price" in the phrase under consideration, was used by the contracting parties with reference to this question *i. e.* whether twenty-three or thirty-five cents or one dollar, or what proportion of each should be paid for a given quantity of grading.

It is true that the aggregate amount to be paid could not be ascertained without first making appropriate measurements; but the question whether a given piece of work is "earth excavation" "loose rock" or "solid rock," and consequently the price payable per cubic yard therefor, is answered by inspection and not by measurement, whether twenty-three cents or one dollar shall be paid per cubic yard, is a question entirely separate and independent of the interrogatory as to how many cubic yards a piece of work may contain.

This conclusion concerning the meaning of the language adopted in the contract receives additional sanction from the considerations, that the form used was doubtless prepared by attorneys for the appellant company; and the provision for the submission to the engineer of disputes as to the total quantity of grading done could easily have been placed in the agreement, by plain and unmistakable language.

The fact that it was not so embodied is an indication that the company did not intend to have it there.

We do not think the district court erred in its theory of the contract; therefore the evidence objected to was properly admitted, and the instructions fairly state the laws applicable to the case. We conclude that the question as to whether the amount of grading done by appellee under the contract was under estimated by the engineer might properly be tried in this case. There was evidence upon this question on which the jury might rest the finding made; as to its sufficiency they were the judges, and this is not one of those instances wherein we would be warranted in disturbing the judgment based upon their verdict.

It will therefore be affirmed.

BEAN v. GREGG.

Filed October 1, 1884.

CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.—The ruling of the trial court on a motion for a change of venue on account of the convenience of witnesses, when the motion is contested on the same ground, will not be interfered with unless there has been an abuse of discretion.

ACTION BETWEEN PARTNERS TO RECOVER ASCERTAINED BALANCE—PLEADINGS.—An action may be maintained by one partner against his co-partner for the balance found due upon a settlement of the partnership affairs. In such action no express promise to pay such balance need be shown; it is sufficient if the sum has been ascertained and agreed upon by the act of both partners. But an averment of the settlement by the plaintiff is material, and without it his complaint is fatally defective. An averment that at the time of dissolution there was in the hands of the defendant "clear profits," amounting to a sum stated, is not equivalent to an allegation of settlement.

APPEAL from the district court of Pueblo county. The opinion states the facts.

Simmonds & Cobb, for the appellants.

Patton & Urmy, for the appellee.

HELM, J. There is nothing in appellant's first objection. The action was brought in the county where appellee, who was plaintiff, resided. This is expressly authorized by section 28 of code (1883). See Law. v. Brinker, 6 Colo., 555.

The second assignment of error is also without merit. The change of venue was demanded upon the ground of convenience of witnesses. But it appears from the affidavits filed that the expense and inconvenience to plaintiff occasioned by the change and consequent delay would have been great; it appears also that no sufficient excuse was given for not interposing the motion at an earlier moment. Aside from these reasons supporting the court's rulings, the record shows that the trial was postponed for thirteen days; that a written stipulation was entered into by the parties fixing a date and place for taking the depositions of appellant's absent witnesses; and that he had ample time to secure their testimony had he desired so to do.

There was no abuse of discretion or error in denying the application.

But the principle objection relied on for a reversal is, that the action could not be maintained in a court of law, there being no averment in the complaint of an accounting and settlement between the partners; and that all evidence of such settlement ought to have been rejected when offered at the trial.

An action may be maintained by one partner against his co-partner for the balance found due upon a settlement of the partnership affairs; the better rule is that no *express promise* to pay such balance need be shown; it is sufficient if the sum has been ascertained and agreed upon by the act of both parties. But an averment of the settlement by the plaintiff is material, and without it his complaint is fatally defective.

The complaint in this case states, "at the time of dissolution of said partnership there were in the hands of defendant, A. J. Bean, clear profits from said business to the sum of $2,133.15."

This is the only declaration in the pleading that can possibly be construed as in any way referring to the subject under discussion.

Is the averment of a settlement, and balance agreed upon, contained by fair and reasonable intendment in the foregoing language? Or are there any facts stated therein, from which such an averment can be fairly implied? The rule is that doubtful language in a pleading, is construed most strongly against the pleader.

Reversing this rule, and construing this complaint most strongly in favor of plaintiff, can we answer these questions in the affirmative?

The above statements, taken from the complaint, simply declare that the business resulted in profits instead of losses, and names the aggregate amount of such profits. It cannot be said that the fact, that plaintiff's ability to state the exact net profits in dollars and cents, *implies* an accounting and settlement. The strongest reasonable implication that could be indulged in from this statement is, that the plaintiff himself had examined the books, investigated the business, and ascertained the exact profits. This might be absolutely true, and yet it might be equally true that the defendant had nothing whatever to do with such investigation and knew nothing about it.

It is agreed by counsel for appellee that the words, "clear profits," have precisely the same meaning in this connection as would have been expressed, had the pleader used, instead, the expression "ascertained balance."

It is only by the implication above suggested, that this can be considered true. But admitting the correctness of counsel's position, still his argument is in no wise strengthened; for, quoting from his own authority, it is only when "an ascertained balance of profit remained in the hands of one of the late partners *upon a general settlement of accounts,*" that an action can be maintained by the other for the recovery of such balance: 2 Addison on Contracts, * page 800. The language of the complaint, by reasonable construction, rather excludes the idea of intention to aver a settlement.

The averment that there were clear profits to a certain amount in the hands of defendant, is not such as the most inexperienced pleader would be likely to use in stating that a settlement had been made by the parties and an ascertained balance agreed upon.

We are reluctlantly forced to say that the complaint in this case entirely fails to aver a settlement, and that therefore it does not state facts sufficient to constitute a cause of action. This is not an instance where a material matter is loosely or inartificially pleaded, but one where the same is entirely omitted.

We cannot agree with counsel in his position that defendant was not prejudiced by this defect, and that consequently the cause should not be reversed.

Defendant first presented this question by demurrer which was overruled; he then answered, but in no way supplied or cured this defect in the complaint: upon the trial he objected to the introduction of all evidence offered upon this question and duly preserved exceptions; in his motion for a new trial and also in his assignment of errors he reviews the objection. He has done nothing to waive the defect, even were a waiver possible.

The jury found correctly upon the testimony under the court's instructions; but the evidence, the instructions, the verdict and judgment are none of them supported by the complaint. The main issue actually tried was the settlement; this issue was wholly unpresented by the pleadings, and defendant omitted no opportunity to attack the proceeding.

The judgment must be reversed and the cause remanded.

STONE v. O'BRIEN.

Filed October 1, 1884.

REPLEVIN—DEMAND—EXECUTION—POSSESSION BY EXECUTION DEBTOR.—No demand is necessary in an action by the real owner to recover possession of personal property levied upon under an execution against another, if at the time of the levy such property was not in the possession of the execution debtor.

DECLARATIONS OF PARTY IN POSSESSION, WHEN ADMISSIBLE.—Declarations of the party in possession of personal property explanatory of his possession, or of the title he is claiming, may be given in evidence by himself, or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, or what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible.

APPEAL from the county court of Custer county. The opinion states the facts.

George S. Adams, for the appellant.

Blackburn & Dale, for the appellee.

HELM, J. Replevin by appellee against appellant Stone, constable, holding under execution levy; appellee claims ownership of the property in controversy; cause tried to the court without a jury.

The proofs show that the animal had been purchased from Payne, the judgment debtor, by appellee; that a change of possession took place at the time of the purchase; that it was re-delivered to Payne, as appellee's agent, for certain specified purposes; that Payne held such possession for a long period, and exercised the usual acts of ownership. That on the day appellant levied the execution, the animal was in the possession of Payne's partner; but that such possession was without the knowledge or consent of Payne; no demand was made of the appellant before suit brought; and a reversal is asked upon this ground.

Had the property been found by the constable in the actual custody of the person named in the execution, his possession thereunder would have been lawful; in such case a demand would have been an essential pre-requisite to the replevin suit: Wells on Replevin, Sec. 368, and cases cited.

The rule would also probably apply had the partner been holding possession as the employee or agent; for such possession would be that of the principal. But this was not the case. Payne supposed that the mare had been placed in pasture, according to his directions. The possession, therefore, at the time of levy, was in no sense that of an agent. Being in the possession of one *not* named in the execution, the taking by the officer was wrongful, and no demand was necessary: Wells on Replevin, Sec. 369, and cases.

A more difficult question presented, relates to the rejection of certain testimony. While in possession of the mare after the sale to appellee, Payne, the vendor, on several occasions made statements to third parties concerning the ownership thereof; these declarations were offered by appellant for the purpose of establishing Payne's title to the animal and sustaining his levy; they were not made when Payne retook possession after sale, nor at the time of execution levy; but on various occasions during the period between these two acts.

The ground upon which their admission in evidence was sought, is that the possession of property is a *continuing* act, and that declarations concerning the ownership thereof by the party in possession, are admissible as part the *res gestæ* of such act.

The attempt to apply this doctrine to the case at bar gives rise to the following question: "Can a defendant in replevin give in support of his defense, declarations made by himself, the plaintiff not beng present, to third parties in favor of his own title to the property while in possession thereof; both himself and the plaintiff claiming the possession by virtue of ownership; and the issue being, to which does the property actually belong?" It is true the nominal defendant in this case is the constable, and not the party making the declarations; but the interest held under or through the execution levy, was exactly the interest owned by Payne, the judgment debtor; no title could be levied on or sold save and except that belonging to him; and the constable is in no better position, so far as the declarations under consideration are concerned, than Payne would be, were he the defendant in the action.

If these declarations were admissible it was because—as claimed by appellant—they were a part of the *res gestæ* of the act of continuous possession.

There are cases which upon superficial reading seem to carry the doctrine of *res gestæ* to this extent; and there is at least one case in which this application of it was made: Robecke v. Anderson, 26 Wis., 311.

But we are not prepared to admit that mere possession alone may properly be termed *an act* so as to justify the application of this branch of the doctrine of *res gestæ*.

The correct rule in this connection, certainly the safer and more equitable one, we conceive to be the following:

"*Declarations of the party in possession explanatory of the possession or explanatory of the title he is claiming,*" may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are "proof only that such was the *character of the possession*, or such was the title *claimed*," they are no evidence of the title actually held; and where the issue is, not what was the *nature* of the possession, or what was the title *claimed*, but which party, plaintiff or defendant, was the *actual owner;* these declarations are not admissible: See dissenting opinions of Dixon, C. J., in Robecke v. Andrews, *supra*.

The instances under this rule when the declarations should be received, are where the *character* of the possession or *nature* of the *claim made*, "becomes material with a view to the determination of some *ulterior* question," as for instance, cases in which a right rests upon the statute of limitations, and it is necessary to show that the possession was adverse.

To say that in a case where the only issue is actual ownership, a party may support his title by proof of his own declarations to third persons on sundry occasions, not in the presence of the other claimant, is to declare that one may manufacture evidence for himself. The injustice of the rule contended for in this case becomes apparent when we remember that the statements of "A," proclaiming his ownership would be received while those of "B" declaring *his* title would be promptly rejected, possession being the test of inadmissibility; "A" having hired or borrowed the horse from "B," may support his fraudulent pretense of ownership by the testimony of numerous reputable citizens as to his declarations; while "B," the real owner, may not call a single witness to prove what he has said on the subject, because having loaned the animal to "A," he was not in possession when he made the statements.

Declarations by a party in possession, against interest or in disparagement of title, are admissible under a different rule from the one we are now considering.

For a full discussion of this question, and careful collection and review of the cases, see the two able dissenting opinions in Robeke v. Andrews, *supra*.

The court did not err in rejecting the declarations of Payne.

Appellant ought, perhaps, to have been permitted to answer the question as to who "pointed out the mare as Payne's property," at the time he levied upon her under the execution; it may be that this evidence was proper as a part of the *res gestæ* of the act of making the levy; though there is doubt upon this question we do not decide it; from the record it appears that appellee was not present and the rejection of a statement made by some third person in his absence would not, even if erroneous, be sufficient in itself to justify reversal of this case.

The judgment of the county court will be affirmed.

REITTEMAN v. BRANDENBURG.

Filed October 1, 1884.

LANDLORD AND TENANT—HOLDING OVER—NOTICE TO INCREASE RENT.—A tenant of demised premises, holding over after the expiration of his term, is presumed in law to hold over as tenant at the same rent he had previously paid, if no new agreement is made. But if he has notice from the landlord that if he retains possession he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to pay such increased rent.

ERROR to the county court of Arapahoe county. The opinion states the facts.

James H. Brown, for the plaintiff in error.

L. C. Rockwell, for the defendant in error.

HELM, J. The tenancy averred and proven by plaintiff in the court below was for a single month; it was not a tenancy "from month to month," within the meaning of section 1,493 of the general statutes: the provisions therefore, of this section, regarding a change in the terms of lease, have no application to the contract now under consideration: Stopple Kamp v. Mangeot, 42 Cal., 316.

If plaintiff's action had been brought under this provision it could not be maintained; for the notice served upon defendant was not a proper compliance therewith. It is not, and was not intended to be a "notice to quit" under section 1,504 of the general statutes.

Plaintiff contends that in view of the proviso embodied in the latter statute no notice was necessary to terminate the tenancy existing in this case. His position is that this tenancy was, by contract, to end on a day certain, viz.: July 31st, that thereafter he was entitled to the possession without notice; that he then had the right independently of statute, to let the premises to another, or re-let them to defendant on such terms as defendant and himself might mutually agree upon; and that his notice to defendant on the twenty-first of July was in the nature of a proposition which, by defendant's consent and acquiescence, became binding upon him as a new contract for the month of August.

We are inclined to agree with plaintiff in error in these conclusions. There is no dispute but that the original entry and continued possession of defendant was that of a tenant; and the relation of landlord and tenant existed between the parties during the month of August.

The notice in this case was not formal as a proposition for a new contract, but it was sufficient to advise defendant that if he held over after the expiration of the lease, he must pay an increased rental. He made no objection whatever to the increase proposed, quietly remained in possession during the month of August, and must be held to have accepted the conditions of the new contract.

The law on this subject is, in our judgment, correctly stated as follows:

"A tenant of demised premises, holding over after the expiration of his term, is deemed in law to hold over as tenant at the same

rent he had previously paid, *if no new agreement is made.* But if he has notice from the landlord that if he retains possession he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to pay such increased rent:" Mack v. Burt, 5 Hun., 28 cases cited. See, also, Higgins v. Holligan, 46 Ills., 173; Hunt v. Bailey, 39 Mo., 257; Griffin v. Kinsley, 75 Ills., 41; Hoff v. Baum, 21 Cal., 121; Roberts v. Howard, 14 E. C. L. R., 648. A difference will be observed among some of the foregoing cases upon an allied question not here presented. In Hunt v. Bailey, it seems to be held that if upon receipt of the notice the tenant objects to the terms increasing his rent and indicates an intention not to pay, although he continues to hold the possession of the premises without any further correspondence with his landlord, he will not be liable for such increase. While in Griffin v. Kinsley, the court declare, that by such continued possession after objection, he will be deemed to have changed his mind and acceded to the new condition.

No such objection was made by defendant, until the month expired; and therefore we are not now required to express an opinion upon this particular question.

The situation of defendant in the case before us is analogous to that of one who "contemplating entering into possession of the lands of another, to occupy for use, is informed by the lessor that he can do so upon terms stated * * * and the party thereafter makes entry, occupies and uses the land."

Upon principle, the same rule should govern both cases; but this court has said in the latter case, that "it is a good acceptance of the terms proposed, and he will become thereby bound, under an implied contract, to pay the sum named:" Dickson v. Moffat, 5 Colo., 114. As already suggested, by the pleadings and proofs, we are advised that plaintiff is treating defendant as a tenant, under an implied contract of rental; upon the expiration of the lease for July, plaintiff elected not to regard defendant as a trespasser, but to continue the tenancy under the conditions theretofore proposed.

Entertaining these views it follows that we must reverse and remand the cause.

IN RE GARVEY ON HABEAS CORPUS.

Filed October 6, 1884.

SUPREME COURT JUDGES—POWER OF TO ISSUE WRITS IN VACATION.—The judges of the supreme court cannot, acting singly or in vacation, issue any of the writs enumerated in section 3, of article VI, of the constitution, or hear or determine the matters arising thereon.

HABEAS CORPUS—PRISONER DENIED SPEEDY TRIAL.—A prisoner who has not been brought to trial within the time required by section 8, of the *habeas corpus* act, may apply to be discharged on *habeas corpus.*

THE SAME—DETENTION OF PRISONER FOR FIVE TERMS.—A prisoner who is held in custody for five successive terms of court, without being tried, is entitled to be discharged on *habeas corpus.*

PETITION for a writ of *habeas corpus*. The opinion states the facts.

Wells, Smith & Macon, for the petitioner.

D. F. Urmy, Attorney-General, for the people.

STONE, J. The petitioner, who is imprisoned to answer to an indictment for manslaughter, now pending in the criminal court of Arapahoe county, prays to be discharged of his imprisonment under the provisions of the eighth section of the *habeas corpus* act, general statutes, p. 535, which is in the words following:

"If any person shall be committed for a criminal, or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the second term of the court, having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for, or on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear, by oath or affirmation, that the witnesses for the people of the state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material."

The facts stated in the petition, and shown by the records, to bring the case within the provisions of the statute, are that, in March, 1881, the petitioner was indicted for murder; that, before he was subjected to trial, the law of murder, as to him, was repealed; that, at the September term of the district court of Arapahoe county, the prisoner was tried, upon said indictment, for murder, found guilty thereof, and, by said court, sentenced to the penitentiary for life. That thereafter, petitioner prosecuted a writ of error out of the supreme court, to reverse the judgment aforesaid, and that said judgment was, at the April term, 1883, of said supreme court, reversed, upon the ground that, owing to the repeal of the law of murder, as aforesaid, the petitioner, could be prosecuted and punished for manslaughter only, under said indictment, and thereupon the said cause was remanded to the said district court with directions to proceed according to law. That thereafter, at the April term, 1883, of the said district court, the petitioner was, without any trial whatsoever, sentenced to imprisonment in the penitentiary for the term of eight years for manslaughter, and was imprisoned accordingly. That thereafter, at the December term, 1883, of the supreme court, the petitioner applied to be discharged from said last mentioned imprisonment under the *habeas corpus* act; and thereupon, by the judgment of the said supreme court, it was held that the said last mentioned judgment of the said district court was void for want of a trial and verdict upon said indictment, but, inasmuch

as it appeared that petitioner stood legally indicted of a felony, it was ordered that he be discharged from imprisonment in the penitentiary, and to be remanded to the custody of the sheriff of Arapahoe county, unless he should give bail in a sum fixed by this court: *In re* Garvey, 3 West Coast Rep., 1.

It is further shown that, being so remanded in pursuance of the order of the supreme court as aforesaid, the petitioner was again brought to the bar of said district court, whereupon afterwards he interposed his motion to be discharged, for that, although committed for a criminal matter and not having given bail, he had not been tried on or before the second term of the court having jurisdiction of the offense, such delay not happening on the application of said petitioner, and that thereupon he was entitled to be set at liberty in pursuance of the eighth section of the *habeas corpus* act.

That afterwards, on or about the fourth day of May, 1884, the said district court, without determining petitioner's said motion, transmitted the record of the indictment and proceedings aforesaid into the criminal court of said Arapahoe county, a court having concurrent jurisdiction of said offense, and that the motion aforesaid, coming on then to be heard, was denied by said criminal court, wherefore the petitioner applies to be set at liberty upon the present writ of *habeas corpus* by this court.

The present application of the petitioner was first made to me, as one of the judges of this court at chambers, in vacation, the latter part of June last, and a question then arose touching the jurisdiction of the judges of this court, or either of them, to act upon such application in vacation, and having declined to entertain jurisdiction in the matter the application was renewed to the court upon its convening at the present session. The same question, respecting applications for this and other writs of original jurisdiction, has been frequently raised before us at chambers, and as frequently ruled upon by the judges, but as no record is made of such proceedings in vacation, no written opinion declaring such ruling has ever been filed by the court, and hence, although this question is not a material one in the determination of this application, since it is presented to the court, yet we deem it not out of place to pass upon the question here, in order that it may furnish a referable guide hereafter.

The points, therefore, to be passed upon in order are:

First—May the judges of the supreme court, or either of them, entertain jurisdiction to hear and determine such matters in vacation?

Second—Does the writ of *habeas corpus* lie as the proper remedy in this case?

Third—Ought the petitioner to be discharged or set at liberty upon the state of facts presented?

Upon the first question there is very little authority to guide in reaching a conclusion, aside from the language of our state constitution bearing thereon.

Section 2 of article VI of the constitution declares that "The supreme court, except as otherwise provided in this constitution,

shall have appellate jurisdiction only." * * * And section 3, following, reads as follows:

"It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same."

This language confers jurisdiction, in respect of remedies under the several writs enumerated, upon the court only by express terms, and not upon the judges thereof, and therefore if the judges possess any such power it is by implication from the foregoing language. That no such implication arises has been uniformly held by the judges of this court ever since the organization thereof under the state constitution. This court, as expressed by the language of the constitution above quoted, is constituted to be primarily and essentially a court of appellate jurisdiction. Constitutions are instruments of limitation, chiefly as to the powers thereby conferred, and had it been the intent of the framers of our constitution to confer jurisdiction in respect of the writs mentioned, upon the judges of this court to act singly and out of term, such intent, as in the constitutions of many of the other states, should have been clearly expressed.

The question of most difficulty to be answersed is that, inasmuch as the legislature has by statutory provisions (section 1,609, general statutes) conferred this authority upon the judges, and since the constitution does not expressly declare that the justices in vacation shall not exercise this power, and that the legislature retains all legitimate powers not expressly forbidden, may it not legally confer such power upon the justices?

If this question be answered in the negative, as we think it should be, it is chiefly because the enumeration by the constitution of certain powers to be exercised by the court, and other language contained in that instrument, by clear implication, forbids the exercise of such authority by the justices out of term.

In the case of *ex parte* Bollman, 4th Cranch, 75, under a statute giving the right to justices of the supreme court of the United States to issue the writ, but not to the court, it was held, (Johnson, J. dissenting) that the court might do so if in the exercise of its appellate powers; but that the converse of this proposition would legally follow, is far from conclusive. We incline to think that the writ of *habeas corpus*, while ancient and existing as a common law writ before its enactment, as the statute of 31 Car. II, is not now issued by courts or judges except the power so to do is expressly given by statute.

And in the case of *ex parte* Bollman, *supra*, it is said by chief-justice Marshall that "courts which originate in the common law, possess a jurisdiction which must be regulated by a common law, until some statute shall change their established principles, but courts which are erected by written law and whose jurisdiction is defined by written law, cannot transcend that jurisdiction: * * * for the meaning of the term *habeas corpus*, resort may unquestionably

be had to the common law; but the power to award the writ by the courts of the United States must be given by written law." And, considering the language of our own constitution touching this question, and also the nature, objects and prime functions of our supreme court, we conclude that the justices thereof, acting singly or out of term, are without constitutional jurisdiction and authority to issue the certain writs enumerated in the constitutional provision referred to, or to hear or determine the matters arising thereon.

Second—Is the proceeding by *habeas corpus* the proper remedy, in this case?

We think it is. The statute under which the remedy is sought, and the only one which affords such remedy, where one exists at all, is in the *habeas corpus* act, and a substantially similar provision for accomplishing the same object—the securing to persons charged with the higher class of crimes a speedy trial, according to law—was contained in the English *habeas corpus* act of Charles II, and, with various modifications, has been brought down to our time, as a part of the act providing for the issue of this famous writ of right, for the protection of personal liberty. In the case of Brooks v. People, 88 Ill., 327, under a similar statute, the question was presented by writ of error, the statute in question having been taken out of the *habeas corpus* act, and placed in the general criminal law; and so the question whether *habeas corpus* would lie, was not raised or discussed, in the principal opinion; but, in the separate opinion of Mr. Justice Scott, who dissented upon another ground, it is said that *habeas corpus* lies in such cases.

The case of the Commonwealth v. Adcock, 8 Grattan, 661, cited by the attorney general, we deem unnecessary to review. It is sufficient to say that it is unsafe to attempt to avoid the hard consequences of a particular case, by setting up what the court or judge may conceive to be the "spirit of the law," against the plain letter and principles of the law.

The same remedy was pursued in the cases of Green v. Commonwealth, 1 Rob. (Va.), 731, and in Glover's case, 109 Mass., 340, and upon principle, we think the writ in such cases ought to lie, for if a given case is brought within the provisions of the act, it becomes a case of an unlawful restraint of liberty. A few authorities hold a contrary doctrine, but, so far as I have examined, are cases arising upon statutes different from ours, such as the cases of *ex parte* McGehan, 22 Ohio St., 444, where the statute provided for the absolute discharge of the prisoner from the offense; and it was held that the judgment of the court below denying the motion for such discharge, was to be reviewed upon error, inasmuch as said judgment was a final discharge, which, in effect, was an acquittal of the crime charged. Our statute, it will be noted, does not work such discharge of the offense, but operates merely to set the prisoner at liberty.

For the foregoing reasons we must hold, that in the case at bar, the writ prayed is the proper remedy.

Third—Ought the petitioner to be discharged upon the facts presented?

The answer to this question rests upon matters of fact solely, for in a case brought fairly within its provisions the statute seems to be peremptory. We are not compelled, upon this application, to consider the proceedings in this case prior to the reversal upon error by the court, 6 Colo., 559, in May 1883, of the judgment of the district court upon the conviction for murder. It appears from the uncontradicted averments of the petition that when the cause was then remanded to the district court for "for further proceedings according to law," the April term of that court was still in session, and there can be no donbt as to that court's then having jurisdiction to try the case. Instead of putting the petitioner upon trial for the crime of manslaughter, the court without trial or verdict, pronounced judgment against him and committed him to the penitentiary for the term of eight years. This court, upon *habeus corpus*, again interposed and discharged him from the penitentiary, but remanded him to the custody of the sheriff to be held for trial.

In the meantime the September term, 1883, and the January term, 1884, of said court came and went, and at the following April term, 1884, the petitioner interposed his motion for discharge under the statute. Before the hearing upon this motion the cause was transferred from the district court upon its own motion to the criminal court of Arapahoe county. The March term of this latter court was then in session, and upon a hearing therein of petitioner's said motion it was denied, after which the term adjourned without trying him.

It appears then from the record that there were four terms of the district court, to wit: April and September, 1883, and January and April, 1884, at each of which that court had jurisdiction both of the petitioner and his offense, and there was in addition one term of the criminal court, when this latter court possessed such jurisdiction. At each of these five terms the petitioner might have been tried; the failure to try did not happen upon his application and he has been in custody during the entire time.

It seems to us, under this state of facts, that we must either misconstrue the statute and legislate into it much that does not appear therein, or grant the prayer of the petitioner; and, for as much as the facts disclosed as above recited appear to bring the case clearly within the plain provisions of the statute upon which this application is made, it becomes our duty, in administering the law, to adjudge and order that the petitioner be set at liberty, and it is so ordered accordingly.

TOLNNIGES v. DRAKE ET AL.

Filed October 6, 1884.

SERVICE OF SUMMONS BY PLAINTIFF—DEFAULT—JUDGMENT.—The service of a summons by a plaintiff in an action, although specially deputized by the sheriff to make the same, is void, and a judgment by default entered upon such service is a nullity.

ERROR to the county court of Gunnison county. The opinion states the facts.

Thomas, McDougal & Thomas, for the plaintiff in error.

Abercrombie & Hawley, for the defendants in error.

BECK, C. J. The principal question submitted for adjudication in this case is, whether under our statute a plaintiff can serve his own summons.

The record discloses that Drake, one of the plaintiffs below, was especially appointed by the sheriff of Gunnison county, to serve the summons in this case, and that he did serve and return the same in manner specified in the civil code.

The provision referred to is as follows: "The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought. When the summons is served by the sheriff or his deputy, it shall be returned with the certificate of the officer of its service, to the office of the clerk from which the summons issued. When the summons is served by any other person, as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of said person of its service:" Civil Code Comp. 1883, page 13, Sec. 39.

It is provided in the general statutes that whenever the sheriff shall be a party to a cause, or whenever an affidavit is made and filed with the clerk, by a party to a litigation, that he believes the sheriff would not, by reason of partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit, the coroner shall execute process of every kind therein: General Statutes, 1883, Sec. 613, 614.

The plaintiff not being prohibited from serving his summons, by the express letter of the statutes, it is contended that the authority conferred upon a sheriff to specially appoint a person to serve the writ, authorizes him to appoint the plaintiff in the action.

We do not think this position is sound. Our statute, when its several provisions are considered together, is found to be but declaratory of the common law rules upon this subject. Under these rules all writs and processes were regularly delivered to the sheriff, for service, and he was sworn to execute the same without favor, dread or corruption.

Nevertheless, if the sheriff was partial, by reason of consanguinity or affinity, or if he was under the power of either party, or if he was himself a party to the action, so that he could not be presumed

indifferent in the service and return of the writ, the process was directed to the coroner. If the coroner was partial or not indifferent in the matter, two persons called elisors, against whom no cause of challenge existed, were named by the court to execute the process: 8 Bacoris Abv., pp. 689, 690.

A careful consideration of the various provisions of the statutes of this state, renders it apparent that it was the intention of the framers, to insure to litigants the same rights that were secured by the rules of the common law, to wit: that all process be served by disinterested and impartial officers or persons. This intention would certainly be defeated by the construction contended for.

It is clear, upon principle, that the same causes which should disqualify a sworn officer from serving a writ, should equally disqualify a private person.

It would involve an absurdity to say that a party to a suit shall be protected against the presumed partiality of a regularly commissioned and sworn officer of the court, arising either from his interest in the subject matter of litigation as a party thereto, or from other causes, and at the same time be exposed to the partial prejudiced or corrupt official action of any other person or party obnoxious to the same objections.

The statute does not say that a plaintiff may execute his own writ, and principle, reason and authority alike forbid such a construction.

The code of Mississippi (Revised Code, 1871, sec. 257), provides that if the sheriff be a party or interested in any suit, or for other just cause, is rendered incapable or unfit to execute his office in any particular case, the coroner shall perform the duties of sheriff and execute all writs. Under this statute, in the case of Dyson v. Baker, 54 Miss., 24, wherein a plaintiff had been specially deputized by the sheriff to execute a writ of attachment in his own case, the court held that both the officers of the court and private persons were disqualified to execute process in cases wherein they were parties or interested.

The case of Filkins v. O'Sullivan, 79 Ills., 524, is very similar, in all respects, to the one under consideration.

The statutes of Illinois of 1869, Laws 1869, page 399, authorized the sheriff to appoint a special deputy to serve any process issuing out of a court of record, by indorsing the appointment on the writ. The person so appointed was required to serve the writ by reading the same and delivering to the defendant a copy thereof, and the return was to be made under oath.

The plaintiff in the above case was authorized to serve the summons. The court said this was error; that a party could not serve his own writ. On account of this error, and of a defective return of the writ, it was held that the court below acquired no jurisdiction of the person of the defendant.

Counsel for defendants in error, in the present case, call our attention to the fact that the provisions of the New York code, forbid a party to the action to serve a summons in any case. They then

cite the cases of Myer v. Overton, 4 E. D. Smith, 428, and Hunter v. Lester, 18 How. Pr., p. 347, as establishing the doctrine that if a plaintiff *does* serve his own summons, it is only deemed an irregularity, and is cured by judgment.

We cannot approve this doctrine, where a plaintiff is disqualified by statute, to perform an official act necessary to give the court jurisdiction over the person of the defendant. As in cases referred to by counsel, to hold that if he does perform such act, and the court proceeds in the absence of the defendant to render judgment by default against the defendant, the defect is cured and the judgment must stand, would seem to fritter away, by construction, the protection against frauds intended to be secured to suitors by the statute.

The last mentioned cases hold, however, that if the defendant appears before judgment, and moves to quash the return, limiting his appearance for the purposes of the motion, the error may be corrected. That was the course adopted by the defendant below in this case, and the refusal of the court to quash the return of service, is the principal error assigned. This ruling would seem to have been erroneous, even under the authority just cited.

We are of opinion that the service of a summons, by a plaintiff in the cause, is void, and that a judgment entered in the absence of the defendant, upon such service, is a nullity.

The judgment is reversed, and the cause remanded, with instructions to the clerk of the court below to issue an *alias* writ of summons.

Judgment reversed.

SUPREME COURT OF NEVADA.

ALT *v.* CALIFORNIA FIG SYRUP COMPANY.

Filed October 6, 1884.

APPEAL—CERTIFICATE OF DEPOSIT IN LIEU OF APPEAL UNDERTAKING.—The statutory requirement, that to render an appeal effectual, the appellant may, instead of giving an undertaking with sureties, deposit money equal in amount to the sum named in the undertaking, is substantially complied with by leaving with the clerk a certificate of deposit, payable to his order, for the requisite amount.

MOTION to dismiss an appeal from the seventh judicial district court for Washoe county. The opinion states the facts.

Thomas E. Haydon, for the appellant.

R. H. Lindsay, for the respondent.

BELKNAP, J. This is a motion to dismiss an appeal because of appellant's alleged failure to give the undertaking or deposit the money necessary to make an appeal effectual.

Upon the evening of the fifth day, following the appeal, the defendant presented the clerk of the district court with a certificate of deposit, payable to his order, and issued by the First National Bank

of Reno, for the sum of $2,621.10, and requested a receipt for this amount of money. The clerk was disinclined to treat the certificate as money. In this emergency, he was requested by defendant's attorney to accompany him to the bank that issued the certificate, and have it cashed. The clerk had no suitable place for safely keeping the money, and, preferring to treat the certificate as money, rather than have the coin or currency in his custody that night, receipted to appellant for $2,621.10, and received therefor the certificate. The next day the bank paid the certificate, on presentation by the clerk.

We are of the opinion that these facts constitute a compliance with the statutory requirement, that to render an appeal effectual the appellant may, instead of giving an undertaking with sureties, deposit money equal in amount to the sum named in the undertaking. This conclusion is reached, because all of the acts of the appellant in the premises are characterized by good faith, and an intention to meet the substantial requirements of the statute. Appellant probably employed the certificate of deposit, instead of the actual money, as a matter of safety and convenience in the first instance. When the clerk, consulting his own accommodation, accepted the certificate, not for the purpose of assisting in a simulated compliance with the law, but because the amount of money called for by the certificate had been appropriated to its payment, the requirements of the statute were substantially performed.

Motion denied.

SUPREME COURT OF CALIFORNIA.

No. 8,587.

LUX ET AL. *v.* HAGGIN ET AL.

In Bank. Filed October 27, 1884.

RIGHTS OF GRANTEE IN NATURAL STREAMS AT COMMON LAW AND IN CALIFORNIA.—Whatever limitations there may be upon the right which the grantee of a parcel of land acquires in a natural stream of water running over it, it is well settled, both by the common law, and in this state, that the right itself is incident to the property in the land, and passes by a grant thereof, as an incorporal hereditament.

THE SAME—APPROPRIATION OF WATER—CONSTRUCTION OF CODE AND UNITED STATES STATUTES.—One who purchases land from the United States, or from this state, after the whole, or some part of the water of a natural water-course, running through such land, has been appropriated by some one else, under the act of congress of July 26, 1866, or under the provisions of title VIII of the civil code of this state, takes such land subject to the rights acquired by such prior appropriator. Such provisions of the civil code only affect water flowing over lands owned by this state, or by the United States. They do not affect the rights of riparian proprietors, (1) because it is expressly declared that they shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired therein, except for a public use, and not then until just compensation has been made.

THE SAME—APPROPRIATION OF WATER ON PUBLIC LAND AFTER DATE OF PURCHASE.—The right of a purchaser of public lands of this state, to have a natural stream of water flowing thereon, at the date of his purchase, continue to flow *currere solebat*, is not affected by an appropriation of the waters of such stream, made subsequent to the date of his purchase, but prior to the date of his patent.

RIGHTS OF RIPARIAN PROPRIETORS, AS BETWEEN THEMSELVES AND OTHERS.—A riparian proprietor has a right to the reasonable use of water, flowing in a natural stream over his land. What is a reasonable use, in any given case, depends upon the facts and circumstance.

of that case. But it is only as between riparian proprietors that the question can ever arise. One, not a riparian proprietor, has no right to interfere in any way with the natural flow of a stream of water over a riparian proprietor's land.

THE SAME—ESTOPPEL IN PAIS—WHAT AMOUNTS TO.—A riparian proprietor is not estopped from disputing the validity of an appropriation of the waters of a stream flowing through his land, by the mere fact that he knew of the intention of the appropriator to divert such water before any was diverted, and of the construction of works for such purpose, but made no objection thereto before bringing an action to prevent the same.

APPEAL from an order of the superior court of Kern county, denying the plaintiffs a new trial. The opinions state the facts.

Stetson & Houghton and *McAllister & Bergin*, for the appellants.

Louis T. Haggin, Garber, Thornton & Bishop and *Flournoy & Mhoon*, for the respondent.

SHARPSTEIN, J. The question whether in this state one can rightfully divert and appropriate to a useful purpose any considerable part of the water flowing in a natural stream over the lands of others, who are making no use of it and deriving no benefit from it, beyond such as it naturally confers by running through their lands, has been elaborately argued by counsel. The contention of the respondent is that "the doctrine that the owner of land upon the margin of a flowing stream, has the right, incident to such ownership, that such stream shall continue to flow unaltered in quality and undiminished in quantity, is a doctrine that was unknown to the common law of England, but on the contrary, the common law was that first in time was first in right as to the uses of the water of a flowing stream, and no action could be except for a disturbance of actual use under an appropriation previously made," and that the law of this state, in that respect, is the same as the common law of England was. But if the common law of England were otherwise, "the so-called doctrine of riparian rights, whereby a proprietor of land bordering upon a running stream is presumed to have a right to the full, free and uninterrupted waters of such stream, is not, and never has been, the law of this state; at least so far as appertains to state or government lands, as contradistinguished from those held by Mexican grant."

While it way be difficult and perhaps impossible to define with precision the character and extent of the right which the grantee of a parcel of land acquires in a natural stream of water running over it, all the text writers and all the cases, so far as we are advised, agree that it constitutes a corporeal right or hereditament that passes by grant of the land over which it runs. "For land," says Sir Edward Coke, "comprehendeth in its legal signification, any ground, soil or earth whatsoever, as arable, meadows, pastures, woods, moors, *waters*, marshes, furzes and heath:" 1 Inst., 4; 2 Bla. Com., 18; Woolrych Law of Waters, 146; Angell on Watercourses, 8.

"The right to flowing water is now well settled to be a right incident to property in the land:" Shaw, C. J., in Elliott v. Fitchburg R. R. Co., 10 Cush., 193. "But this right or corporeal hereditament, which is embraced within or appertains to the ownership of

the land over and through which a watercourse runs, is subject to the same incidents as all other interests in real property. It may be conveyed absolutely, by grant; so, too, it may be lost or acquired, either wholly or in part, by an adverse user sufficiently long, exclusive and notorious, to furnish adequate grounds for the presumption of a grant:" Brace v. Yale, 10 Allen, 441. So that whatever limitations there may be upon the right, it is well settled that the right itself is incident to property in land. It constitutes a real or corporeal hereditament. It is often said that the owner of land over which a natural stream of water runs has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law: 3 Kent's Com., 561. "For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient usufructuary property therein:" 2 Bla. Com., 18. From the context it is quite clear that the learned commentator meant no more than that a natural stream of water must of necessity continue common as between all who own lands through which it runs. "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration:" 3 Kent's Com., 439. And the same doctrine was laid down in nearly the same words by Sir John Leach in Wright v. Howard, 1 Sim. and Stuart, 190, in which the vice-chancellor said: "Every proprietor has an equal right to use the waters which flow in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, no other proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above."

With the exception of the *dicta* in a few cases cited by counsel for respondent, we have been unable to discover anything in the text-books or reports which conflicts with this exposition of the common law doctrine on the subject. And in Mason v. Hill, 5 B. & A., 1, Denman, C. J., said: "None of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of the land below, and may deprive him of the benefit of the natural flow of the water."

Has the common law rule in this respect been abrogated or modified in this State?

We know of no case in this state prior to Ferrea v. Knipe, 28 Cal., 340, which involved the question of the right of an owner of land to have a natural stream of water which flowed over it continue to do so without material obstruction or diminution, from

artificial causes. In that case the court "while admitting that a riparian owner to whom the water first comes in its flow, has the right to use it for domestic purposes, and for watering his cattle" said "that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run." This has never been overruled, or doubted; nor is it in conflict with any of the earlier reported cases.

But it is insisted by respondent's counsel that both the United States and this state have adopted a policy in respect of water flowing over their lands which is inconsistent with the doctrine of riparian rights, as we construe it. As a result of that policy it is claimed that a grant of land by either of these governments must be read as if it contained a condition, that any one should thereafter be at liberty to appropriate so much of the water of any natural stream running over such land as the grantee had not previously appropriated to some useful purpose, other than that which it subserved by flowing naturally over such land. That would constitute a reservation of an interest in the land granted, not for the benefit of the grantor, but for that of any other person who might choose to avail himself of it. If a grant does not contain any such express reservation or condition, we ought not to interpolate one unless it is clearly implied, because the general rule is that the owner of property cannot be divested of any interest in it by the simple prior appropriation of that interest by some one else. Both the state and the United States governments have granted to private persons and corporations large tracts of land which have remained unoccupied and in their virgin state for many years afterwards. It probably never occurred to any one that the owners by neglecting to appropriate the grasses and trees naturally growing on such lands to some useful purpose, left them open and subject to a rightful appropriation by any one else. And yet we have the same authority for holding that a simple grant of land conveys a right to have the water flowing over it continue so to flow, as we have for holding that it conveys a right to the trees and grasses growing on it, or to the soil itself. The principle that he who first appropriates property to a useful purpose, is best entitled to it, applies only to cases in which none of the parties has a grant, actual or presumptive.

In an early case, which involved the question, "whether the owner of a canal in the mineral region of this state, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, subsequent to the diversion, take up lands along the banks of the stream for the purpose of mining," the land through which the stream run, and through which the canal passed, being a part of the public domain to which there was no claim of private proprietorship, the court held that the common law doctrine which "prescribes that a water-course must be allowed to flow in its natural channel," could not be invoked in such a case, because, as the court said, that doctrine would, upon an examination of the author-

ities which support it, "be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being, both at the civil and common law, that the owner of lands on the bank of a water-course, owns to the middle of the stream, and has the right, in virtue of his proprietorship, to the use of the water in its pure and natural condition:" Irwin v. Phillips, 5 Cal., 140.

In Crandall v. Woods, 8 Cal., 136, where both parties had posessory rights, in separate parcels of land, the title to which was in the United States, it was held that each had a right to have a stream of water which naturally flowed over both parcels, continue to flow over the parcel in his possession, substantially as it did when his possessory right first attached to it. As between themselves, their respective rights in the stream, were held to be those of riparian owners.

In Hill v. Smith, 27 Cal., 476, it is explicitly denied that the rules of the common law, touching water rights, have been materially modified in this state. Although in that case it is said that these rules do not apply to sections of the state in which water is exclusively used for mining purposes. But this was said in a case in which neither of the parties owned any land over which a natural stream of water flowed. The respective rights of prior and subsequent appropriators were alone involved. It is claimed that the same reason exists for not applying the common law doctrine of riparian rights to the agricultural, as is given for not applying it to the mining regions of the state. Because water is as essential to the prosecution of the one industry as of the other, in this state.

But in Hill v. Smith, the court says: "When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case." The conditions upon which it is said the rule is founded do exist in agricultural districts. And it is the rule applicable to those districts which concerns us in this case. And, after carefully examining all the cases bearing on this question, we are unable to find one in which it is held, or even suggested, that outside of the mining districts, the common law doctrine of riparian rights does not apply with the same force and effect in this state as elsewhere.

And the reason why it did not apply to the mining districts is given in the opinion of the court by Field, J., in Atchison v. Peterson, 20 Wall., 507, where he says: "The government being the *sole* proprietor of all the *public* lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of *those* streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to en-

courage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories."

Which is, in effect, saying that the government, being the owner of all the land through which a stream of water ran, had a right to permit the diversion and use of it by any one who chose to divert and use it for mining, agricultural or other purposes. There is not only no occasion for the application of the doctrine of riparian proprietorship to such a case, but it is one to which the doctrine could not be applied.

The provisions of the civil code in respect to the appropriation of water must be limited to that which flows over lands owned by this state or by the United States. It cannot affect the rights of riparian proprietors (1) because it is expressly declared that it shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired in it except for a public use, and not then until just compensation has been made for it. Grants from the state and from the United States have always been construed like other grants, and a simple grant of land by either conveys the same interest as the grant of a private owner would. We think a grant of swamp or overflowed land conveys all the corporeal rights or hereditaments that a grant of any other land conveys. Property rights are essentially the same and quite as secure here as elsewhere. The right to acquire and possess property is as fully protected by the constitution of this state as it is by that of any other state. No one can be deprived of it except by due process of law. Private property cannot be taken or damaged except for one purpose, and then only on condition that just compensation is first made.

But whoever purchases land from the United States, or this state, after the whole or some part of the water of a natural watercourse, running through such land, has been appropriated by some one else under the act of congress of July 26, 1866, or under the provisions of title VIII, of the civil code of this state, takes subject to the rights acquired by such prior appropriator.

We do not doubt the power of the state to authorize the appropriation of water running through its own lands, and we think that such an appropriation would vest in the appropriator a right in the water thus appropriated superior to that of a subsequent purchaser from the state of the lands through which such water had previously run.

It therefore follows from our point of view that the material issue in this case is whether the defendant has diverted from the land of the plaintiffs, since the title of the state thereto vested in them or their grantors, the water of a stream which otherwise would naturally have flowed over such land.

The plaintiffs allege that they are the owners of land "situated along and bordering on Buena Vista slough," which is, and as they are informed and believe, "from time immemorial has been, a part of the natural stream or watercourse known as the Kern river, and through it the waters of said Kern river flow and always have flowed, on their way to Tulare lake." This is denied by the defendant. The issue is a vital one; and the finding on it is in favor of the defendant. If the finding is justified by the evidence, the order denying the plaintiffs' motion for a new trial cannot be disturbed, unless some material error was committed during the trial.

To maintain this issue on their part, the plaintiffs introduced evidence which tended to prove the substance of said allegation. First—They introduced patents, for the lands described in their complaint, from the state to them, and to their grantors. Second—They introduced evidence tending to prove that said lands bordered on Buena Vista slough, and that said slough formed a part of a natural watercourse, known as the Kern river, and that the waters of said river flowed through said slough to Tulare lake.

The defendant not only denied the material allegations of the complaint, but pleaded a prior appropriation, under the laws of this state, of a certain specified part of the water of said Kern river, and introduced evidence which tended to prove that said appropriation ante-dated any of the patents which the plaintiffs had introduced in evidence. After the defendant had rested, the plaintiffs, sought to introduce certificates of the purchase of said lands, by them and their grantors from the state prior to the date of defendant's said appropriation. To the introduction of said evidence, an objection was made made by the defendant, and sustained by the court. The grounds of the objection were that the evidence was "irrelevant, immaterial, incompetent, and not proper testimony in rebuttal." The materiality of it is apparent. If the appropriation was made while the state was the owner of said lands, the defendant's rights, as to the water appropriated, according to the provisions of the civil code, would be superior to those of subsequent purchasers of said lands: C. C. 1,410–1,422. But a diversion of water flowing in a natural stream over the plaintiffs' lands, could not be justified on the ground that it was diverted by virtue of an appropriation made subsequent to the plaintiffs' purchase of said lands from the state. Unless previously appropriated, water so flowing over said lands at the date of the plaintiffs' purchase, could not afterwards be diverted without affecting their rights, as riparian proprietors. And the rights of riparian proprietors are not affected by the provisions of the code: Id., 1,422. The right to have the water which flowed over their lands, at the date of their purchase, continue to flow

currere solebat, was a corporeal hereditament, of which the plaintiffs could not be deprived, except in the mode, and for the purpose prescribed by the constitution. The evidence was clearly admissible, and it was error to exclude it: Homestead Association v. Willard, 48 Cal., 614.

The defendant also introduced evidence tending to prove that by reason of natural obstructions, at certain points in Buena Vista slough, above plaintiffs' lands, the water of said slough did not flow over any of said lands. After the defendant had rested, the plaintiffs called witnesses to prove that there were no such obstructions at those points. To the introduction of such evidence an objection was made and sustained. This ruling was erroneous.

The court found that neither of the parties was a riparian proprietor. If that be the fact, there is no occasion for considering what their respective rights would be were the fact otherwise. If the plaintiffs were not riparian proprietors, they have no cause of action. If they are, and the defendant is not, it has no right to interfere in any way with the natural flow of a stream of water over the plaintiffs' land. A riparian proprietor has a right to the reasonable use of water flowing in a natural stream over his land. What may be a reasonable use in any given case depends upon the facts and circumstances of that case. But it is only as between riparian proprietors that the question can ever arise. According to the findings of the court, the question of riparian rights is in no way involved in the case.

The plaintiffs must prove by a preponderance of evidence, that there is a natural watercourse running through their land, from which the defendant has diverted or obstructed the natural flow of the water, before they will be entitled to any relief; and even then they will not be entitled to any, if the defendant proves by a preponderance of evidence that the water so diverted was duly appropriated, in accordance with the law of this state, while said land was owned by the state or the United States: Osgood v. E. D. W. Co., 56 Cal., 571; 11 Otto., 277.

The only difficulty that need be experienced is in arriving at the facts. The law is plain enough: Ferrea v. Knipe, 28 Cal., 341; Wixon v. Bear River Co., 24 *Id.*, 367; Hill v. Smith, 27 *Id.*, 476; Pope v. Kinman, 54 *Id.*, 3; Creighton v. Evans, 53 *Id.*, 55; Leigh Co. v. Independent Ditch Co., 8 *Id.*, 323; Crandall v. Woods, 8 *Id.*, 136; Ellis v. Tone, 58 *Id.*, 289; Lytle Creek Water Co. v. Perdew, 1 West Coast Rep., p. 866; Learned v. Tangeman, 3 *Id.*, 153; Osgood v. El Dorado Water Co., 56 Cal., 571; Broder v. Natoma W. Co., 11 Otto., 277.

Unless the plaintiffs were estopped, and the court does not find that they were, by reason of their acts and conduct while the defendant was constructing its works for the diversion of the water of Kern river, from complaining of such diversion, the findings that the plaintiffs knew of the intention of the defendant to divert said water before any was diverted, and of the construction of works by de-

fendant for that purpose, but made no objection to the operations of defendant before the commencement of this action, are irrelevant. The facts found do not, in our opinion, constitute an estoppel, and if not, the plaintiffs had the full statutory period within which to commence their action.

The evidence as well as the findings, should be confined to the material issues in the case; and the court should find the ultimate and not the probative facts.

Order reversed.

McKINSTRY, J., and THORNTON, J. concurred.

McKEE, J., CONCURRING. In the examination of every case before a court of justice, the first important inquiry is, what are the inherent facts of the case? And the second, what is the law applicable to the facts? Law, announced without reference to the facts, is the source of much error.

The plaintiffs in the action in hand claimed to be, and the court found they were, at the commencement of the action, owners in fee, seized and in possession of an extensive tract of country, described in their complaint, the title to which they acquired, by letters patent from the state of California, issued to them in the years 1876 and 1877, and under a statute of the state entitled: "An act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties," approved March 20, 1878. The lands, it is alleged, are situate along and bordering on a natural watercourse, known as Buena Vista slough, and along and bordering on Buena Vista lake and Kern lake, and a natural channel which connects the two lakes. Buena Vista slough is claimed to be the lower portion of a natural watercourse known as Kern river—a river, which rising in the Sierra Nevada, debouches from the mountains into the plains about ten miles from the town of Bakersfield in Kern county, whence it flows naturally to and through the Buena Vista slough northward into Tulare lake, and part of its waters through the natural channel, connecting Buena Vista lake and Kern lake, into the said lakes.

The facts as found by the court are: That the plaintiffs' lands are situated in and form part of the body of the swamp and overflowed lands known as Buena Vista swamps; that a portion of them borders on that part of Buena Vista slough south of where the present lower portion of Kern river, known as New river, empties into the slough; and the water of the river in its natural course flows into and through the slough, and also to and into Kern and Buena Vista Lakes. To the extent that the plaintiffs' lands are situate upon these natural water-courses, the plaintffs are riparian proprietors. As such, they claim the right to the natural flow of the water of Kern river through the slough, and the natural channel which connects the lakes, and to the use of the same for domestic purposes and irrigation.

Unquestionably, the plaintiffs, as owners of lands upon which, or between which, there is a natural water-course, are entitled to the natural flow of the water in the channel of the water-course, and to its use for domestic purposes, for watering live-stock, and for irrigation. Such a right is a natural right, existing in the soil over which the water flows; and if it did, in fact, exist in the soil at the time of the acquisition of title to the soil, it was as much a part of the estate, acquired by the title, as was the soil itself, to which the title attached; and the owner could no more be divested of it, against his consent, by the subsequent act of another, than he could be of the soil itself. Water flowing in a natural water-course, upon or between a man's lands is, therefore, property in the highest sense of the term. The absolute owner of real property is entitled in law to every right appertaining to it in the condition in which it was at the time of the acquisition of his title to it, and to be protected by law in its enjoyment. In that regard, the source of his title makes no difference. A grantee, or patentee, of land from the state of California, or from the United States, is certainly entitled to equal rights in his lands, and to the protection of the law, in the enjoyment of those rights, as a grantee from the Spanish or Mexican governments.

But the great contention is, that the right to the natural flow of the water of Kern river, through the natural channels already mentioned, down to and through the lands of the plaintiffs, did not exist when the plaintiffs acquired their titles to these lands; and, as it did not exist, it did not pass to the plaintiffs from the state, nor under the statute referred to; because the defendant had, under the authority and sanction of law, while the lands belonged to the state of California, acquired the right to divert the water of Kern river from its natural channel, at a point above the lands of the plaintiffs, and to appropriate it for beneficial uses.

As a fact, the court finds that on the fourth of May, 1875, the grantors of the defendant did acquire the right to appropriate seventy-four thousand inches of the water of Kern river, measured under a four-inch pressure; and that, under that right, they, and their successors in interest, actually diverted, and have continued to divert, at a point in the river, above the lands of the plaintiff, that amount of water from the natural channel of the river, by means of a main ditch or canal, and its distributing ditches, for the purpose of irrigating lands along the route of the canal and its ditches, and supplying the owners and occupants of such lands with water.

Assuming the acquisition of such a right, on the fourth of May, 1875 (while the lands, which might be affected by it, belonged to the state), as a valid existing right, which has passed to, and vested in, and has been exercised and enjoyed by the defendant, it is a right superior to that asserted by the plaintiffs; for, as I understand it, it is settled law, so far as this state is concerned, that property in the water of a stream upon *the public lands* may be acquired by mere appropriation for mining or other beneficial purposes; and that the

first appropriator is, to the extent of his appropriation, the owner, as against all the world, except the government. Such will be found to be the established doctrine of this court, and of the supreme court of the United States, in a great number of cases, commencing with Hill v. Newman, 5 Cal., 445, and ending with Broder v. The Natoma Water Company, 101 U. S., 274. In the last case, The Natoma Water Company, in the year 1853, constructed *upon public lands* of the United States, a canal through which, under a right of appropriation, it brought water, from a stream flowing upon public lands, for mining and other purposes. Several years afterwards the plaintiff acquired title to the lands upon which the canal was constructed —to one portion of them by a pre-emption settlement, made under an act of congress, passed in 1866, and to the other portion, by deed from a railroad company, under a grant to the company. Being an owner of the land, he brought suit against the water company to abate the canal as a nuisance. But the supreme court held, that the right of the prior appropriator of the water of the stream, under which the company constructed its canal upon the public lands, was a pre-existing right, which the government had recognized and confirmed; and the subsequent grantee of the lands from the government, took them subject to the pre-existing right of the company.

But an appropriation of the water of a stream flowing upon public lands, and upon lands held in private ownership, does not affect or destroy riparian rights existing in the stream at the time of the appropriation. Both rights—rights of appropriation and riparian rights—may be acquired by original and derivitive acquisition; they may exist together, and be held in common as property, and each is entitled to the protection of the law. Riparian rights depend upon the ownership of land, which is contiguous to, and touches upon, a natural water-course. Rights of appropriation arise out of some law or agreement, or grant, or the presumption of a grant, arising from the lapse of the period of prescription, or by the operation of the statute of limitations. The difference between the two rights is clearly expressed by the English supreme court of judicature, as follows: "The right to the water of a river, flowing in a natural channel, through a man's land, and the right to water flowing to it through an artificial water-course, constructed on his neighbor's land, do not rest on the same principle. In the former case, each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant, or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or some other legal origin:" 31 Eng. Rep., 771.

In the case before us, the right asserted by the defendant was not founded upon prescription, nor upon adverse possession, nor the time required by the statute of limitation, nor upon a grant, nor the

presumption of a grant. The source of the right is found in the fact that, in the year 1875, the lands, on which the right originated, were public lands, upon which the grantors of the defendant were authorized by law to enter and acquire the right. According to the claim of the defendant the right, therefore, originated in the policy of the government, as to its public lands. But if the lands did not, at the time of the acquisition of the right, belong to the government, but had passed into the ownership of riparian proprietors, then such lands were not in a condition in which any rights appertaining to them, or incidental to them, could be legally appropriated by any one without the consent of the true owners. The water of a stream running upon a man's lands, cannot be appropriated without his consent, for a private use, nor can it be taken from him for a public use, without compensation, according to the law of the land.

Whether the lands involved in the trial of the case were public lands at the time the right to appropriate the water of Kern river was acquired by the grantors of the defendant was, therefore, *the* question at issue in the case. The evidence before the court upon that question preponderated in favor of the defendant, because it proved satisfactorily that the right to the water had vested in its grantors by prior appropriation before the patents were issued by the state to the plaintiffs for their lands. The rights of the plaintiffs in the lands, acquired by them were, therefore, subordinate to the pre-existing right of the defendant to the water. But the plaintiffs offered to prove that the lands belonged to them, as purchasers from the state, under certificates of purchase, which they held as evidence of ownership, at the time the grantors of the defendant originated their right. But the court excluded the evidence, and that, I think, was a material error, for which the order should be reversed.

ROSS, J., DISSENTING. As I am unable to concur in the judgment of the court or in the reasons given in support of it, I think it proper, in view of the great importance of the main question involved, to state the grounds of my dissent.

In effect, the conclusion reached by the majority is, that the grantee of any legal subdivision of the public lands of the United States or of the state, through or along which a stream of water flows, is lawfully entitled—at least as against any one not a riparian proprietor or *previous* appropriator—to have the water continue to flow in its natural channel undiminished in quantity and unaffected in quality. In other words, that as against such grantee there can be no such subsequent appropriation of any of the water of such stream as will reduce the natural flow in quantity, through however much public land the stream may flow before reaching the subdivision granted. This, of course, is conceding that the court below should have allowed the plaintiffs to have put in evidence their certificates of purchase, some of which ante-dated the appropriation under which the defendant claims, and concedes, further, that the

certificates of purchase conferred upon the plaintiffs the same rights with respect to the water in question as would have been conferred by patents, and that the lands of the plaintiffs, border upon the stream from which the diversion complained of is made; I assume all this because, from the view I take of the main question, those matters become immaterial. The validity of appropriations made *prior* to the grant from the state or the United States, I understand to be conceded in the opinion of the majority. Although numerous contests with respect to water have arisen and been adjudicated by the supreme court of this state as well as by the supreme court of the United States, neither court has heretofore been called upon to decide the precise question now at issue. But the *principle* which, in my opinion, should control its determination, has been uniformly held by both tribunals. The doctrine that the water of a stream must continue to flow in its natural course undiminished in quantity has been so far modified in states with the climatic conditions of Massachusetts and Illinois as to permit the diversion of water for the purposes of irrigation, where the quantity of the stream is necessarily diminished by at least the quantity absorbed in the irrigation of the land upon which it is put. Especially should this be so in California, where, in a great part of the state, water is its very life-blood. Every practical man must know that, with the dry atmosphere and porous soils of those sections requiring irrigation, but little, if any, of the water diverted and used in irrigation is or can be returned to the stream from which it is taken. To establish, therefore, as the law of this state that the water of a watercourse must flow on in its natural channel undiminished in quantity would in effect be to convert the fertile fields, gardens, orchards and vineyards in many and great sections of the state into waste and desert places. Such a rule is inapplicable to the condition of things existing here. The common law is supposed, and has been said to be the perfection of human reason, but it would be the very reverse of this to hold that the waters of the streams of California must continue to flow in their natural channels until they sink into the sand or waste themselves in the sea, while orchards, vineyards and growing crops, of immense, if not incalculable value, perish for thirst. In the case of The People v. The Canal Appraisers, 33 N. Y., 482, the court of appeals of New York quoted with approval this language of Judge Bronson: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition, form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law, when that reason utterly fails, *cessante ratione legis, cessat ipsa lex.*" And in McClintock v. Bryden, 5 Cal., 100, this court said: "The wants and interests of a country have always had their due weight upon

courts in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they are to govern." In the case of Atchison v. Peterson, 20 Wall., 511, the supreme court of the United States held that as respects the use of water for mining purposes throughout the Pacific states and territories "the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent, to the necessities of miners and inadequate to their protection. By the common law," said the court, "the riparian owner on a stream not navigable, takes the land to the center of the stream and such owner has the right to the use of the water flowing over the land, as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him." In the subsequent case of Basey v. Gallagher, 20 Wall., 682, the court held that the views expressed and rulings made in the case of Atchison v. Peterson, "are equally applicable to the use of water on the public lands for purposes of irrigation."

It has never been held by the supreme court of this state, that the waters of the non-navigable streams of the state are not subject to diversion for the purposes of irrigation. On the contrary, the right so to divert them has been frequently upheld. The latest case upon the subject is that of the Anaheim Water Company v. Semi-Tropic Wr. Co., 12 P. C. L. J., 158.

In the case at bar no question arises as to the rights of grantees of Spanish or Mexican grants, or their successors in interest, through or along whose land a stream of water flows, either as between themselves or others. The question here is between a purchaser of a part of the public land of the state, derived from the United States, and an appropriator of water upon the public lands of the United States. From the foundation of the state, waters pertaining to the public lands of both the federal and state governments have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use was first sanctioned by custom, next by the decisions of the courts, and finally by legislative action on the part of the United States as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the state, was bound to take notice. In protecting, therefore, the rights of appropriators of water upon the public lands of the state and of the United States, no wrong is done to the pur-

chasers from either government. That, from the very beginning, it has been the custom of the people of the state to divert from their natural channels the waters of the streams upon the public lands and appropriate the same to the purposes of mining, agriculture and other useful and beneficial uses, is a part of the history of the state. That such diversions and appropriations have been, from the earliest times, recognized and sanctioned by the supreme court of the state, is equally true. Numerous cases attest this fact: Irwin v. Phillips, 5 Cal., 140; Tartar v. The Spring Creek Water and Mining Co., *Id.*, 397; Conger v. Weaver, 6 Cal., 555, are among the earliest. In Hill v. King, 8 Cal., 338, Chief Justice Murray, who dissented in Conger v. Weaver, used this language: "The right to appropriate the waters of the streams of this state, for mining and other purposes, has been too long settled to admit of any doubt or discussion at this time. Some of the older English authorities held that a right to water might be acquired by a riparian proprietor, by appropriation, and this court might, with propriety, have maintained the rights of water companies on the ground that they were riparian owners; but it has based this right on the ground that the legislation of the state has given to every one, not only a privilege to work the 'gold placers,' but also to divert the streams for this and other purposes. The legislation of the state has been held to amount to a '*general license to all*,' (whether properly, is not for me to say, the point having been decided by a majority of the court against my own opinion—see Conger v. Weaver, October 2, 1856), 6 Cal., 548, and when these ditches have been constructed they are regarded as a franchise or easement, belonging to the proprietors, and are entitled to protection as any other property." In Irwin v. Phillips, *supra*, after stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the federal government, and heartily encouraged by the expressed legislative policy of the state, the court said: "So fully recognized have become these rights, and without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers." The California reports abound with cases to the same effect: McDonald v. Bear River Co., 13 Cal., 232; Ortman v. Dixon, 13 Cal., 38; McKinney v. Smith, 21 Cal., 381; Smith v. O'Hara, 43 Cal., 374; N. C. and S. C. Co. v. Kidd, 37 Cal., 314, and Rupley v. Welch, 23 Cal., 455, are among them.

It is true that in none of these cases was it a question of right between a *grantee* of either the federal or state government, and an appropriator of the waters. But the cases are cited to show that from the foundation of the state government the people of the state have been accustomed to do that which, according to the rule of the common law, they could not have done, namely, to divert and

appropriate the waters of the streams flowing over the public lands for the purposes of mining, agriculture and other beneficial uses; that this custom, which is wholly at variance with the accepted principles of the common law, has been from its very beginning acquiesced in by the state government, has been, as said by this court in 1855, in the case of Irwin v. Phillips, "heartily encouraged by the expressed legislative policy of the state," and has all along been recognized, sanctioned and confirmed by the highest judicial tribunal of the state. Not only this: but the federal government, first by its silent acquiescence and afterwards by express statutory enactment, assented to this departure from the principles of the common law with respect to the waters upon the public lands in California. And it did so for the same reasons and in much the same way that the state of California assented to it. Allusion has has already been made to the case of Atchison v. Peterson, in which the supreme court of the United States said that as respects the use of water for mining purposes in California, "the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection;" and also to the subsequent case of Basey v. Gallagher, in which the same learned court declared that the views expressed and the rulings made in Atchison v. Peterson are equally applicable to the use of water on the public lands for purposes of irrigation." In Broder v. Water Company, 11 Otto, 276, which is also a California case, the supreme court of the United States said: "It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the act of 1866"—referring to the act of congress of July 26, 1866, the ninth section of which contains this declaration: "That wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed." And the court added: "We are of opinion that the section of the act which we have quoted (the ninth) was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." The court accordingly, in the Broder case, without regard to the act of 1866, protected the right of defendant to divert the water there in question from its natural channel, upon

the ground that the government had, by its conduct, recognized and encouraged and was bound to protect such diversions. It seems to me, therefore, that this court, in the late case of Osgood v. Water and Mining Company, reported in 56 Cal., 571, was entirely justified in saying, as it did, that "the principle of prior appropriation of water on the public lands in California, where its artificial use for argicultural, mining and other like purposes, is absolutely essential, which has all along been recognized and sanctioned by the local customs, laws and decisions, was thus expressly recognized and sanctioned by the supreme court of the United States, and also by the act of congress of 1866." It was this principle, and nothing else, that secured the defendant in the case of Broder v. The Water Company, in the continued enjoyment of the water it had appropriated *as against a grant from the government ante-dating the act of* 1866; for the court in terms declares: "We do not think that the defendant is under the necessity of relying on that statute." The defendant had acquired the right to divert the water from its natural channel and appropriate it to a useful purpose, because the government by its conduct, through a long series of years, in view of the necessities of the country, which were widely different from those of the country from which the common law was taken, had recognized and encouraged such diversions and use of the waters upon the public lands. The government permitted the principle of appropriation of such waters to grow up and become a part of the law in relation to the public lands, and therefore in construing the grant from the government the court considered it with reference to the principle of appropriation, and protected the rights of the defendant which arose under and by virtue of that principle. The common law doctrine of riparian rights being wholly inconsistent with, and antagonistic to, that of appropriation, it necessarily follows that when the federal and state governments assented to, recognized and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply. The doctrine of appropriation thus established was not a temporary thing, to exist only until some one should obtain a certificate or patent for forty acres or some other subdivision of the public land bordering on the river or other stream of water. It was, as has been seen, born of the necessities of the country and its people, was the growth of years, permanent in its character and fixed the status of water rights with respect to public lands. No valid reason exists why the government which owned both the land and the water could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the state and of the legislation and decisions with respect to the subject in question, is it possible that either government, state or national, ever contemplated that a conveyance of forty acres of land at the lower end of a stream that

flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream upon the public lands above and entitle the grantee of the forty acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated. Of course, the doctrine of appropriation as contradistinguished to that of riparian rights, was not intended to, and, indeed, could not, affect the rights of those persons holding under grants from the Spanish or Mexican governments—first, because the doctrine is expressly limited to the waters upon what are known as the public lands, and, secondly, because the rights of such grantees are protected by the treaty with Mexico and the good faith of the government. It is the rights of such riparian proprietors as *those* that are unaffected by the doctrine of appropriation and *those* are the riparian rights that are excepted from the operation of the provisions of the civil code in relation to "water rights" by section 1,422 of that code, which reads: "The rights of riparian proprietors are not affected by the provisions of this title." That code, as well as the other codes of California, went into effect the first of January, 1873. The appellants contend, and the prevailing opinion holds, that by the section of the civil code just quoted, the legislature of the state declared that the common law doctrine of riparian rights should apply to all the streams of the state. It seems very clear to me that this is not so for many reasons. Leaving out of consideration the question whether it lay in the power of the state to nullify the doctrine of appropriation established by the United States with respect to the waters flowing over their lands—established, too, in pursuance of the policy the state itself had previously adopted, and for the advancement of the interests of the people of the state—I find nothing in the civil code, or in any of the other codes, to indicate any intention on the part of the legislature of the state to return to the doctrine of riparian rights with respect to the waters upon the public lands. On the contrary, the code enacts in statutory form, in language as clear as language can be made, the theretofore prevailing law of appropriation. Title VIII of the civil code is headed "Water Rights." The first section of that title—section 1,410 of the code—declares: "The right to the use of running water flowing in a river or stream, or down a cañon or ravine, may be acquired by appopriation."

Can anything be clearer? By the common law, the water flowing in a river or stream, or down a cañon or ravine, could *not* be acquired by appropriation, and must continue to flow in its natural channel undiminished in quantity and unaffected in quality. Could there be any clearer declaration of the fact that the common law doctrine of riparian rights should not apply to the streams of this state than is found in this declaration of the statute that the waters of such streams may be acquired by *appropriation*? The statute proceeds:

"Section 1,411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

"Section 1,412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flumes, pipe or acqueduct by which the diversion is made to places beyond that where the first use was made."

"Section 1,413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished."

"Section 1,414. As between appropriators, the one first in time is the first in right." Next follow sections providing the manner in which appropriations shall be made. Section 1,420 provides that "persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases;" and the last section of the title—1,422—is the one already quoted, and reads: "The rights of riparian proprietors are not affected by the provisions of this title."

The construction claimed by appellants, and in the prevailing opinion given of this last section, in effect wipes out all of the provisions of the title to which it is but a saving clause. This is reversing the established rule of construction as I understand it. To my mind nothing is clearer than that by the provisions of the code referred to, the legislature continued in existence the pre-existing law with respect to the appropriation of waters upon the public lands; and as both the federal and state governments, in the exercise of a policy eminently wise and just, substituted the doctrine of appropriation for the riparian doctrine, so far as the public lands and the waters pertaining thereto are concerned, the only riparian proprietors to which the saving clause can apply, are such as hold under grants from the Spanish or Mexican governments. In other words, that in adopting the provisions of the civil code in question, the legislature did not codify the pre-existing law upon the subject.

From the views I entertain upon the main proposition in the case, the other questions discussed by counsel and in the prevailing opinion become unimportant. In my opinion the order appealed from should be affirmed, and I therefore dissent from the judgment given here.

MYRICK, J., DISSENTING. I concur in the foregoing dissenting opinion.

MORRISON, C. J., DISSENTING. I concur in the views expressed by Mr. Justice Ross and in his dissenting opinion.

No. 8,588.

LUX ET AL. v. HAGGIN ET AL.

In Bank. Filed October 27, 1884.

JUDGMENT REVERSED on the authority of Lux v. Haggin, *ante*.

APPEAL from a judgment of the superior court of Kern county, entered in favor of the defendant. The facts were the same as in Lux v. Haggin, *ante*.

Stetson & Houghton, and *McAllister & Bergin*, for the appellants.

Louis T. Haggin, Garber, Thornton & Bishop, and *Flournoy & Mhoon*, for the respondent.

THE COURT. ROSS, J., MYRICK, J., and MORRISON, J., dissenting. On the authority of Lux v. Haggin, No. 8,587, *ante*, judgment reversed and cause remanded.

No. 9,722.

BROWN v. DEXTER.

Department Two. Filed October 27, 1884.

CITIZENSHIP OF THE UNITED STATES—RENUNCIATION OF.—A person born in the United States, and a citizen thereof, has a right to expatriate himself, to renounce his allegiance to the country of his birth, and to become a citizen of another state or kingdom.

THE SAME—CHILD BORN IN FOREIGN COUNTRY OF EXPATRIATED FATHER.—A child born in a foreign country of a father who had previously renounced his citizenship of the United States and assumed allegiance to another power, is not a citizen of the United States.

MANDAMUS. The opinion states the facts.

R. M. F. Soto, for the petitioner.

John A. Wright and *T. E. K. Cormac*, for the respondent.

THORNTON, J. This is an application to compel the respondent to enter the name of petitioner on the great register of the county of Monterey as a voter.

The grand-parents of petitioner were native born citizens of the state of New York, and removed therefrom to Canada, in 1835, taking with them their child, then eleven years of age, which child subsequently became the father of petitioner. The said father of petitioner after attaining majority, took the oath of allegiance to the queen of Great Britain, voted and held office. This oath was taken in January, 1858, before the birth of petitioner, which occurred in March, 1858. The petitioner and his father continued residents of Canada until their removal to this state, which occurred as follows: The petitioner in September, 1883, became and has continued to be a resident of Monterey county, and the father about February, 1884, became a resident of the same county.

We are of opinion that the taking of the oath of allegiance in January, 1858, by the father of the petitioner, was an act of expatriation and denationalization, and made him a citizen of a foreign country. By such act, he renounced his allegiance to the United States. We have no doubt that he had a right when he took this oath to expatriate himself, to renounce his allegiance to the country of his birth, and to become a citizen of another state or kingdom. On this point we refer to the case *In re* Look Tin Sing, 4 West C. Rep., 71, where the right of expatriation is discussed, and in the views there expressed concerning it, we concur.

That the act of taking the oath of allegiance made him a citizen of another county, is sustained by the admitted facts that he afterwards voted at public elections and held public offices in Canada. The petitioner having been born after his father became a citizen of a foreign country is not within the provisions of the act of congress of February, 1855, or of section 1,993, revised statutes of the United States. These provisions only apply to the children born out of the limits and jurisdiction of the United States before or after the passage of the enactment referred to, whose fathers were at the time of their birth citizens of the United States.

It follows from the foregoing that the petitioner has never been a citizen of the United States, and therefore is not entitled to be registered as a voter.

The clause in section 2,172, title XXX of the revised statutes—"and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof," should not in our opinion be construed as changing the rule prescribed in section 1,993. It should be read and construed with the section last mentioned, that the father of such child must have been at the time of its birth, a citizen of the United States. We cannot suppose that with the provisions of section 1,993 before it, congress intended in section 2,172 to alter the rule prescribed in the former section, and to make the child of one who had renounced his citizenship in the United States and assumed allegiance to another power, born after such renunciation and assumption, a citizen of the United States—in other words to make a child born abroad of an alien, a citizen of this country.

The writ must be denied and it is so ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 8,900.

WINANS v. SIERRA LUMBER COMPANY.

In Bank. Filed October 28, 1884.

CONFLICT OF EVIDENCE—VERDICT—NEW TRIAL.—A verdict rendered upon substantially conflicting evidence cannot be disturbed and a new trial granted, except for errors of law occurring at the trial.

AN INSTRUCTION, ALTHOUGH ERRONEOUS, IF NOT PREJUDICIAL TO THE DEFEATED PARTY, is not ground for reversal.

DAMAGES FOR BREACH OF CONTRACT—NEGLIGENCE—PREVENTION OF LOSS.—One who sues to recover damages for injuries in an action arising out of contract or tort, cannot recover if the injuries were consequent upon his own negligence which directly contributed to them. Every one engaged in the performance of a contract is bound to do everything in his power to prevent loss to himself from a breach of the contract by the other party. If he cannot prevent it altogether, he must make reasonable exertions to render it as light as possible; and if, by his own negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss must fall upon him.

PARTIAL BREACH OF CONTRACT—ESTOPPEL—PART PERFORMANCE OF CONTRACT.—A party to a contract is not estopped from asserting his claim for a partial breach of the contract by the other party, from the fact that at the time when a settlement was had between them for work done under the contract, no mention was made of such claim. If the contract was susceptible of more or less performance, and there was a partial breach thereof by one of the parties, the other has the right to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the partial breach.

BREACH OF CONTRACT TO MANUFACTURE LUMBER—MEASURE OF DAMAGES.—The plaintiff and defendant entered into a contract whereby the plaintiff agreed to manufacture lumber, and the defendant agreed to purchase all that the plaintiff might manufacture, at a stipulated price, and to furnish him certain machinery for such purpose. The machinery furnished was inadequate, and by reason thereof the plaintiff was unable to manufacture as much lumber as he otherwise would have done. In an action to recover for the breach of such contract, *held*, that the measure of damages was the contract price for the lumber which the plaintiff was so prevented from manufacturing, less the expense he would have incurred in manufacturing said lumber, over and above the amount necessarily expended under the circumstances, in manufacturing the amount actually manufactured by him.

APPEAL from a judgment of the superior court for Tehama county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Chipman & Garter and *Mastick, Belcher & Mastick*, for the appellant.

J. Chadbourne and *J. F. Ellison*, for the respondent.

MCKEE, J. Appeal from a judgment and order denying a motion for a new trial.

On the fifteenth of March, 1881, the Sierra Lumber Company, being the owner of some tracts of timber lands, two saw mills known as the Champion and Yellow Jacket Mills, situate in Tehama county, together with a lumber yard and planing mill, a water flume, extending from the Champion Mill to its lumber yard, and personal property used in connection therewith, made and entered into a contract with George Winans, the plaintiff to the action in hand, to deliver to him possession of said property, including a specified number of teams and trucks for hauling logs, and to furnish him sufficient strap iron and rails for a tramway and a suitable engine and cars for the tramway. Winans agreed to construct the tramway from the Champion to the Yellow Jacket Mill at his own expense, and to operate the mills during the lumbering season of 1881, for manufacturing from the timber lands of the company, lumber,

which when manufactured was to be delivered at the lumber yard, to the company, who agreed to pay for the same, when delivered, nine dollars per thousand feet, and eight dollars per thousand feet for any undelivered lumber remaining at the mills, on the first day of December, 1881, when the mill property was to be surrendered to the company.

The company furnished the two mills with their equipments, the flume, the outfit for logging and the iron for the tramway to be constructed by the plaintiff; and the plaintiff entered into possession under the contract, constructed a tramway and operated the mills through the lumbering season of 1881, during which he manufactured five and one-half millions feet of lumber, all of which the company received from him and settled for at the contract price.

But the plaintiff charges that while he fully performed the contract on his part, the defendant on its part failed to fully perform it, in this, that it neglected and refused to furnish a suitable engine for the tramway which he constructed. In fact, the company did furnish an engine; but the plaintiff alleges that it was wholly unsuitable for the tramway "by reason of the peculiar make of its wheels," and would not work properly on the tramway, and although repeatedly notified and informed of the fact, defendant refused to furnish a suitable engine, in consequence of which plaintiff was able to manufacture only five and a half millions feet of lumber, when, if he had been furnished with a suitable engine for the tramway, according to the contract, "he would have cut nine millions feet at no greater costs or expense than he was put to in the manufacture of said five and a half million feet."

In answer to this the defendant averred, that the contract was for the manufacture of seven million feet of lumber for which the company promised to pay nine dollars per M, and admitted, that the plaintiff entered upon the performance of that contract, and commenced to construct the tramway called for by the contract, but averred: "That the plaintiff failed to build and complete about three and a half miles of the tramway, and that the six and a half miles constructed by him were constructed with such short and irregular curves and uneven and excessive grades, and in so unworkmanlike, insufficient and defective a manner that it could not be successfully worked by him, and was of little value when turned over to defendant at the end of the season."

The questions at issue, as raised by the pleadings, therefore, involved inquiries as to the contract under which the parties had acted—the plaintiff in constructing the tramway, and the company in furnishing the engine, and as to the character and sufficiency of the tramway and the suitability and sufficiency of the engine. It was conceded that the engine and tramway did not work well together; but the great question was, whether the faults, which caused that result and occasioned the loss of which the plaintiff complained, were in the engine or in the construction of the tramway.

As to the contract, there was given evidence tending to prove that it had been made by the plaintiff and the general superintendent of the company. It was admitted that both parties acted under the contract which was made, and each claimed to have fully performed it. The company gave evidence tending to show that the contract was for the manufacture of seven million feet of lumber; the plaintiff, that the contract was "to manufacture all the lumber he could." Much evidence was also given in relation to the construction of the tramway and the suitability and sufficiency of the engine which the company furnished, and which the plaintiff used and operated in the performance of the contract; there was also evidence given tending to prove that the plaintiff had men, machinery and force sufficient to operate the mills at their full capacity for the lumbering season of his contract, and that he could have manufactured during the season a greater quantity of lumber than he actually did. The verdict was for the plaintiff; and as it was rendered upon substantially conflicting evidence it cannot be disturbed and a new trial granted, except for errors of law occurring at the trial; and the main matters urged on this appeal are errors of law occurring at the trial.

The first relates to instructions given to the jury upon the question of the authority of an agent of a corporation to make a contract for the corporation. At the defendant's request the court had given the jury some instructions upon the subject of the ostensible authority of such an agent, and then quoted to them the language of sections 2,315–16–17 of the civil code, and, in connection therewith, substantially told them that the plaintiff would not be entitled to recover, unless they found as a fact that the superintendent of the company had been authorized to contract for the company. The defendant excepted to the instructions; but the instructions as given were favorable and not prejudicial to the defendant.

As to the performance of the contract by the parties the following was given: "One of the parties to a contract cannot complain of a failure on the part of the other to perform, if his own laches or refusal to perform has contributed to defeat the object of the contract.

"Proof of perfection, however, in tramway, cars or engine, is not required; only such as from the evidence you find that the parties contemplated such a tramway, such cars, and such an engine, and only such, to fulfill the contract, as a prudent man, owning the timber and mills, would have made or furnished for himself, having in view present and future pecuniary profit." Defendant excepted to the latter portion of the instruction. We think it was not objectionable. In substance it told the jury, that to entitle either of the parties to their verdict it was not necessary for the plaintiff to prove that he had constructed a perfect tramway; nor for the defendant to prove that he had furnished a perfect engine. The contract only required such a tramway, or engine, as, in the situation of the parties and in the light of surrounding circumstances, would be sufficient and suitable for the business in which they were about to

engage. To the first part of the instruction the defendant did not object. In fact, it was given at the request of the defendant; and, in connection with it, the court elaborately instructed the jury, that if they believed from the evidence that the loss of which the plaintiff complained resulted from his own failure to perform his part of the contract, or from his negligence in constructing the tramway, or in operating the engine which the company furnished, or from the want of ordinary care and caution, either in operating the engine, or in constructing the tramway, or in repairing the particular places where the injury was threatened or was likely to arise, he would not be entitled to their verdict, even if they found as a fact that the engine furnished by the defendant was defective and unsuitable for the tramway.

The elaborate instructions which were given placed the right of the plaintiff to recover upon the ground that he himself must have been wholly free from fault, not only in performing his part of the contract, but in operating the engine which was furnished to him. And there is no doubt that a person who sues to recover damages for injuries in an action arising out of contract or tort, cannot recover if the injuries were consequent upon his own negligence which directly contributed to them. The law imposes upon every one engaged in the performance of a contract the duty of doing everything in his power to prevent loss to himself from a breach of the contract by the other party. If he cannot prevent it altogether, he must make reasonable exertions to render it as light as possible; and if, by his own negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss must fall upon him: Hamilton v. McPherson, 28 New York, 72. The question, whether the loss of which the plaintiff complained was due to the laches of the plaintiff or to the non-performance of the contract by the defendant was, therefore, properly put to the jury; and if the evidence satisfied the jury that the engine furnished by the defendant was so defective that the plaintiff was prevented from manufacturing the quantity of lumber which he could have manufactured with a suitable engine, and thereby sustained a loss, he was entitled to recover, unless he had by his conduct estopped himself from maintaining the action.

There was evidence given of a settlement between the parties, after the close of the lumbering season of the year 1881, of the affairs and business of the parties in connection with the lumber manufactured and delivered under the contract. At that settlement the plaintiff made no mention of any claim, or cause of action, against the defendant for a partial breach of the contract. But if the plaintiff had such a cause of action he was not bound to make it known at a settlement about the lumber actually manufactured; and the mere non-mention of it would not estop him from afterwards maintaining an action upon it. The instructions to the jury that the plaintiff would not be estopped, unless they believed from the evidence that he, by his acts, declarations, or omissions had

intentionally and deliberately led the defendant to believe that the engine furnished was according to the contract, and that the defendant relied upon such acts, declarations or omissions to its injury, were, we think, correct. And we think the court correctly instructed the jury, that when the plaintiff discovered "that the engine was unsuitable for the tramway, he was not bound to rescind the contract, and make no further effort to carry out its purposes. He was at liberty to go on and manufacture all the lumber he could under the circumstances, and endeavor in good faith to carry out the contract; and by so doing he would not release or forfeit any claim for damages he might ultimately sustain by reason of any breach of the contract by the defendant." The contract was one susceptible of more or less performance; and if there was a partial breach of it by the defendant, the plaintiff had the right to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the partial breach.

If there was such a breach, resulting in loss to the plaintiff, the question then remained what was the measure of damages? Upon that question the following instructions were given:

"For the breach of an obligation arising from contract, the measure of damage is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

"Where an action is brought to recover general damages for a breach of contract, the jury may take into their consideration any consequential damages which the plaintiff has sustained by reason of such breach, provided that such damages may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from the breach of the contract itself, or may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it."

"If the jury believe from the evidence, that the engine furnished by defendant to plaintiff was not of the make and description it had contracted to furnish him; and that the plaintiff duly notified the defendant of the defects in said engine, and of its unfitness for the purposes of said contract, and afterwards, without any default on his part, made every reasonable effort, in good faith, to accomplish the purposes of said contract, and to prevent loss or injury, but, ultimately, by reason of defendant's failure to furnish an engine of the kind and make agreed to be furnished, suffered damage, and was prevented from manufacturing lumber, which he otherwise would have manufactured, then the plaintiff is entitled to recover, as damages, the contract price of the lumber which he was so prevented from manufacturing, less the expense he would have incurred in manufacturing said lumber, over and above the amount necessarily expended under the circumstances, in manufacturing the amount actually manufactured by him."

We think these instructions were right.

The contract being one susceptible of more or less performance, the damages sustained by an incomplete performance or partial breach were apportionable according to the extent of failure. That would cover the actual loss sustained, and the actual loss would be the profits which the plaintiff could have made upon a complete performance of the contract: Utter v. Chapman, 43 Cal., 283; Upstone v. Weir, 54 *id.*, 124: Hale v. Trout, 35 *id.*, 220. And these profits would be the product of the lumber which he was prevented from manufacturing, by the partial breach of the contract, and the contract price, less the expenses which would have been incurred in its manufacture.

There was evidence tending to prove that the plaintiff had made preparation by men and means to manufacture lumber to the extent of the capacity of the mills; and that with this force he could have manufactured with a suitable engine more lumber that he did not manufacture. But defendant denied "that the plaintiff could have cut nine million feet of lumber at no greater cost or expense than he was put to in the manufacture of the lumber he, in fact, manufactured," and contended that the manufacture of any additional lumber would have involved the expense of cutting additional logs, and making them ready to be hauled over the tramway and laying them at the mills for the purpose of manufacture, even if he had a force of men and logging teams employed for that purpose, and that such additional expenses should be deducted from the profits of any additional lumber which could have been manufactured. That contention was founded upon some evidence in the case, and it was fairly covered by the instruction, that the plaintiff, if he was entitled to recover at all, was entitled to recover as damages the contract price for the lumber which he was prevented from manufacturing, less the expense he would have incurred in its manufacture, "over and above," *i. e.*, separate from the expense he had incurred in and about the lumber which he had actually manufactured.

It was also contended that the value of the use of the tramway and engine by the plaintiff for his individual benefit, at times which did not interfere with the performance of the contract, should be deducted from any damages sustained by the plaintiff. But that matter entered into the settlement between the parties as to the lumber actually manufactured; and the defendant admitted that the plaintiff had paid for the same.

Taken in connection with the evidence and pleadings in the case, we think the instructions, as a whole, correctly stated the law of the case, and presented the case fairly to the jury; and as we find no prejudicial errors in the numerous assignments of errors, the judgment and order are affirmed.

MYRICK, J., SHARPSTEIN, J., and THORNTON, J., concurred.

No. 8,827.

RECLAMATION DISTRICT NO. 108 v. HAGAR.

In Bank. Filed October 28, 1884.

RECLAMATION STATUTES NOT IN CONFLICT WITH UNITED STATES CONSTITUTION.—The statutes of this state, regulating the formation of reclamation districts, the levying of assessments, and the mode of collecting the same, are not in conflict with the fourteenth amendment of the United States constitution; nor are the same in violation of section 10, article I of said constitution, forbidding the passage of any law impairing the obligation of contracts, on the ground that the state, in accepting the grant under the "Arkansas Act," assumed the burden of reclaiming the land, and cannot impose this burden upon its grantees.

APPORTIONMENT OF ASSESSMENT—EQUALITY OF BURDEN OR BENEFIT.—Whether or not the mode of assessment is in accordance with proper apportionment, or equality of burden or benefit, is for the consideration of the legislature, in the absence of a palpable violation of private rights. In the present case, the court cannot say that the burdens to be borne are not equal in proportion to the benfits.

SUCH ASSESSMENT MAY BE MADE PAYABLE IN GOLD COIN.

BY-LAW OF ASSESSMENT DISTRICT—SUBSEQUENT ASSESSMENT.—A by-law of an assessment district, prohibiting an indebtedness to accrue, in excess of the amount of assessment levied, cannot invalidate an assessment levied in accordance with section 34, of the act of 1868.

POWER OF TRUSTEES OF RECLAMATION DISTRICTS TO EMPLOY COUNSEL.—The trustees of reclamation districts are authorized to employ special counsel, other than the district attorneys of their respective counties, in the prosecution of actions for the enforcement of assessments, and to provide for the payment of their services out of subsequent assessments.

CONSTITUTIONALITY OF ASSESSMENT.—An assessment for the reclamation of swamp lands, although not made by a municipal corporation, is not unconstitutional.

RECLAMATION DISTRICT—LANDS WITHIN OTHER COUNTY—POWER OF SUPERVISORS OVER.—The legislature may confer on the board of supervisors of one county the power to include within a reclamation district any lands within another county.

ACTION TO ENFORCE ASSESSMENT—REAL PARTY IN INTEREST—RECLAMATION DISTRICT AS PLAINTIFF.—In an action to enforce an assessment for the reclamation of swamp lands, brought under the act of March 28, 1868, the reclamation district is the real party in interest, and a judgment therein, rendered in favor of the plaintiff, if otherwise valid, will not be reversed, because such action was not brought in the name of the people.

APPEAL from a judgment of the superior court for Colusa county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Belcher & Belcher, for the appellant.

A. C. Adams and *Jackson Hatch*, for the respondent.

SHARPSTEIN, J. This action was brought to recover of the defendant an assessment levied upon his land for reclamation.

1. The statutes of this state relating to the formation of reclamation districts, and the levying of assessments, require that upon the presentation of a petition setting forth a description of the lands of which it is desired to have the district formed, with the names of the owners (if known), notice of the hearing shall be given by publication. After the formation of the district, no other or further notice to owners is required to be given; but proceedings are to be had for the election of trustees, making of by-laws, appointment of commissioners, the estimate of works and their cost, and the assessment of such cost upon the lands of the district, and no time, place or manner is named for any opposition to be made. If an assessment remains unpaid, provision was made for the bringing of an action against the delinquent owner. The appellant claims that the statutes are in conflict with the fourteenth amendment of the constitution of the United States. Upon this point the supreme court of the United States and this court have decided adversely to

the appellant: Davidson v. New Orleans, 96 U. S., 97; Hagar v. Rec. Dist. No. 108, 111 U. S., 701; Rec. Dist. No. 3 v. Goldman, 4 West C. R., 97.

2. Whether or not the mode of assessment in accordance with proper apportionment, or equality of burden or benefit, was for the consideration of the legislative department, in the absence of a palpable violation of private rights: Hagar v. Rec. Dist. No. 108, 111 U. S., 701. In the case before us, we cannot say that the burdens to be borne were not equal in proportion to benefits.

3. It is claimed that the law authorizing the assessment is in violation of section 10, article I, of the constitution of the United States, forbidding the passage of any law impairing the obligation of contracts, on the ground that the state, in accepting the grant under the "Arkansas Act," assumed the burden of reclaiming the land, and cannot impose this burden upon its grantees. The case of Hagar v. Rec. Dist. No. 108, *supra*, holds the contrary.

4. There is nothing in the point that the assessment is sought to be enforced in gold coin: Hagar v. Rec. Dist. No. 108, *supra*.

5. A by-law adopted declared that "the trustees shall allow no indebtedness to accrue in excess of the amount of assessment levied." An indebtedness in excess of the first assessment was levied to pay such excess, with other expenditures. It is urged that the subsequent assessment is therefore void. Section 34 of the act of 1868 authorized additional levies to be made, upon revised estimates, if the previous taxes should be insufficient. The by-laws authorized to be adopted were such as might be deemed necessary to effect the work of reclamation and keep the same in repair. By-laws could not have the effect of forbidding the doing of that which the law expressly authorized to be done.

6. After the levy of two assessments, which were found to be insufficient, a third assessment of one hundred and eighteen thousand two hundred and eighty-eight dollars was levied. On the trial of this case, the defendant offered to prove that of the indebtedness of one hundred and eighteen thousand two hundred and eighty-eight dollars (the amount of the third assessment) more than ten thousand dollars, and of the indebtedness of one hundred and ninety-two thousand and forty-six dollars (the amount of the second assessment) more than fifteen thousand dollars had been paid by the trustees for the services of attorneys, other than the district attorneys of the counties of Yolo and Colusa, in the prosecution of actions in the courts of this state for the enforcement of the first and second assessments. This evidence was objected to, on the ground, among others, that the nature of the indebtedness was necessarily determined by the trustees in their statement to the board of supervisors to have been proper, and such as the law contemplated, and by the board of supervisors in making the order for the assessment, and that neither the determination of the trustees nor that of the board of supervisors can be contradicted or impeached in this suit. The objection was sustained.

A like ruling was had upon a question asked as to how much of the one hundred and eighteen thousand two hundred and eighty-eight dollars had been paid for the expenses of procuring legislation in regard to the affairs of the district. That the ruling of the trial court was right was decided by this court November 29, 1879, in Rec. Dist. No. 108 v. Howell, No. 6,348, and Rec. Dist. v. Howell et al., No. 6,346. See also, Rec. Dist. v. Hagar, 6 Pac., C. L. J., 499, sustaining the same view.

7. The point that the assessment sought to be enforced in this action was not made by a municipal corporation, and was therefore unconstitutional and void, is admitted by appellant to be adverse to the decision of this court in Hagar v. supervisors of Yolo county, 47 Cal., 222; but we are asked to reconsider the question. We are not disposed to say that case is not correct.

8. The appellant claims that the assessment was void, because, under the law authorizing it, lands within the district belonging to the state, as a private proprietor, were required to be and were exempt from the assessment. We are not referred to anything in the transcript, showing that any lands in the district belonged to the state; nor that any lands were omitted from the assessment.

The complaint alleged that no lands in the district were unsold; and this allegation was found by the court to be true. The petition presented to the board of supervisors was accompanied by a schedule, giving a list of the lands of the proposed district, with the names of owners so far as known; and, on the hearing of that petition, the defendant Hagar, being present, admitted the truth of all the facts set forth therein.

9. The point that the legislature could not confer on the board of supervisors of one county the power to include within a district any lands within another county, is not well taken: Hagar v. Rec. Dist. No. 108, *supra*.

10. The act of March 29, 1872, stats. 1871–72, p. 696, authorized the recovery of interest.

11. The assessment in question was valid according to the provisions of the act of March 28, 1868, as amended March 28, 1872. All of the requirements of that act with respect to assessments were met and performed, according to the averments of the complaint, which averments were by the court below found to be true. Upon the merits, therefore, the judgment appealed from is right. Must we reverse it only because it is brought in the name of the reclamation district, which, under every statute that has been passed with respect to the reclamation of lands, is the real party in interest? It is true that it has been decided here that actions brought under and in pursuance of the provisions of the act of 1868, were properly brought in the name of the people: People v. Hagar, 52 Cal.; People v. Haggin, 57 Cal.; and, further, that actions brought under and in pursuance of the provisions of the political code must be commenced in the name of the reclamation district: People v. Haggin, 57 Cal. The judgment in the case last mentioned was properly re-

versed on the ground first discussed in the opinion. But here the case resolves itself into the simple question whether we must reverse the judgment, otherwise valid, only because it is brought in the name of the Reclamation District instead of the People, when if the People were plaintiff, they would be merely formally so—the real party in interest all the time being the Reclamation District. The legislature, by section 475 of the code of procedure, has declared that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Judgment and order affirmed.

ROSS, J., concurred.

THORNTON, J., concurring. I concur in the above, except what is said in relation to the last point discussed. I think that the act of 1868 was repealed as far as regards this point by the one hundred and sixteenth section of the act of March 30, 1874. (See amendments to the codes for 1873–74, 60); therefore the action was properly brought in the name of the Reclamation District: Pol. Code, sec 3,466; People v. Haggin, 57 Cal., 579. The proceedings in regard to the assessment substantially followed the provisions of the political code.

I therefore concur in the judgment.

MCKINSTRY, J., concurring. I concur. With respect to the action being brought in the name of the Reclamation District, I add: The complaint contains a statement of facts constituting a cause of action to enforce which the plaintiff (*quasi* a municipal corporation), is alone interested. It seems to be admitted that plaintiff is "the real party in interest," and the general rule is that an action must be brought in the name of the real party in interest: C. C. P., 367. The statute has been construed as authorizing an action like the present to be commenced in the name of the People of the state: People v. Hagar, 52 Cal., 171. If it be conceded that the effect of the statute is to deprive plaintiff of its capacity to sue in its own name the objection to its legal capacity could only be taken by special demurrer: C. C. P., 430, 434. Nor is People v. Haggin, 57 Cal., 579, to the contrary. In that case it was assumed that the action was commenced under the political code, and the political code does not authorize such an action to be prosecuted in the name of the people of the state.

MYRICK, J., and MCKEE, J., dissenting. We concur in the foregoing opinion in all respects, except as to the admissibility of evidence concerning the payment of attorneys' fees and for procuring legislation; in those respects, we think the evidence was admissible.

No. 8,675.

PEOPLE v. HAGAR.

In Bank. Filed October 28, 1884.

RECLAMATION OF SWAMP LANDS—ACTION TO ENFORCE ASSESSMENT—EVIDENCE THAT LANDS WERE NOT BENEFITED NOT ADMISSIBLE.—The board of supervisors, in hearing the petition for the formation of a reclamation district, and, in making the order, has jurisdiction to determine what lands would to benefited by the proposed system of reclamation, and to include such lands within the district, and their determination cannot be inquired into; the trustees have authority to cause surveys, plans, location and estimates of the cost of the work to be made, and the commissioners have authority to assess upon each and every acre within the district, to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, it is not competent for the court below, in an action to enforce an assessment, to determine that certain lands assessed were not benefited, or that such benefit was not of the value of the assessment.

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Belcher & Belcher, for the appellant.

A. C. Adams, W. B. Treadwell and *J. C. Ball*, for the respondent.

MYRICK, J. Many of the points involved in this case are similar to points presented in Reclamation District No. 108 v. Hagar, No. 8,827, *ante*, opinion this day filed. Two points, however, not involved there, are for consideration here.

1. There is evidence sufficient to sustain the finding, that the allegation of the complaint, that the commissioners jointly viewed the lands of the district, was true.

2. The lands of the defendant consist of many parcels, sections, fractional sections and subdivisions of sections, containing several thousand acres. The defendant offered to prove that of his lands, which were assessed, 522.13 acres were situated between the western base of the levee and the river, part occupied by the levee and part between the levee and the river; that twenty parcels are so situated, ranging from one acre to 114.48 acres; that said lands were not benefited by the works of reclamation, but were assessed at the rate of $195.15 per acre.

This evidence was objected to for the reason, among others, that the offer was an attempt to contradict and impeach the assessment, by showing that the commissioners erred, in their judgment, in determining that each tract of land in the district was benefited to the same extent as all others in proportion to acreage, and that the several tracts were chargeable with the amounts severally assessed against them, as returned by the commissioners.

The board of supervisors, in hearing the petition for the formation of the district, and in making the order, had jurisdiction to determine what lands were to be benefited by the proposed system of reclamation, and to include such lands within the district, and their determination cannot now be inquired into; the trustees had authority to cause surveys, plans, location and estimates of the cost of the work to be made, and the commissioners had authority to assess

upon each and every acre within the district, to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, we do not think it was competent for the court below to have determined that either of the parcels enumerated in the offer was not benefited, or that such benefit was not of the value of the assessment.

Judgment and order affirmed.

SHARPSTEIN, J., MORRISON, C. J., MCKINSTRY, J., MCKEE, J., THORNTON, J., and ROSS, J., concurred.

No. 8,831.

RECLAMATION DISTRICT NO. 108 *v.* HAGAR.

In Bank. Filed October 28, 1884.

JUDGMENT AFFIRMED on authority of Reclamation District No. 108 v. Hagar, *ante.*

APPEAL from a judgment of the superior court for Colusa county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts are similar to those of Reclamation District No. 108 v. Hagar, *ante.*

Belcher & Belcher, for the appellant.

A. C. Adams, and *Jackson Hatch*, for the respondent.

THE COURT. For the reasons given in the opinion in Reclamation District No. 108 v. Hagar, No. 8,827, *ante*, the judgment and order are affirmed.

No. 8,708.

RECLAMATION DISTRICT NO. 108 *v.* HAGAR.

In Bank. Filed October 28, 1884.

JUDGMENT AFFIRMED on authority of Reclamation District No. 108 v. Hagar, *ante.*

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts were similar to those of Reclamation District No. 108 v. Hagar, *ante.*

W. C. Belcher, for the appellant.

A. C. Adams and *W. B. Treadwell*, for the respondent.

THE COURT. For the reasons given in the opinion in Reclamation District No. 108 v. Hagar, No. 8,827, *ante*, the judgment and order are affirmed.

No 8,733.

RECLAMATION DISTRICT No. 108 v. MARTIN ET AL.

In Bank. Filed October 28, 1884.

JUDGMENT AFFIRMED on authority of Reclamation District No 108 v. Hagar, *ante.*

APPEAL from a judgmeut of the superior court for Yolo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts were similar to those of Reclamation District No. 108 v. Hagar, *ante.*

Belcher & Belcher, for the appellants.

A. C. Adams and *W. B. Treadwell*, for the respondent.

THE COURT. 1. The alleged error of the court in excluding a certified copy of the plat and field notes, and the evidence offered in connection therewith, to show that the land had, in 1858, been offered at public sale by the United States, and patented, was immaterial.

2. There is nothing in the point that the tax-deed to Bullock was conclusive as to plaintiff's right to recover.

Therefore, and for the reasons given in the opinion in Reclamation District No. 108 v. Hagar, No. 8,827, *ante*, the judgment and order are affirmed.

No. 8,684.

RECLAMATION DISTRICT No. 108 v. HAGAR.

In Bank. Filed October 28, 1884.

JUDGMENT AFFIRMED ON AUTHORITY OF Reclamation District No. 108 v. Hagar, *ante.*

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts were similar to those of Reclamation District No. 108 v. Hagar, *ante.*

W. C. Belcher, for the appellant.

A. C. Adams and *W. B. Treadwell*, for the respondent.

THE COURT. In general, the same points are presented on this appeal as in the case of Reclamation District No. 108 v. Hagar, No. 8,827, *ante.*

On the authority of that case, the judgment and order are affirmed.

No. 8,483.

McCLOSKEY *v.* SWEENEY.

Department One. Filed October 28, 1884.

INFANT'S POWER TO NOMINATE ATTORNEY—SERVICE OF SUMMONS ON INFANT—APPOINTMENT OF GUARDIAN *ad litem.*—An infant over the age of fourteen has not power to nominate an attorney, nor has the court authority to appoint a guardian *ad litem* to appear for such infant defendant until after summons has been served upon him.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

J. D. Sullivan, for the appellant.

J. B. Hart, for the respondent.

McKINSTRY, J. In the action James McCloskey v. Margaret Sweeney, Mary Sweeney and James Sweeney, the defendant last named —an infant over the age of fourteen years—was not served with process. The infant was not authorized to nominate an attorney. Nor does the court have power to appoint a guardian *ad litem* to appear for the infant until after summons has been served on the infant: C. C. P., 373: Johnson v. S. F. S. Union, XI Pac. C. L. J., 481.

Judgment and order reversed; and cause remanded for a new trial.

ROSS, J., and McKEE, J., concurred.

No. 7,870.

HOGAN *v.* BLACK ET AL.

Department One. Filed October 28, 1884.

SETTLEMENT OF ACTION BY PLAINTIFF AFTER ASSIGNMENT—EFFECT OF AS BETWEEN DEFENDANT AND THE ASSIGNEE.—The settlement of an action made by the defendant with the nominal plaintiff, without notice, actual or constructive, of any assignment of the cause of action, is valid as against the plaintiff's secret assignee. The assignee's only remedy is against the plaintiff. Nor, if such assignee is the plaintiff's attorney in the action, does he have any lien for costs, by which he can disturb the satisfaction of the demand.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. M. Wood, for the appellant.

D. H. Whittemore and *George & Loughborough*, for the respondents.

McKEE, J. Pending the action in hand for the foreclosure of a street assessment lien, to satisfy a demand for work done under the street law of the city and county of San Francisco, the defendants settled the matter in suit with the plaintiff in the action by giving

him a sum of money less than the amount demanded. Upon receiving the money the plaintiff satisfied the demand and cancelled the assessment. But before doing so, he had assigned and set over the cause of action to his attorney in the action, and the latter continued the prosecution of the action in the name of the plaintiff without notice to the defendants of the assignment to him; and when the defendants settled with the plaintiff, they had no notice, actual or constructive, of any assignment by him.

As between the assignor and the assignee, the assignment transferred the interest of the plaintiff in the subject-matter of the action; but the assignee could not avail himself of the benefit of the same against the defendants in the action without notifying them of the assignment, or without having himself substituted for the plaintiff in the action: Section 385, C. C. P.; Doll v. Anderson, 27 Cal., 248.

The settlement made by the defendants with the nominal plaintiff, without notice, actual or constructive, of any assignment of the cause of action, was therefore valid against the secret assignee: Sec. 368, *supra*; and his only remedy under these circumstances, was against the plaintiff in the action, and not against the defendants. Nor did he have any attorney's lien for costs in the action, by which he could disturb the satisfaction of the demand and the cancellation of the assessment by the plaintiff: Mansfield v. Dorland, 2 Cal., 507; Russell v. Conway, 14 *Id.*, 103.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, concurred.

No. 8,595.

SUTTER STREET RAILROAD COMPANY v. BAUM ET AL.

Department One. Filed October 23, 1884.

CONTRACT BETWEEN A DIRECTOR AND THE CORPORATION—LOAN ON EXCESSIVE INTEREST.—A director of a corporation cannot contract with his co-directors that, in consideration of a sum of money advanced by him, he should receive the company's notes for a much larger amount, bearing an excessive rate of interest, although by oral contemporaneous agreement it was provided that of the excess beyond the amount loaned, the corporation should be required to pay only the sum which the lender might pay for taxes upon the property, with interest thereon. The corporation may satisfy such notes by paying the amount actually loaned, with interest thereon at the ordinary rates.

ACTION FOR PART RESCISSION OF CONTRACT—OFFER TO REFUND AMOUNT DECREED WHEN DISPENSES WITH TENDER.—Where a plaintiff comes into a court of equity asking for the rescission, in whole or in part of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication, based on evidence of facts independent of the terms of the contract, an offer to refund such sum as shall be decreed, is a sufficient offer to do equity. In such case the plaintiff cannot determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an

order denying the defendant a new trial. The opinion states the facts.

Lloyd, Newlands & Wood, and *William H. Sharp,* for the appellant.
Wilson & Wilson, and *J. P. Hoge,* for the respondent.

McKINSTRY, J. The court below found: "Prior to the twenty-first day of November, 1878, and at all times herein mentioned, the defendant Shrier was, and is, the partner of the defendant Baum; that although the said notes and mortgage were made to the said Shrier, by name, yet he never had any real or beneficial interest therein, and never advanced any part of the said $125,000 (the full amount received by plaintiff); that the defendant Baum was the person who advanced all of said money, and that he was the real and substantial owner of all of said notes and mortgage, and that he negotiated the said loan and arranged the terms thereof, with his co-directors of said corporation; that the said Shrier merely lent his name to the transaction; * * * that about the eighteenth of August, 1879, the said notes and mortgage were formally assigned, transferred and delivered to the said Baum, and that ever since said last mentioned day, said Baum has been the (legal) owner and holder thereof, and still is such owner and holder."

There was sufficient evidence to uphold the finding.

2. It is not necessary to say whether the notes and mortgage were or were not void. For the purposes of this decision, it may be conceded, as is claimed by appellant, that the doctrine laid down by Mr. Taylor (in his Treatise on the Law of Private Corporations, section 634), is just, and sustained by authority. That writer says: "The following rules, regarding loans to a corporation from its officers, seem deducible from the preceding and other cases. Directors and other officers may, when they honestly deem it for the interest of the corporation to borrow, advance it money, on terms as favorable as any on which they could have procured the money for it from other sources; and they may take from the corporation security for their loan," etc.

3. The court below found, "from the tenth day of July, 1879, (the date of the resolution, which purported to authorize the execution of the notes and mortgage), ten per cent. was an excessive and unjust rate of interest; and from and after said day, according to current market rates, nine per cent. per annum *upon said* $125,000, was a fair, just and reasonable rate of interest, the mortgagee paying the tax upon said debt and mortgage.

The most that can be conceded to the defendant Baum is that he believed it to be for the interest of the corporation to borrow one hundred and twenty-five thousand dollars, the money which it actually received. The finding, of course, is to be applied to the transaction before the court, and is to the effect that nine per cent. —the mortgagee paying the taxes—was a just, fair and reasonable rate to be paid for the use of the one hundred and twenty-five thousand dollars, reference being had to the security in fact given, and to

the usual rates paid in similar cases. Accepting the doctrine laid down by Taylor, and it being conceded that defendant Baum was authorized to advance the money at nine per cent., secured by mortgage on the property of plaintiff, he to pay all taxes on the mortgage, he was not justified in contracting with his co-directors that, in consideration of one hundred and twenty-five thousand dollars, advanced by him, he should receive notes in the aggregate amounting to one hundred and thirty-seven thousand five hundred dollars, bearing interest at the rate of *ten* per cent. per annum, even though by oral contemporaneous agreement it was provided that of the excess beyond one hundred and twenty-five thousand dollars, and interest, the plaintiff should be required to pay only the sum which the defendant might pay for taxes upon the property, with interest thereon.

The court was therefore justified in holding that the notes and mortgage should be satisfied upon payment by plaintiff of one hundred and twenty-five thousand dollars, with interest thereon from July 10, 1879, at the rate of nine per cent. per annum, less the interest paid since that date.

4. The court also found, "that in negotiating, arranging and bringing about the transaction, the defendant Baum used his position as director to obtain for himself an undue advantage," etc. The evidence sustained the finding, and it follows that from the amount to be paid by plaintiff there should also be deducted one hundred and fifty-eight dollars, expenses of making and acknowledging the mortgage.

5. In its complaint plaintiff offers to comply with all terms imposed by the court as conditions to a decree in its behalf, and offers to refund to the defendants any and all sums of money received from them or either of them, together with such amount of interest thereon as may be just and equitable. Where a plaintiff comes into a court of equity asking for the rescission in whole or in part of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. In such case the plaintiff cannot determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action.

Judgment and order affirmed.

McKEE, J., and ROSS, J., concurred.

No. 8,276.

LYONS v. CUNNINGHAM ET AL.

Department One. Filed October 28, 1884.

PROOF OF SERVICE OF SUMMONS—DEFAULT JUDGMENT, WHEN VOID.—Proof of service of summons in a case, by a person other than the sheriff, is a condition precedent to a judgment by default. If such proof is not made, as required by law, the court acquires no jurisdiction of the person of the defendant, and has no authority to render judgment against him. Such judgment would be null and void.

THE SAME—AFFIDAVIT MUST SHOW AGE OF PERSON SERVING.—The affidavit of service of summons, by a person other than a sheriff, must expressly state that, at the time of service, the person making the same was over the age of eighteen. It is not enough to state that such person is a "white male citizen of the United States," as that expression does not imply that he is an elector, and, consequently, over the age of twenty-one.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

R. P. Wright, for the appellants.

J. C. Bates, for the respondent.

MCKEE, J. The judgment appealed from is a default judgment, which was entered against the defendants, upon proof of service of summons, by the following affidavit of service, subscribed and sworn to on the nineteenth of January, 1881: "George Comstock, being duly sworn, says, that he *is* a white male citizen of the United States, over the age of eighteen years, and not a party to, or interested in, the above entitled action That he served the annexed summons in said action, on the thirteenth day of December, 1880, upon Patrick Cunningham, executor of the last will and testament of Mary Cunningham, deceased, therein named defendants," etc.

Proof of service of summons, in a case by a person other than the sheriff, is a condition precedent to judgment by default. If such proof is not made, as required by law, the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them. Any judgment rendered is, therefore, invalid and void: Weise v. Bennet, 9 P. C. L. J., 626; Howard v. Galloway, 60 Cal., 10; Maynard v. MacCrellish, 57 Id., 355.

In this case the affidavit does not expressly state that the person making the service was over the age of eighteen at the time of making the service. But it is claimed that the words, "a white male citizen of the United States," denote an elector; that an elector is a male citizen, twenty-one years of age, and upwards; and, as the person serving the summons was twenty-one years of age on the nineteenth of January, 1881, it follows that he was at the time of the service of summons, on the thirteenth of December, 1880, over eighteen years of age.

It is true that a citizen, in the full acceptation of that term, may be said to be a member of the civil state, entitled to all its privileges. But the possession of all political rights is not essential to citizenship: People, etc., v. De la Guerra, 40 Cal., 311. The term has quite a comprehensive meaning. It includes citizens of the

state, and citizens of the United States, and these include political and civil citizens—electors and non-electors: Sections 50, 51, Pol. C. Every male citizen of the state, and of the United States, is not necessarily an elector. It is provided, not only by the constitution of the state, but by the constitution of the United States, that all male citizens, twenty-one years of age, and upwards, shall be entitled to vote. But the affiant does not state that he is twenty-one years of age, and entitled to vote. He may not be, and yet be a citizen. Presumptively, therefore, although a citizen of the United States, over eighteen years of age, he is a citizen under the age of twenty-one years, and, therefore, a non-elector: Section 60, Pol. C.

The affidavit of service was insufficient to sustain the judgment.

Judgment reversed, and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,265.

COTHRIN v. TABER ET AL.

Department One. Filed October 23, 1884.

PRE-EMPTION OF PUBLIC LAND—PRIORITY OF LOCATION—RELATION OF TITLE.—The right of a pre-emptor of public land relates back to the date of the first proceeding taken by him for its acquisition under the pre-emption laws, and takes priority over a title acquired through a subsequent location under the soldiers' additional homestead act.

APPEAL from a judgment of the superior court for El Dorado county, entered in favor of the defendant. The opinion states the facts.

Charles F. Irwin, for the appellant.

A. P. Catlin, for the respondents.

ROSS, J. The case shows that in the month of November of the year 1872 the land in controversy was public land and was then unoccupied and subject to settlement and pre-emption under the laws of the United States; that at that time and under those circumstances the defendant, Peter Faber, possessing all the necessary qualifications, went into possession of and settled upon the said land for the purpose of making it his permanent residence and to obtain the same by purchase from the United States under and by virtue of the pre-emption laws, and on the following day filed in the office of the register and receiver of the United States land office, in the district in which the land was situated, his declaratory statement alleging his settlement and his desire to purchase the land and setting forth all other matters required by law to be stated; that on the fourteenth day of May, 1875, said defendant proved up his claim to the land in the office of the register and receiver under and in accordance with the rules of the United States land department, and

then applied to enter the land. Upon the transmission of defendant's proofs to the commissioner of the land office at Washington, that officer, on the seventh of September, 1877, held the land to be mineral in character, but subsequently, and in February, 1878, upon additional evidence touching its character, decided it to be agricultural, and on the fifteenth of May, 1878, said defendant was permitted to enter the land, and having paid therefor, received from the proper officer the proper receipt.

Subsequent to the defendant's settlement upon the land in question, and after he had made proof of his claim thereto in the office of the register and receiver, to wit, in the latter part of the year 1875, one Greene, in the state of Michigan, and one Lamar, in the state of Kansas, made affidavits, as required by statute to obtain land under the act of congress granting additional homesteads to soldiers, and at the same time each of them signed an application in the form required by said act of congress, except that no description of any land was given therein. Each, also, at the same time, together with his wife, signed and acknowledged a paper purporting to be a power of attorney, appointing —— their true and lawful attorney for them and in their name, place and stead "to enter into and upon and to take possession of any and all pieces and parcels of land in the state of California which we may now own or which we may hereafter acquire or become seized of or in which we may now or hereafter be in any way interested, located under the provisions of the second section, of the act of March 3, 1873, under which laws I am entitled to select and enter one hundred and twenty acres of land in addition to my forty acres homestead, and we further authorize and empower said attorney to grant, bargain, sell, devise, lease and convey and confirm said land or any part thereof to such person or persons, and for such price as to our said attorney shall seem meet, and for that purpose to execute any deed or conveyance thereof." No one was named in the instruments as attorney in fact. After the execution of these papers by Greene and Lamar, and prior to the first of January, 1878, the papers came into the possession of one Snow—in what way does not appear. Some time in the latter part of 1877 one Farr "purchased said papers and the right of said Greene and Lamar to locate land under said claim to an additional homestead." The papers were delivered by Snow to Farr, and thereupon the latter "filled in said application of Greene" with a description of one part, and "filled in said application of Lamar" with a description of the other part of the land upon which Faber was settled and which he had applied to enter as already stated.

"Said applications and proofs were thereupon presented to the register of the United States land office at Sacramento, California. Said register thereupon issued his certificates, which were deposited in the general land office at Washington; thereafter, on the first day of May, 1878, letters patent were issued by the government of the United States to the said Greene for the land described in his said application, and also letters patent were issued on the same day to

the said Lamar by the government of the United States for the land described in his application. Each of the said letters patent were delivered to the said Farr, and thereafter, on the twentieth day of May, 1878, Farr inserted in each of the powers of attorney hereinbefore stated to have been signed and acknowledged by Greene and wife and Lamar and wife, the following words, to wit: 'David Johnston of the county of Sacramento, state of California.' Said Johnston thereupon, at the request of Farr and in the name of Greene and Ruth Anne Greene, his wife, made, executed and delivered to the plaintiff herein a good and sufficient conveyance of all the land described in the letters patent issued to said Greene, and on the same day the said Johnston, at the request of said Farr, and in the name of said Lamar and his wife Susan Lamar, made, executed and delivered to the plaintiff herein a good and sufficient conveyance of all the land described in the letters patent to Lamar."

Plaintiff's cause of action rests upon the deeds thus executed to him.

Upon these facts we are of opinion that he is not entitled to recover the land from the defendant. When on the fifteenth of May, 1878, defendant was permitted to enter the land pursuant to the proceedings initiated by him in 1872, and to pay for it, receiving from the government the appropriate evidence of payment, he acquired a right which related back to the inception of the proceedings taken by him for its acquisition under the pre-emption laws. The rights thus acquired antedated the beginning of the proceedings under which the plaintiff claims and secured defendant in the possession he had all along held of the land, and entitled him to the ultimate conveyance of the legal title to it.

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,353.

AMBROSE v. EVANS.

Department One. Filed October 31, 1884.

PLEDGE OF CERTIFICATES OF STOCK BY DEPOSITARY—RIGHTS OF OWNER AND PLEDGEE.—The real owner of certificates of stock, who endorses and delivers the same to a third person for safe keeping, cannot recover such certificates from the pledgee of the depositary, until the demand for which they were given in pledge is satisfied.

THE SAME—SALE OF CERTIFICATES BY PLEDGEE, PENDING ACTION FOR POSSESSION.—If, pending an action to recover possession of such certificates, the pledgee sells the same for more than enough to satisfy his demand, the owner is not entitled to a judgment for such excess, because it did not constitute any part of his cause of action.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Roche & Disbeck, for the appellant.

Sawyer & Ball, for the respondent.

McKEE, J. This was an action to recover twenty shares of railroad stock, or its value.

The case shows that a corporation, known as the Guatemala Central Railroad Company, issued to W. G. Miller fifty shares of its stock; and Miller, being the owner of the same, endorsed and delivered it to Henry Toomey for safe keeping. Toomey afterwards, viz., on the fourth of September, 1879, "cut up" the original stock, and delivered twenty shares of the same to Gomer Evans, the defendant in the action, as security for a loan of $350. While Evans was the holder of these twenty shares, Miller, the original owner of the stock, by an instrument in writing, assigned the same, "together with all causes of action therefor," to Samuel Ambrose, the plaintiff in the action, who immediately notified Evans of the assignment, and demanded of him a return of the stock; but Evans refused to deliver the stock, and, on the twenty-fifth of October, 1880, Ambrose commenced the action in hand to recover the stock, or its value, charging that Toomey had unlawfully transferred it, and that the defendant wrongfully retained the same.

But the endorsement and delivery of the stock by Miller to Toomey, clothed the latter with the *indicia* of the legal ownership of the stock, so as to enable him to deal with it as his own; and when he, as owner, pledged the twenty shares as security for the payment of a debt which he owed to Evans, the transaction was legal, and the transfer of the stock for that purpose, vested the pledgee with a right to it as security for the money advanced. Evans, therefore, as holder of the stock in pledge, was rightfully in possession of the stock when Ambrose demanded it of him, and when this action was commenced, and he was entitled to hold it until the demand for which he had it in pledge was satisfied.

It is said, however, and the court finds, that the pledgee sold the stock in open market, and realized from the sale the sum of $550, over and above the amount necessary to satisfy his demand, and that he wrongfully claims this surplus, and refuses to pay it to the plaintiff, who is entitled thereto.

But this sale, as found by the court, was made on the sixth of November, 1880, after the commencement of the action in hand; and, while it is true, that the surplus, which remained in the hands of the pledgee after the satisfaction of his demand, did not belong to him, the plaintiff was not entitled to recover it, because it did not constitute any part of his cause of action.

The judgment is, therefore, erroneous. Judgment and order reversed, and cause remanded for further proceedings.

McKINSTRY, J., and ROSS, J., concurred.

No. 7,130.

ALEXANDER v. MUNICIPAL COURT OF APPEALS.

Department One. Filed October 31, 1884.

CERTIORARI—OBJECT OF THE WRIT—NO REHEARING PERMISSIBLE AFTER JUDGMENT.—An error or irregularity committed in the exercise of a court's jurisdiction is not reviewable on *certiorari*. A rehearing after judgment on a writ of review cannot be had in the lower court. The case is heard there upon the return made to the writ; and the only question upon the return is, whether the court, whose judgment or order is the subject-matter of review, pursued its jurisdiction. The judgment rendered on that question is reviewable only on appeal.

DISMISSAL OF APPEAL BY MUNICIPAL COURT OF APPEALS—NOTICE OF TO APPELLANT.—The municipal court of appeals of the city and county of San Francisco, had jurisdiction to dismiss an appeal from the justices' court taken on questions of law and fact, after the same has been placed on the calendar by stipulation of the parties, if the appellant fails to appear at the trial, although no notice of the motion to dismiss had been given. Such dismissal, even, if irregular, is not reviewable on *certiorari*.

APPEAL from a judgment of the superior court of the city and county of San Francisco. The opinion states the facts.

R. P. Wright, for the appellant.

J. Rothchild, for the respondent.

MCKEE, J. Appeal from a judgment in proceedings on a writ of review, affirming an order made by the late municipal court of appeals of the city and county of San Francisco, dismissing an appeal, and from an order setting aside an order granting a rehearing.

The order dismissing the appeal was made by the municipal court of appeals in a case pending before it on an appeal taken from the judgment of a justice's court, on questions of both law and fact. While the case was there pending, the parties stipulated in writing that it be placed on the calendar of the court for trial, and that was done; but, on the calling of the case in its order on the calendar, for trial, the appellant did not appear, and the court, upon motion of respondent, ordered that the appeal be dismissed for want of prosecution. That order was made and entered without proof of service of notice of the motion upon the appellant; and it is contended that the court exceeded its jurisdiction in making the order without proof of such service.

The contention is founded upon section 980, C. C. P. That section, as it existed at the time of the proceedings which are called in question, provided:

"Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside or confirm, or modify, any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial must be conducted in all respects as trials in the district court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after notice, may order the appeal to be dismissed," etc.

These provisions regulated the practice of the court in (1) cases where appeals were taken on questions of law alone, (2) where appeals were taken on questions of both law and fact, and, (3) where there was failure to prosecute the appeal, or unnecessary delay in bringing it to a hearing. The last case arose where an appellant failed to do any of the acts required by section 977, C. C. P., in perfecting his appeal, or in causing the papers in the case to be transmitted and filed in the appellate court. For any omissions, or unnecessary delay, in the performance of the requisite acts, the respondent in the case was entitled, after notice to the appellant, to have the appeal dismissed.

But in the case under review, there was no failure to prosecute the appeal, and no unnecessary delay in bringing it to a hearing; for the papers in the case were promptly transmitted to and filed in the appellate court, and the parties stipulated in writing that it should be heard as soon as it was reached in its order upon the calendar of the court. The appeal was therefore not one of the class of cases dismissable, upon notice, for failure to prosecute the appeal, or for unnecessary delay in bringing it to a hearing; it was an appeal ready to be heard and determined on the questions of both law and fact on which it had been taken. If heard on questions of law the appellant was the actor; if on questions of fact, the plaintiff in the action, although respondent on the appeal, was the actor; and, when the case was called for trial, the burden of proof was upon him to make out his case whether the appellant appeared or did not appear. Regularly, therefore, the respondent, when the case was called for trial *de novo*, ought to have proceeded with the case and taken a judgment. Instead of taking that course he moved to dismiss the appeal. Assuming that that was an irregular proceeding, it did not affect the jurisdiction of the court over the appeal.

In the exercise of its appellate jurisdiction, the court had authority to hear and determine the motion to dismiss. The fact that the motion was made without notice to the non-appearing appellant, was not jurisdictional. The decision of the motion, without requiring proof of notice of the motion, may have been error; but if so, it was error within the jurisdiction of the court, and an error, or irregularity, committed in the exercise of jurisdiction, is not reviewable on *certiorari*. Therefore, the judgment on the writ of review, affirming the order of the municipal court, was correct; but the subsequent order, granting a re-hearing on the writ, was incorrect, and it was proper for the superior court to set aside that order.

There is no such thing as a re-hearing, after judgment, on a writ of review. The case is heard upon the return made to the writ; and the only question upon the return is, whether the court, whose judgment or order is the subject matter of review, pursued its jurisdiction: Sec. 1,074, C. C. P. The judgment rendered on that question is reviewable only on appeal.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,376.

MURPHY v. HELMRICH ET AL.

Department One. Filed October 31, 1884.

STATUTE OF FRAUDS—WRITTEN ADMISSIONS OF VERBAL CONTRACT.—Written admissions of a verbal contract of sale, signed by the party sought to be charged, are sufficient to take such contract out of the statute of frauds.

AGENT WHEN PERSONALLY LIABLE ON WRITTEN CONTRACT EXECUTED IN HIS OWN NAME.—Where an agent, in executing a written instrument, does not attempt to bind his principal, and in terms imposes an obligation on himself, he incurs by such act a personal liability, even though he described himself as an agent.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Friedenrich & Ackerman, for the appellants.

Chas. J. Swift, for the respondent.

MCKEE, J. This was an action to recover the difference between the contract and market price of one hundred shares of San Francisco gas stock which the plaintiff claims to have sold to the defendants on the fifteenth of October, 1878.

It is contended that the defendants are not liable, because there was no note or memorandum of the sale in writing, or subscribed by them; and therefore the sale was void; and, because in the transaction, they acted in the capacity of brokers for another person for whom they purchased, and not for themselves.

The promise by the defendants on the fifteenth of October to take the stock at the stipulated price was valid. Next day the plaintiff sent word to the defendants that the stock was ready to be delivered to them, and to come and get it and pay for it; they declined to pay; but, in answer, wrote to the plaintiff as follows:

"The purchaser of the one hundred shares of gas stock has not made his appearance, and it looks very much as if he was trying to back out. If you have accounted for the stock already, we will, of course, make the deficiency good; if not, would advise to do nothing in the matter, as there are to-day no buyers over ninety-four cents.

"Yours, etc., HANSEN."

Written on the back of the note was the following:

"Will call as soon as I get a chance."

On the same day the plaintiff also received the following:

"I have not seen the purchaser of the one hundred shares gas stock, but we guarantee that it is all right at ninety-five and one-half, and you can account for it to your buyer at that rate. But we shall probably only take the stock to-morrow, unless we meet the party. Will that be in order?

"Yours, etc., HANSEN."

After the receipt of those notes, the plaintiff tendered the stock to the defendants at their place of business, and demanded the amount of the purchase money; they declined to take the stock or pay the money; but afterwards wrote the plaintiff as follows:

"October 24th, 1878.

"In the present state of the market, for gas stock, we have not as yet received a satisfactory bid. We think, however, you had better sell the stock if you have an opportunity to do so.

"But we cannot understand why you should wish to sell it on our account, as we did not buy it on our account. Surely, we thought the party that wanted the stock could be depended on, which we told you, acting as your agent and in your interest.

"Under no circumstances could we have acted any differently; but it appears unfortunately for the owner of the stock. We shall continue our effort, and remain

"Yours, &c., HELMRICH & HANSEN."

"Mr. Murphy, of the Pacific Bank."

Upon the receipt of this last note the plaintiff sold the stock in market for eighty-seven dollars and fifty cents per share and notified the defendants that he would look to them for the deficiency; but they refused to pay, and hence this action.

The defendants by their answer to the complaint in the action, specifically denied the averments of the complaint, and set up that they acted in the transaction "solely as brokers and agents for others;" and the only questions at issue were:

1. Did the defendants buy the stock, as charged in the complaint?

2. Did they buy for themselves, or as agents for another?

The evidence shows that there was a complete verbal contract of sale which was followed by written admissions of the contract signed by the defendants. These they signed by their own names, and not as agents for any other person whom they named as principal. In thus signing them they bound themselves as principals, even if they were acting for another, unless it was so understood and intended between them and their vendor. But their memoranda did not disclose the name of any principal, and there was no evidence given tending to prove that there was any other known person for whom they acted and intended to bind. Where an agent does not attempt in an instrument to bind his principal, and in terms imposes the obligation on himself, the rule is, that he incurs by such act a personal liability even although he described himself as agent: Dayton v. Waren, 43 N. J. L. R., 659. This personal liability they assumed, for while vaguely intimating that there was somebody for whom they were acting, they guaranteed the plaintiff as their vendor that he would be paid ninety-five dollars and fifty cents per share for the stock which they agreed to buy from him, and afterwards directed him to sell it and they would make good any deficiency. He accordingly sold the stock in open market and accounted to them.

Under those circumstances they are not relievable from responsibility on the ground of agency for some unknown person.

"If a person," says Chancellor Kent, "would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind him.

"The agent becomes personally liable when the principal is not known, or when there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power:" 2 Kent's Com., 630-631.

And such is the English law: "A man has the right to the character, credit and substance of the person with whom he contracts; if, therefore, he enters in a contract with an agent, who does not give his principal's name, the presumption is that he is invited to give credit to the agent; still more if the agent does not disclose his principal's existence:" Anson on Contracts, 345; see, also, Benjamin on Sales, pp. 235, 52, 53.

We find no error in the record.

Judgment and order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 9,530.

PEOPLE, EX REL. GLOVER, v. BECKER.

Department One. Filed October 28, 1884.

REMOVAL OF INTERPRETER OF CRIMINAL COURTS OF SAN FRANCISCO.—An interpreter, appointed for the criminal courts of the city and county of San Francisco, under the act of March 8, 1876, by the county judge, the mayor and the police judge of said city and county, may be removed from office, and another interpreter appointed in his place, after the adoption of the present constitution, by the votes of the mayor and superior judge, although the police judge votes against such removal.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant.

This is a proceeding in the nature of *quo warranto*, brought to oust respondent from, and reinstate relator in the office of interpreter of certain foreign languages in the criminal courts of San Francisco. The complaint and amendment set forth in effect that the mayor, the police judge, and the superior judge of criminal department No. 11, all of said city, at a meeting held by them in April, 1883, removed the relator from said office by the votes of the mayor and superior judge, the police judge voting against such removal, and that thereupon the defendant was by the votes of the mayor and superior judge elected to fill the vacancy thus occasioned.

The court below sustained defendant's demurrer to the amended complaint, on the ground that it did not state facts sufficient in law to constitute a cause of action. Relator failed to amend, and takes this appeal from judgment on demurrer. The act of March 8th, 1876, Statutes 1875–76, p. 153, authorized the county judge, the mayor and the police judge of San Francisco to appoint an interpreter of the Portuguese, Italian and Slavonian languages for the criminal courts of the city and county. The relator was appointed under this act prior to the adoption of the new constitution, which abolished the county court; and in the matter of his removal from and the appointment of defendant to this office, he claims that the superior judge had no authority to act in the place of the county judge on this commission. This claim of relator presents the only point in issue.

Attorney-General and *C. B. Darwin*, for the appellants.

Langhorne & Miller, for the respondent.

THE COURT. On the authority of *ex parte* Reis, 12 P. C. L. J., 222, judgment affirmed.

WEST COAST REPORTER.

WHOLE No. 46. NOVEMBER 13, 1884. VOL. IV. No. 7.

COMMUNITY PROPERTY.

THE WIFE'S EARNINGS.

The supreme court of Texas, in a very recent case, decided a point which may, perhaps, have some bearing upon questions arising under the provisions of our code concerning community property. The court held that when a wife during marriage, and apparently while living with her husband, borrows money for the purpose of engaging in business, the money so borrowed, and of course the proceeds of the business in which she thus engaged, become community property, and as such are liable to execution for the husband's debts.[1] In this case the wife, of course, was not carrying on the business as a "sole trader."

The general system of "community property" in California was avowedly borrowed from the legislation of Texas on that subject; although there are, doubtless, special provisions in our civil code, which are not found in the Texas statutes. Under the definition of community property, given by the civil code,[2] money borrowed by the wife for business purposes while she is living with her husband, and all earnings made by her while she is living with her husband, either from any business or profession which she carries on not as a "sole trader," or from her work or labor, are undoubtedly community property. The section which provides that "the earnings and accumulations of the wife while she is living separate and apart from her husband, are the separate property of the wife,"[3] assumes that such earnings, while she is living with her husband, become community property, under the general definition of community property. The definition of community property applies alike to both spouses; and the very language which makes the earnings, of the husband community property, would, equally, make *all* the earnings of the wife, both when living with her husband, and when living separate and apart from him, to be community property, were it not for the exception contained in the section last quoted. This excep-

[1] Herschell v. Blum, Texas Law R., June, 1884; Am. Law Review, Sept. 1884, p. 915.
[2] Civil Code, § 164.
[3] Civil Code, § 169.

tion can extend no further than its express terms, and as it is confined to the case of a wife living separate and apart from her husband, it necessarily follows that the wife's earnings while she is living with her husband, must fall under the general definition, and must be community property. It is provided, however, in another section,[4] that "the earnings of the wife are not liable for the debts of the husband." This language certainly applies to a wife living with her husband; but it does not alter the nature of the property nor make her earnings her "separate property." It would violate the most familiar rules of construction to give such a meaning and effect to this language. It is true that in Maslow v. Bailey,[5] Mr. Justice Rhodes said, "the wife's earnings are her separate property," citing sections 168 and 169. But this remark was a mere incidental *dictum*, utterly unnecessary for the decision or for the argument on which the decision was based. It is certainly opposed to the whole theory of community property, and to the plain interpretation of the code. What then are the real meaning, design, and effect of this short section? It was undoubtedly intended in some way to protect the wife against her husband's creditors; but in what manner, to what extent, and under what circumstances the protection may be obtained, is very doubtful and uncertain. In my opinion, there is hardly a section in all the chapter dealing with the property relations of husband and wife, of which the reasonable and *consistent* interpretation presents greater difficulties, unless the court shall arbitrarily legislate in disregard of other provisions of the code. I say, a *consistent* interpretation, because a true interpretation of this section ought to proceed upon the fact that the wife's earnings while she is living with her husband are still community property and not her separate estate, and ought to recognize and take into account the various rules contained in other sections for the government and disposition of the community property in general. In no other manner can a consistent and harmonious system be secured.

I will suggest, without attempting to discuss, much less to answer, one or two of the special questions which must arise in the practical application of this section to particular circumstances. The earnings of the wife are not liable for "the debts of the husband." The first question which arises is: What debts of the husband are here intended, for which her earnings are not liable? All the debts which the husband incurs in the support and maintenance of his family, and all those which he incurs in carrying on any trade, business, profession, or office by which community property is acquired, and all those which he incurs in the management, increase or obtaining of community property, are

[4] *Ibid.*, § 168.
[5] 53 Cal., 456, 459.

debts of the husband, in the sense that he is alone the contracting party, he is alone personally liable, and he alone can be sued by the creditors. The common law still prevails in this state that, so far as personal liability goes, such debts are debts of the husband. But since all these debts are incurred for the benefit of the community and of the community property, they are also community debts, and all the community property is liable for them on the husband's death, before the widow's share of that property is ascertained from the residue after their payment. But there may be other debts of the husband which are his own separate and individual liabilities, and not community debts. For example, if he has a separate property, all the debts which he incurs in managing or protecting such property, would be his separate debts and not community debts. The theory upon which the whole system of community property is based, is, that it is the product of the joint labor of both the spouses. Even where the wife directly contributes nothing, and the whole community property is the result of the husband's business or employment, yet the wife's interest is founded upon the theory that it was all produced by their *joint* labors. Upon this theory, it is eminently just and equitable that both the spouses should in some way be liable for the community debts. As no personal liability attaches to the wife, this result can only be reached by making all the community property liable for the community debts. In other words, it is just and equitable that all the community property, even though some portion of it consists of earnings of the wife, should be liable for all the community debts notwithstanding those debts are in a strict legal sense "debts of the husband." Indeed, no other result is just or equitable, when we take into consideration all the provisions of the code concerning community and separate property.

Another, and even more difficult question is, What are "the earnings of the wife,"—which are declared not to be liable for the debts of the husband? Does the phrase mean the wife's earnings while they are in the condition of "earnings," being still due and unpaid to the wife, so that a creditor of the husband is prevented simply from reaching them in that condition, and from compelling the wife's debtor to pay them over to himself to be applied upon his claim against the husband? Or, on the other hand, does it mean an amount equal to her earnings after they have been paid over to her and fully incorporated with the community property as a part thereof? If the latter be the true meaning, then it would seem to follow that whenever a wife's earnings have been paid to her, and have been mingled with and incorporated into the mass of the community property, an amount of the community property equal to those earnings must always remain exempt, and beyond the reach of her husband's creditors; for this is the only manner in which her earn-

ings can be free from liability to her husband's creditors after they have been paid to her and united with the community property. To illustrate: if a wife living with her husband had earned five hundred dollars, which sum had been paid over to her, and had thus become a part of the community property, and if the whole community property was fifteen hundred dollars, then five hundred dollars of this total amount would constantly remain free from all claim by the creditors of her husband.

If the interpretation should prevail that "the debts of the husband" include all the community debts which he incurs and for which he alone is personally liable, as well as his own individual and separate debts; and that the wife's earnings, even while living with the husband, continue to be free from liability for all such debts after they have been paid over to her and have become part of the community property, then such a case as the following would not be impossible nor even improbable. A husband and wife are living together, neither of them having any separate property. The wife by her superior energy, industry, skill, and knowledge earns, either by her mental or physical labor, all the income for themselves and family. The husband, while free from habits of dissipation, is so deficient in activity and purpose, that he really contributes nothing for the support of himself, wife and family. The earnings of the wife are more than enough for the maintenance of the household, and the surplus has accumulated, and whatever may be its form, whether money, or land, or chattels, or things in action, it is community property. This husband, however inefficient he may be as a business man and a producer, is still the legal head of the family; he is legally bound to support it; the debts incurred for the support and maintenance of himself, wife and family are *his* debts, for which he alone is personally liable; all the contracts which the wife may make for supplies of every description furnished for themselves and family are *his* contracts made by her as his agent. In short, all such debts incurred for the benefit of the spouses and their family are "the debts of the husband," for which he alone can be sued. They are also community debts. Moreover, by the express terms of the code, he alone has the legal possession, control, management and power of disposition of this community property. The interpretation above described would necessarily lead to the result that in such a case as this, all the community property would be completely beyond the reach of the creditors, although their demands were community debts. The creditors might recover personal money judgments against the husband on their claims, but could not satisfy these judgments out of the community property. As neither spouse had any separate estate, the creditors in such a case would be without any legal remedy. An interpretation which leads to

such an unjust and inequitable result, ought if possible to be avoided. In order to preserve any consistency and congruity with the general theory of community property, § 168 should be construed as applying alone to the separate individual debts of the husband and not to his community debts; but if it does include his community debts, then the "earnings of the wife" should not extend to sums which have been actually paid to the wife, and thus incorporated into the mass of community property. The language of the section is clearly capable of this construction without any unnatural forcing of its terms; and it alone can produce results at once consistent and equitable.

In this connection I may mention another question concerning which there seems to be a considerable difference of opinion,—whether the community property is liable for the debt of the wife contracted before marriage? It was a well settled rule of the common law that the husband, immediately upon marriage, and entirely irrespective of his having or not having acquired any property from her by the marriage, became personally liable for all his wife's debts contracted *dum sola*, provided the creditors recovered judgment for their claims against him during the coverture. The civil code provides; "§ 170: The separate property of the husband is not liable for the debts of the wife contracted before the marriage;" and "§ 171: The separate property of the wife * * * is liable for her own debts contracted before or after marriage." These are all the provisions expressly relating to the wife's debts contracted *dum sola*. The code further adds: "§ 167: The property of the community is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereof executed by the husband." The statutes in operation previous to the civil code contained provisions in all respects substantially the same as these which are now found in the code. In Van Maren v. Johnson,[6] the supreme court held that by the common law the husband was, during coverture, liable for the debts of the wife contracted *dum sola*. The California statute had modified this rule in two respects: namely, (1) it renders the separate property of the wife liable; and (2) it exempts the separate property of the husband. Beyond this exception of his separate property, the liability of the husband still exists; that is, he is still liable to the extent of the community property. The separate property of the wife, and the community property of both the spouses, are thus liable for the wife's debts contracted previous to the marriage; and judgments recovered for such debts may be enforced against either class and both classes of property indiscriminately. Again in Vlautin v. Bumpus,[7] it was held that in an action against husband and wife for the wife's debts contracted

[6] 15 Cal., 308, 312.
[7] 35 Id., 214.

before marriage, judgment may be rendered to be collected out of the community property of the two spouses, as well as out of her separate property. Since the provisions of the statute under which these decisions were rendered, were in all respects the same as those contained in the civil code, the result seems to be clear that the rule which they established must necessarily prevail under the code. This result is only strengthened by a reference to the peculiar language of the civil code. It nowhere says that the husband is not liable for his wife's debts contracted before the marriage; but only that his separate estate is not liable. And it should be noticed that the section which exempts the community property from liability for the wife's contracts made after marriage, is entirely silent with respect to her contracts made or debts incurred before the marriage. Finally, the rule making the community property liable for the wife's debts contracted before marriage, is just and equitable, and in complete agreement with the general theory of community property. Since the community property is deemed to be the product of the joint labors of both spouses, it is most eminently just that property which the wife has produced should be liable for her debts, for the same reason that property produced by the husband should be liable for his debts.

In another article I propose to describe some very curious effects which may be produced by the community property system of this state.

J. N. P.

CIRCUIT COURT, DISTRICT OF OREGON.

C. T. PARKHURST ET AL. v. E. F. HOSFORD ET AL.

October 31, 1884.

INADEQUACY OF CONSIDERATION.—Mere inadequacy of price is not sufficent to avoid the sale of real property; but when such inadequacy is gross and the vendor was needy and of weak mind and acted upon the impression that he was indebted to the vendee, when he was not, equity will give relief by treating the vendee as the trustee of the property for the benefit of the vendor or his representatives. Four hundred dollars held to be a grossly inadequate price for property worth not less than fifteen hundred dollars.

INSANITY—OPINION OF NON-PROFESSIONAL WITNESS.—Upon the trial of an issue involving the sanity of a person, the opinion of a non-professional witness, based upon his own observations, is competent evidence, and is entitled to weight, according to the intelligence of the witness, his means of information and the character of the derangement.

NOTICE OF PRIOR EQUITY.—A purchaser of real property for a valuable consideration is not affected by notice of a prior adverse equity received from a stranger or person not interested in the property; nor will mere rumors or hearsay concerning such equity and communicated by such person be sufficient to put him on inquiry and charge him with knowledge of the facts that he might have thereby learned.

SUIT to set aside a conveyance. The opinion states the facts.

Rufus Mallory and *William M. Ramsey*, for the plaintiffs.

W. H. Holmes, for the defendant Hosford.

E. J. Dawne, for the defendant Schindler.

DEADY, J. The plaintiff, C. T. Parkhurst, and fifteen others, citizens of Kansas, Illinois, Massachusetts, Indiana, New York and California, respectively, bring this suit against E. F. Hosford and John Schindler, citizens of the state of Oregon, for relief against a conveyance made by Lewis Parkhurst in his lifetime to the defendant Hosford of a tract of land situate in Polk county and containing three hundred and eighteen acres; and also a subsequent conveyance made by said Hosford of a portion of the same premises to the defendant Schindler, upon the ground of the insanity or imbecility of Parkhurst at the date of the conveyance to Hosford and the inadequacy of the consideration therefor.

The case was heard on the bill, answer and replication thereto and the evidence. The defendants answered separately, but not under oath. The answer of Schindler contains the defense, that he was a purchaser in good faith and for a valuable consideration; and also the statute of limitations.

The answers not being under oath, are not evidence for the defendants, and the rule invoked by counsel for Hosford, that his answer must be taken for true, unless overcome by the testimony of two witnesses or that of one witness and circumstances equivalent to another, does not apply.

The answer of Hosford admits the conveyance from Parkhurst to him and from him to Schindler, but denies the insanity of the former and the inadequacy of the consideration and the alleged value of the premises now and at the time of such conveyance.

The evidence is voluminous and quite contradictory on the disputed points. The plaintiffs examined thirty-two witnesses, whose testimony covers three hundred and five legal cap pages, while the

defendants examined thirty-seven, whose testimony covers four hundred and sixteen such pages.

The following facts are admitted or satisfactorily proven:

Lewis Parkhurst was a native of Dana, Massachusetts, from whence he emigrated to Wisconsin in 1843, and thence to Oregon in 1848. Soon after, he occupied the premises in question, and some time in 1850 became a settler thereon under the donation act of September 27 of that year. Having subsequently complied with the provisions of said act, the land was set off to him, by the proper authority, as claim No. 70, and on February 9, 1866, a patent was issued to him therefor.

This donation includes parts of sections 8, 9 and 10, in township 7 south, of range 3 west, and is situate in Polk county, on the west bank of the Wallamet river, about three miles below Salem. About one-third of it is prairie and the rest of it is covered with scattered timber and brush, and the greatest portion of it is bottom land, consisting of a dark sandy loam and in extreme high water is subject to overflow.

Parkhurst was born in 1817, and was never married. He lived alone, in a cabin, on his donation, and maintained himself principally by day's work in the neighborhood. The defendant Hosford and his brother, C. O. Hosford, settled on the public land adjoining Parkhurst's donation about 1849, and for some years thereafter the latter worked more or less, as a sawyer, in the defendant's sawmill. Parkhurst was a methodist and so are the Hosfords—C. O. Hosford being a preacher in that denomination, and on this account, as well as their nearness of residence, Parkhurst appears to have been more intimate with them than any one else, and had great confidence in the defendant. In time he seems to have been possessed with the idea that he was Jesus Christ, the lion of Judah, and claimed the right to have carnal communication with women at his pleasure.

In 1860 he was arrested on a charge of an indecent assault upon a woman of the neighborhood, a connection of C. O. Hosford's, and was discharged on giving bond in the sum of two hundred and fifty dollars for his good behavior. The evidence on this point is indefinite, but nothing more was done in the matter, and it is probable that the charge was not well founded, and was predicated as much on his foolish talk about women as anything else. But, however this may be, Parkhurst was by some means impressed with the idea that he was in danger of being mobbed on that account and left the county, and went to C. O. Hosford's, who had about the same time removed to Multnomah county and settled a short distance east of Mount Tabor, for whom he worked on the farm about three months. Then he probably went to the east of the Cascade mountains in the direction of the gold mines that were discovered there about this time. In the winter of 1861–2, C. O. Hosford says he roomed awhile in Portland, and that he worked for him again six weeks during the summer of 1882; and in the fall of that year he returned to his do-

nation and assisted the defendant Hosford in building a house on the latter's place. In the spring of 1863 he left the county again and went to Washington territory and "took up" a homestead on Mill plain, about two miles back of the Columbia river and eight miles above Vancouver, and about six miles east of C. O. Hosford's place. In January, 1864, he sent a letter from there to C. O. Hosford for the defendant, in which he proposed to sell the latter his donation for the sum of four hundred dollars, stating at the same time it was "worth five thousand dollars in gold and silver;" but that he was willing to sell it for "a little price," so as to pay the defendant Hosford what he owed him, which he said was "about two hundred and fifty dollars," and to "get a little money" for his present needs. On the receipt of this letter the defendant Hosford went to his brother's place, from which they both went to Mill plain, where they found Parkhurst alone in a hut in the timber, and very anxious for one hundred and fifty dollars wherewith to purchase an outfit to enable him to be employed in driving cattle to the mines east of the Cascade mountains. On the same day—February 12—the terms of the sale were agreed on, and they all then went to Vancouver, where Parkhurst executed a conveyance of the premises to the defendant Hosford, which the latter had prepared beforehand and brought with him, in the presence of C. O. Hosford and H. K. Hines, a Methodist preacher of that place, in consideration of the sum of four hundred dollars, paid as follows: two hundred dollars in currency as the equivalent of one hundred and fifty dollars in coin, though it was not then worth more than sixty-five cents on the dollar, and the discharge of the said indebtedness of two hundred and fifty dollars without interest, although the defendant wanted to charge interest thereon for four or five years at the rate of two per centum per month.

Within a year after this transaction Parkhurst returned to the neighborhood of the defendant, without any means, and took up his abode in the old cabin on his donation, saying, with much emphasis, that he had come to stay there. Thenceforth he had led an aimless, doless life, living mainly on raw vegetables, going dirty and ragged, and often sleeping in the fence corners, saying that the devils would not let him sleep in the cabin, until August 18, 1866, when, on the petition of sundry of the neighbors, he was brought before the county judge of Polk county and duly committed to the insane asylum, under the act of September 27, 1862, (Or. Laws, 620), as an indigent, insane person, where he remained until his death, on November 30, 1879, leaving the plaintiffs, his brothers and sisters, or their children, his sole heirs.

When first committed to the asylum, Parkhurst was classed among the "doubtful" patients, but after two years he was placed among the "incurables," where he remained until his death. To the last he was impressed with the idea that some persons in Polk county wanted to kill him; and he also fancied some one was trying to chloroform him.

The evidence as to the value of the donation is very contradictory. But I am satisfied, that at the date of the conveyance to the defendant, it was not worth less than five dollars an acre, and probably more. Mr. B. F. McClench, a disinterested and competent witness, who has lived within four miles of the land since 1852, swears that in 1864 it was worth from six to eight dollars an acre, and from twelve to fifteen dollars at the commencement of this suit.

But the sale by the defendant Hosford of two-thirds of the land to the defendant Schindler in 1881, for eight dollars and fifty cents an acre, is a material circumstance upon this question of value. It has been suggested in the argument, that Hosford made this sale for less than the land was really worth under the apprehension that the heirs were about to claim it. But there is no direct proof to that effect and nothing in the circumstances gives any countenance to the suggestion. The grantor appears to be a shrewd man, in good circumstances, and no immediate want of money. Neither did the sale exonerate him from liability in the premises, as his deed to Schindler contained a covenant of general warranty, for any breach of which he is well able to respond in damages.

But the consideration named in the deed—four hundred dollars—is less than one-third of the real value of the property at the time of the sale, and upon any view of the matter, this must be regarded as a grossly inadequate price therefor: Seymour v. Delancey, 6 John. Ch., 222; 2 Pom. Eq. Jur., sec. 927, note 3. But as Parkhurst had a right to sell his land to Hosford for any price he chose or even give it to him, the mere fact of gross inadequacy of price is not of itself sufficient to avoid the sale: 1 Story's Eq. Jur., sec. 245; Seymour v. Delancey, *supra*, 232; 2 Pom. Eq. Jur., sec. 926. But the disproportion between the price and the value of the subject is so great in this case as to cast the burden of explanation on the vendee, and require him to show that the vendor with a true knowledge of all the circumstances deliberately fixed on this price. But where the transaction purports to be a sale, and there is nothing in the circumstances of the case or the relations of the parties to suggest that the vendor intended or might have made the vendee the recipient of his bounty, under the guise of a sale, for a very inadequate or mere nominal consideration, such gross inadequacy of price may furnish satisfactory evidence of some serious overreaching or advantage on the part of the vendee as would justify the interference of a court of equity: Story's Eq. Jur., sec. 246; 2 Pom. Eq. Jur., sec. 928, note.

Now, there is nothing in the circumstances of this case to indicate that Parkhurst might knowingly and deliberately dispose of his property to Hosford for anything less than its real value.

His only apparent motive for making the sale to Hosford was to pay him what he seemed to think he owed him, and to obtain a little money to meet his present and urgent necessities. Add to this what I think was always present in his mind, the apprehension of danger from parties in Polk county, which made him more or less afraid to live there.

He declared at the time of the disposition of the property that it was worth "five thousand dollars in gold and silver," and although there was an attempt made, both in the evidence and the argument, to show that he meant five hundred dollars, it came to nothing. Parkhurst was evidently a man of limited education, and the letter in which he proposed to dispose of his donation is somewhat difficult in places to decipher, more on account of the chirography, than the orthography, though that is peculiar, but the words "five thousand dollars" are as plain as any in it, and could not well be mistaken for "five hundred."

And first, was Parkhurst mistaken about the indebtedness to Hosford; and was he induced to part with his land upon a false impression in that respect? There is no doubt but Parkhurst thought he owed Hosford two hundred and fifty dollars, and I think the discharge of this obligation was a controlling circumstance in the disposition of his property to the latter. Upon the evidence, minus Parkhurst's admission, however, I am of the opinion that the indebtedness is not proven; and that the attempt to do so is very unsatisfactory and calculated to cast suspicion upon the whole transaction.

In the spring of 1883, the plaintiff, C. T. Parkhurst, came to Oregon to look after this matter for himself and co-plaintiffs. They had lost sight of the deceased, and do not appear to have known anything of his death, or the disposition of his property until 1881. Parkhurst visited the defendant, Hosford, at his house twice in the month of April, 1883, with a view of a settlement. According to Parkhurst's testimony, Hosford first told him that the deceased owed him eight hundred dollars, and that he bought the property for six hundred dollars, having done so to get what he owed him, but on looking at the deed admitted he only paid four hundred dollars. Hosford also produced the letter from the deceased, and read it to the witness as if the latter had said the place was worth only five hundred dollars instead of five thousand dollars; and his wife, who was present, read it the same way. Hosford said this eight hundred dollars was for money loaned to the deceased to live on and two hundred and fifty dollars he had to pay as security on a bond to get the deceased out of jail and money he had to pay the sheriff for expenses. At the second interview Hugh V. Matthews was present with Parkhurst, and he testifies that on that occasion the latter taxed Hosford with having read the letter to him on the former interview wrongly in respect to the phrase "five thousand dollars" and Hosford did not deny it. Both testify that he admitted that the deceased was a weakminded man and sometimes insane on the subject of religion, but claimed that he was all right at the time of the sale and conveyance of the land.

In his testimony, Hosford denies having read the letter wrongly in respect to the value of the land or that he told the plaintiff he went security for the deceased and had to pay two hundred and fifty dollars on that account or to get him out of jail, but stated that

he was indebted to him in the sum of two hundred and fifty dollars for small amounts of money loaned to him at one time and another, he couldn't say when, and for one hundred and seventy-two dollars or seventy-two dollars advanced to Mr. Holman, sheriff of the county, when deceased was under arrest, to enable him to go east of the mountains, and that he never kept any memorandum of these transactions or took any obligation or acknowledgment from the deceased on account of them.

In his answer, Hosford states that this sum of one hundred and seventy-two dollars or seventy-two dollars was advanced by him to some one, presumably the sheriff, at the request of Parkhurst, as he understood, to procure his discharge from imprisonment. But it does not appear that he had any personal communication with Parkhurst from sometime before the latter's arrest, until the fall of 1862, but rather the contrary.

There is no evidence that there ever was any breach of the bond given by Parkhurst to keep the peace, and the contrary is the reasonable inference from all the facts; and therefore it is quite certain, that Hosford never was called upon to pay the penalty of it. And if he ever deposited any money in lieu of such bond, as was suggested on the argument, that he might have done, it was not forfeited either for the same reason, and in the due course of proceeding must have been returned to him within six months—the limit for which a security to keep the peace could then have been required: Or. code, 1854–5, p. 242.

True, the magistrate who took this security, might also have required Parkhurst to pay the costs of the examination, and in default thereof, have committed him: Or. code, 1854–5, p. 243. And the defendant, Hosford, might have furnished the money for that purpose and thereby procured his discharge from imprisonment, as he alleges in his answer, he did.

But there is no evidence of anything of this kind, nor is there any claim or suggestion to that effect in the argument or brief of counsel. Besides, Hosford has deliberately testified that he gave the money to the sheriff at the request of Parkhurst, as he understood, not to procure the discharge of the latter from imprisonment, but to enable him to go to the mines.

Neither does it appear reasonable that Hosford would advance money to a third person for Parkhurst without any written request or communication from the latter, for such an indefinite purpose as either to get him out of jail or to enable him to go to the mines, without taking a receipt or some written evidence of the fact; and it is also improbable that he would furnish money for such a purpose under such circumstances and make no memorandum of it nor be able to now state the amounts any more definitely than that it was either one hundred and seventy-two dollars or seventy-two dollars.

The prayer of the bill is that the conveyance to Hosford be declared null and void and of no effect, or that he and his grantee Schindler be required to convey the premises to the plaintiffs.

If Parkhurst, at the date of the conveyance to Hosford, was a lunatic—a person generally insane—incapable of understanding and acting intelligently in the ordinary affairs of life, his deed is not only voidable but void. This point is now settled for this court by the decision of the supreme court in Dexter v. Hall, 15 Wall., 9.

A number of witnesses have testified, *pro* and *con.*, on the question of Parkhurst's insanity, but none of them are medical experts, and the evidence is objected to by the defendants on that ground. The witnesses knew Parkhurst in his lifetime more or less intimately, and having stated their relations with him and means of knowledge, expressed their opinion as to his sanity.

The Oregon code of civil procedure, section 696, subdivision 10, permits an intimate acquaintance to testify as to the sanity of a person—the reason of the opinion being given. But the admissibility of evidence in the national courts, in equity and admiralty cases, is not governed by the law of the state, but by the general rules of evidence as established by the decisions of the courts and defined by approved authors and commentators. Neither section 858 of the revised statutes, regulating the competency of witnesses in the national courts, nor section 914, prescribing the law of procedure and practice in civil actions, at common law, therein, touch the question.

The question of the admissibility of the opinion of a non-professional witness upon an issue of insanity came before the supreme court lately in the case of the Conn. M. L. Insurance Company v. Lathrop, 111 U. S., 612, when it was held admissible. In delivering the opinion of the court, Mr. Justice Harlan said:

"Whether an individual is insane is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common-sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject." And the "judgment" of a non-professional witness, he adds, "based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value, because, the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by everyone of ordinary intelligence who comes in contact with his species." It is not suggested in the opinion that any particular degree of intimacy should have existed between the witness and the person whose sanity is the subject of inquiry, but that the weight to be given to the witness' opinion must depend upon the intelligence manifested by him on his examination, "and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached;" as well as the degree and character of the insanity.

Upon the issue of insanity the burden of proof is on the plaintiffs. The law presumes that Parkhurst was sane and capable of disposing of his property in any way he chose: Hall v. Unger, 4 Saw., 680.

His commitment to the insane asylum by the county judge of Polk county, in August, 1864, as an "indigent insane" person is *prima facie* evidence of his general insanity at that time, and so long thereafter as he was confined in the asylum in pursuance of the same. But how far, if at all, the result of this inquiry affects the question of Parkhurst's insanity in February, 1864, depends on circumstances. So far as it indicates a habitual and chronic lunacy, which in its nature was likely to have existed for some considerable period of time prior thereto, it tends to show unsoundness of mind in 1864.

Dr. J. R. Sites, the physician who examined the deceased on the inquiry before the county judge, and on whose certificate he was committed to the asylum, states therein, that "the supposed cause" of his insanity was "religious enthusiasm and self abuse."

But the evidence is not satisfactory to my mind that Parkhurst was generally insane—*non compos mentis*, in February, 1864, or prior thereto, so that he was incapable of making a contract. At the same time it is manifest that he was drifting that way or sinking in the scale of sanity from the time of his arrest in 1860, and it is probable that that fact, with the attendant circumstances, did much to impair his mental equilibrium. Two delusions or manias followed this event, and were largely consequences of it. One, that a mob in Polk county purposed to do him bodily harm, and another that Hosford had in some way incurred an expense or charge of two hundred and fifty dollars in getting him out of the clutches of the law. It is not proved that Hosford intentionally caused or directly promoted or encouraged these delusions, although there are some circumstances in the case calculated to excite suspicion that he did. For instance, at the time of the purchase of the premises he undertook to make Parkhurst believe that he owed him interest on the two hundred and fifty dollars at the rate of two per centum per month for about five years, which would have amounted to three hundred dollars, and swallowed up, twice over, the small sum in money which Parkhurst was expecting to receive for his present necessities; and this, too, in the face of the fact, that by his own admission there was no contract to pay interest, and when he must have known that by the act of October 16, 1862, Or. Laws, 623, then in force, that only ten per centum per annum could be recovered in any case where there was no contract to pay more, and then only for twelve per centum per annum; and that prior to that time there was no law regulating interest in the state, and that none was recoverable except where there was a special contract to that effect. And poor old Parkhurst does not seem to have known enough to dispute directly this unconscionable claim, but prompted by his necessities he pushed it one side, insisting that, however that might be, his proposition was that he would take one hundred and fifty dollars over and above what he owed Hosford, be that more or less, which sum was finally paid him in greenbacks at twenty dollars more than their market value.

But while it is not proven that Hosford is responsible for the delusions under which Parkhurst labored, it does satisfactorily appear that he took advantage of them to purchase the premises for a grossly inadequate price, from a man who had long confided in him, and whom he knew to be much in want and generally weak in mind. This being the case, the sale and conveyance to Hosford was inequitable, fraudulent and unjust: Scovill v. Barney, 4 Or., 291; Holmes v. Holmes, 1 Saw., 103; 2 Pom. Eq. Jur., sec. 928; and so far as he is concerned, he must be treated as trustee for the heirs.

The defendant Schindler is a *bona fide* purchaser for a valuable consideration, unless it appears that he had notice of the plaintiff's equity at the time he made the purchase or information thereof sufficient to put him on inquiry, whereby he might have ascertained the fact.

The only evidence upon this point is the testimony of M. Croisan, a German, who appears to have lived in the neighborhood from about 1876.

He testifies that about the time Schindler was negotiating for the purchase of this land he told him, substantially, that there would be trouble about it some day; that the general talk was, that Hosford had gotten the land unjustly from a crazy man. This is denied by Schindler in a general way, to the effect that he had never heard anything against Hosford's title; and from the fact that he is a German and does not speak English and appears to have been poorly interpreted, his testimony is general, vague and indefinite.

But, admitting that Croisan told him what he said he did, it is not sufficient to charge him with either "notice" or "knowledge" of the plaintiff's equity or the invalidity of Hosford's title. It did not constitute "notice," because Croisan was a mere stranger to the property and the parties and in no way interested in the transaction: 2 Pom. Eq. Jur., 602; Hardy v. Harbin, 1 Saw., 203. It did not impart "knowledge" of the plaintiff's equity to Schindler, because Croisan knew nothing about the matter and did not profess to. He only repeated what he said was rumored in the neighborhood—that Hosford had obtained the property of a crazy man unjustly, some sixteen or more years before. Neither was it sufficient "information" to put Shindler on inquiry. It furnished him no clue or guide to an investigation of the matter, and pointed to no person or place where information could be obtained.

If a person about to purchase an interest in real property obtains or receives information, tending to show the existence of a prior, adverse right to such interest, which information, considering its character and source, is sufficient to put a prudent man on inqniry, which inquiry, if prosecuted with reasonable diligence, would lead to a discovery of such prior, adverse interest, then the reasonable inference is that he acquired such knowledge and had actual notice thereof.

And if such person negligently or for the purpose of keeping himself in ignorance, fail to make such inquiry, he is nevertheless

chargeable with "notice" of the facts he might thereby have ascertained.

But such person is not affected by mere rumors, hearsay statements, vague suggestions, surmises and the like, concerning the existence of such prior adverse interest. The information must be credible in its character and source and sufficiently circumstantial to furnish him with a palpable clue or guide by means of which he may investigate the matter and ascertain the truth: 1 Story's Eq. Jur., section 400 *a;* 2 Pom. Eq. Jur., section 597.

In 1881 Schindler had no means of ascertaining whether Parkhurst was insane or not in 1864. The information which Croison says he gave him on the subject amounted to nothing. Even after this thorough investigation of the subject with the aid of the process of this court and the diligence and astuteness of learned and industrious counsel, this court is unable to say that Parkhurst was generally insane at the date of his conveyance to Hosford, and that therefore the same is *ipso facto* void and of no effect.

I find that the defendant Schindler is a purchaser in good faith and for a valuable consideration, without notice or information of the prior equity of the plaintiffs, and therefore the bill as to him must be dismissed with costs.

As to the defendant Hosford, a decree will be entered that within thirty days he convey to the plaintiffs by a good and sufficient deed, with a warranty against his own acts, that portion of the Parkhurst donation not heretofore conveyed by him to the defendant Schindler, and that he also pay to the plaintiff a sum of money equal to the price received by him from said Schindler for the remainder of said donation, to wit, the sum of one thousand eight hundred and four dollars and eighty-five cents, together with four hundred and fifty-seven dollars and twenty-two cents, the legal interest thereon, from the date of the sale to Schindler, to wit, August 29, 1881, in all, the sum of two thousand two hundred and sixty-two dollars and seven cents, and that in default of said payment within thirty days, the plaintiffs have execution therefor.

The bill also prays for an account of the rents and profits, but the matter was not pressed on the argument, and I have concluded on the evidence that the amount paid Parkhurst, with that expended in taxes, repairs and improvements, is sufficient to offset the claim for rents and profits.

SUPREME COURT OF COLORADO.

SCHWENKE ET AL. v. UNION DEPOT AND RAILROAD COMPANY.

Filed October 17, 1884.

SPECIAL STATUTE REFERRING TO EXISTING LAW—EFFECT OF ON APPEAL ON PRIOR STATUTE.—A local and special statute which adopts, by reference, provisions relating to procedure in an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted.

REPEAL OF STATUTE BY IMPLICATION -LEGISLATIVE INTENT.—The law does not favor the repeals of existing statutes by implication; they will not be adjudged to follow unless there is such a positive repugnancy that the two statutes cannot consistently stand together; the legislative intent to substitute the new for the old law must clearly appear, this intent is never *prima facie* presumed. And a stronger repugnancy or clearer indication of legislative intent is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law.

PATENT ISSUED UNDER REPEALED ACT IS VOID.—A patent to land showing on its face that it was issued under and in pursuance of an act of congress, which had been repealed prior to the application therefor, is void, and may be collaterally attacked.

DENVER TOWN SITE ACT NOT REPEALED.—The act of May, 1864, regarding the town site of Denver, was a local and special statute, and was not repealed by the repealing clause of the general town site act of July, 1864. Nor is there anything repugnant or inconsistent in the provisions of such acts.

APPEAL from the district court of Arapahoe county. The opinion states the facts.

W. A. Hardenbrook and *W. B. Felker*, for the appellants.

Teller & Orahood, for the appellee.

HELM, J. The assignment of errors in this case contains thirty different specifications. The important ones, however, may be condensed into two general questions or propositions as follows:

First. Was appellee, The Union Depot & Railroad Company, at the commencement of this suit, a corporation duly organized and existing under the laws of Colorado?

Second. Is the patent through which appellee claims, conveying title of the original Denver town site from the United States to Hall, probate judge, in trust, absolutely void?

As shown by the record, appellant deemed it advisable to bring a separate action in the nature of *quo warranto*, directly challenging the corporate existence of the Depot Company. That suit was vigorously prosecuted and resulted in a decision at the last term of this court affirming the validity of the corporation: People ex rel. Bernard v. Cheeseman, et al., 2 West Coast Rep., 870.

This decision fully answers and disposes of the first question above stated. Hence we proceed at once to a consideration of the second.

The validity of the patent in question is assailed on the ground that it was issued entirely without warrant or authority of law. The instrument itself contains the declaration that it is issued in pursuance of two certain acts of congress passed in May, 1844, and in May, 1864, respectively. The former was a general town site law, the latter was a local and special act. In July, 1864, and ten months previous to the patent entry by Hall, congress enacted another general town site law; this last statute contained the following repealing clauses:

"The act entitled 'an act for the relief of the citizens of towns upon the lands of the United States under certain circumstances,' May 23d, 1844, and all other acts and parts of acts inconsistent with this act be, and the same are hereby repealed:" V. 13, ch. 205, p. 313, U. S Statutes at Large.

Appellants' contention is that this repealing provision swept away both of the previous acts above mentioned, and that for this reason the patent is void, and conveyed no legal title whatever to the trustee therein named.

We will not question appellants' right to test the validity of this patent collaterally upon the foregoing ground. We shall assume without argument that if a patent on its face shows that it is issued under and in pursuance of certain acts of congress, and it is true that such act were repealed prior to the application therefor, the patent is void. There is, then, such "an absolute want of power" as is mentioned in Sherman v. Buick, 93 U. S., 209, and cases cited, which renders the instrument liable to impeachment in a court of law: See Patterson v. Winn, 11 Wheaton, 380, and cases cited; Parker v. Duff, 47 Cal., 554, and cases cited.

It must be conceded at the outset, of course, that the law of 1844, was repealed by that of July, 1864, for it is expressly in direct terms so declared.

The discussion will therefore be confined to the question, Was the Denver act abrogated also by the repealing provision above quoted, or did its repeal follow the adoption of the subsequent law by implication.

This act is not, as claimed, an *amendment* of the law of 1844: it is "an act for the relief of the citizens of Denver in the Territory of Colorado." It is local and special: it was intended to relieve the inhabitants of a particular locality from an inconvenience or disability existing under the general law and confer upon them certain privileges not bestowed thereby. This important and controlling purpose was attained by the very language of the statute itself; so far it was in no way dependent upon the general town site law of 1844.

The act did not itself operate as a conveyance of the legal title because no "words of present grant" were inserted therein, and such was not the legislative intention. It recognized and declared a right to title but required that a patent issue, and that certain preliminary steps be taken by the probate judge therefor. This procedure by that officer was incidental to the main purpose of the act; had congress remained silent on this subject the statute would have been inoperative, but not invalid. That body chose to avoid a useless repetition of lengthy provisions, it incorporated into the Denver act by reference to the law of 1844, a statement of the preliminary steps required of the probate judge; the following language is used, "except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of May 23d, 1844." We understand this to mean; that in procuring the patent to the Denver

town site and conveying to the proper parties, the probate judge should proceed in the manner prescribed by the former law for the government of probate judges generally, in making town site entries; it is just the same in our judgment as though congress had copied into the latter act these provisions from the former.

It is therefore a logical sequence that the identity of the two laws in this respect does not affect the following propositions: that the latter is independent and complete; that the procedure for procuring patent and executing the trust incorporated by reference to the prior general law remained in force for the purpose of carrying out the provisions of the special act; and that the existence and effect of the latter were not jeopardized by the repeal of the former.

"A statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the statute adopted:" Siker v. The Chicago and N. W. Ry., 21 Wis., 375; Wood v. Hustis, 17 Wis., 429; Crosby *et als.* v. Smith *et als.*, 19 Wis., 472.

We prefer at present to limit the foregoing doctrine to the facts in the case at bar.

Our statement of it, then, is as follows: A *local* and *special* statute which adopts by reference provisions relating to *procedure* in an existing general law is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted.

The case of Ellison v. Jackson Water Company, 12 Cal., 542, cited by counsel for appellant, is not in point. The act there held inoperative by the repeal of the former law was general, not special; it was simply a supplement or amendment to the law repealed; it extended the provisions of the prior statute to include things not therein enumerated, viz: "Bridges, ditches, flumes, or aqueducts, constructed to create hydraulic power or for mining purposes." The court appropriately say that the repeal "carried with it the supplementary acts;" * * * "without the original act there was no mode of enforcing the supplementary act."

But it is argued by counsel that the provisions of the Denver act are repugnant to and inconsistent with the statute of July, 1864; that, therefore, ignoring its dependence upon the law of 1884, there was both an implied and an express repeal thereof; that such repugnancy and inconsistency in and of themselves operated to produce a repeal by implication, and also bring the statute within the express provision repealing all inconsistent acts and parts of acts.

It is hardly necessary for us to consider these propositions separately. If there is no such repugnancy as would produce a repeal by implication, it will in our judgment appear that in this instance there is no such conflict or inconsistency as produces an express repeal under the declaration quoted.

The law does not favor repeals by implication; they will not be adjudged to follow unless there is such a repugnancy that the two statutes can not consistently stand together; the legislative intent to substitute the new for the old law must clearly appear; this intent

is never *prima facia* presumed: Potter's Dwam's, p. 155, and cases cited; Bishop on Written Law, section 154, and cases.

And a stronger repugnancy of legislative intent is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law. "A general affirmative statute does not repeal a prior particular statute * * * unless negative words are used, or unless there is such irreconcilable inconsistency as indicates an intent of the legislature to repeal:" Sedgwick on Construction of Statutes, p. 98, note (*a*) and cases cited; Conley *et al.* v. Supervisors, 2 West Va., 416; Ottawa v. LaSalle County, 12 Ill., 339; Brown v. County Commissioners, 21 Pa. St., 43; Blain v. Bailey, 25 Ind., 165; Williams v. Pritchard, 4 S. R. E.

The reluctance to recognize a repeal by implication in the latter case is still greater where the prior statute is not merely special or local in its application, but also relates to a purely *local subject;* it has been said that there the "language and scope of the subsequent act must be equivalent to an *express repeal:*" Cole v. Board of Supervisors, 11 Iowa, 552.

Of course the cardinal rule of construction prevails in this field. The inquiry in all cases is, what did the legislature intend? The numerous and discordant decisions upon this subject attest the difficulty of discovering and declaring safe subordinate tests as general rules. But the foregoing remarks indicate that there is a recognized difference in the degree of clearness with which the intent must appear; a difference dependent upon the character and purpose of the prior statute. In this particular the cases seem to be in harmony; but the minor tests adopted by courts in their endeavor to arrive at the legislative design in this matter, are not uniformly applied even under similar circumstances; and each particular case must, of necessity, be determined, largely upon its own peculiar facts and surroundings, irrespective of rules and precedents.

We apprehend, however, that with the light afforded by the recognized distinction above stated, there will be no serious difficulty in correctly answering the question of repeal in the case before us.

Were the Denver act, and that of July, 1864, both general, we might be constrained to agree with counsel for appellant; they provide systems of procedure for patent radically different; the former preserves the trustee method of making entries; the latter discards it entirely, and substitutes a system wholly at variance therewith; there is nothing to indicate that the latter was designed to be cumulative; it can not, therefore, be contended that both systems are applicable to the same town town-site patent proceedings.

But the Denver statute possesses three characteristics, which, in our judgment, under the law above stated, prevent its repeal, on the ground of inconsistency or repugnancy: First, it is *special,* in that its operation is confined to a particular municipal corporation; Second, it treats of a purely *local subject;* and, Third, there is but one thing to be done, a single act or proceeding authorized, viz., the procuring of patents to certain specified quarter sections of land. Upon

issuance of this patent, the act practically performed its office. This is unlike those cases where the particular thing to be done is repeated at stated or irregular intervals; as where a peculiar or unusual tax is authorized to be collected from year to year by the city authorities, or where a special penalty is visited in a particular city or county, upon the commission of a stated offense.

The primary reason for declaring repeals by implication is that conflict and confusion may not prevail in the application of the law. It is presumed that the legislator intended that no difficulty of this kind should exist. Hence, where two statutes relating to the same subject are so conflicting that they cannot both be applied to the subject referred to, and the latter is not cumulative, courts have recourse, when necessary to avoid confusion and carry out the legislative intent, to the doctrine of repeals by implication.

But the concurrent existence and enforcement of the Denver act and the July law could produce no inconvenience or confusion; no conflict could arise in complying with their respective provisions; no one could ever attempt to enter any other town site under the Denver act; and the entry of the tracts of land specified therein could in no possible way affect proceedings for patents in other cases under the general law.

To avoid the foregoing conclusions, we must say that the land specified in the Denver act was intended to be included by congress as one of the town sites mentioned in the July law; this would amount to a concession of the very point under discussion. If congress did not so intend, there can be no repugnancy or inconsistency between the statutes; for, in that event, they do not refer to the same subject matter. Unless we can find something else besides the so-called repugnancy itself of the two acts, to indicate an intention on the part of congress to have the latter include the subject matter of the former, we must hold that it does not do so. For, as already shown, all presumptions in cases like this are against recognizing this kind of repeals.

It is agreed that on the first of July, 1864, congress had before it the whole subject of town-site entries on the public domain, and that if it had been the intention to retain in force the Denver statute, such exception would have been expressly stated.

It may be answered that the Denver act was passed at the same session, and only thirty-two days prior to the July law; that hence the presumption that congress had not forgotten its existence, is especially strong; and that it is reasonable to suppose that if that body intended to rescind so recent an enactment, it would have so declared in express words; this precaution was taken with reference to the general act of 1844, in connection with which much less uncertainty could arise.

Nor does the statement that all inconsistent acts were repealed, imply that congress had specially in view the Denver act. This provision is common in general statutes; it is inserted through an abundance of caution, and creates no necessary presumption that there are

conflicting provisions. Besides, for aught we know, there may have been other general or special acts of congress which these words were intended to repeal.

The proposition has been announced that "a general law does not operate as a repeal of a special law on the same subject passed at the same session:" Ottawa v. La Salle County, 12 Ill., 339, citing 4 Pike, 410.

This declaration must be accepted with the qualifications hereinbefore suggested; but the fact that at the same session of congress a general and a special law are enacted, justly strengthens the presumption against an intent to repeal; the special act not being specifically mentioned.

In view of the principle of law above referred to, we are of opinion that there was no implied or express repeal of the Denver act. Under all the circumstances we think the two statutes may stand together. We have no doubt but that the finding of the district court is right and should be affirmed.

If, however, the scales of judgment upon the question above discussed were evenly balanced; and if there existed in our minds uncertainty as to the technically proper ruling in the premises, we would resolve the doubt in favor of affirmance. The patent which we are asked in this case to declare void with reference to the ground in controversy, covers upwards of nine hundred and fifty acres. The entry for this patent was made over nineteen years ago; upon the land conveyed thereby has since been built the most important part of the city of Denver; with a few isolated exceptions, this instrument constitutes the first link in the claim of title relied upon. To hold the patent void as to the lot here in litigation might, by unsettling titles, impair the value of property worth millions of dollars. These circumstances render applicable legal principles which in a doubtful case would most assuredly challenge consideration.

Holding as we do, that so far as the objection here presented is concerned, the patent through which appellee claims is valid, no necessity exists requiring a discussion of the rulings as to the alleged rights or title of appellants.

The judgment will be affirmed.

WILCOX ET AL. *v.* JACKSON.

Filed October 17, 1884.

CHATTEL MORTGAGE—ACKNOWLEDGMENT OF—POSSESSION OF MORTGAGOR.—The failure to properly acknowledge a chattel mortgage is fatal to its validity while the property mortgaged remains in possession of the mortgagor.

THE SAME—CHANGE OF POSSESSION—ATTACHING CREDITORS.—A chattel mortgage of the stock in trade of a merchant, although followed by an actual change in possession, is invalid as against subsequent attaching creditors of the mortgagor, without notice actual or asstructive of the mortgage, unless such change in possession is accompanied by the sasumption on the part of the mortgagee of the usual *indicia* of ownership. And the mere employment of another clerk is not sufficient notice of a change of ownership to put creditors and purchases upon inquiry.

ASSIGNMENT OF FIRM PROPERTY BY ONE PARTNER FOR BENEFIT OF CREDITORS.—A voluntary assignment of all the firm property, made by one partner in favor of a creditor, without the knowledge or assent of his partner, and against his previously expressed wishes, is invalid.

ERROR to the district court of El Paso county. The opinion states the facts.

Decker & Yonley, for the plaintiffs in error.

William Harrison, for the defendant in error.

BECK, C. J. This is a contest between creditors who are striving to obtain satisfaction of demands due and owing to them respectively from the late firm of Tribe & Jefferay, dealers in books, stationery &c., at Colorado Springs and Leadville.

The goods and effects of the firm in the store at Colorado Springs were seized by the United States marshal, April 6th, 1881, upon an attachment against said firm issued out of the United States circuit court for the district court of Colorado, at the suit of James McClurg & Co.

The present action was instituted by W. J. Jackson, another creditor, against the marshal and his deputy, to recover possession of the goods attached, his right to possession being based upon a chattel mortgage bearing date October 1, 1880, and upon an order for possession, assignment, or transfer, of date March 18, 1881; also, upon actual possession under said instruments previous to and at the time of the levy of the attachment.

There was a verdict and a judgment below in favor of Jackson, to reverse which judgment this suit of error is prosecuted in the interest of the attaching creditors.

Both the chattel mortgage and the order for possession were executed by the partner George H. Jefferay, in the firm name, without the knowledge or consent of his copartner Tribe, and the latter persistently refused to ratify either of these transactions up to the time that the rights of the attaching creditors are alleged to have accrued.

Plaintiffs in error contend that the chattel mortgage was fraudulent and void in law as to creditors upon several grounds, some of which are the following:

No memorandum of the acknowledgment was made by the officer taking the same in his docket, as required by statute.

The mortgage was not recorded; the goods mortgaged were left in the possession of the mortgagors, who continued to retail the same in the usual course of trade as before, for their own benefit, with the knowledge and consent of the mortgagee, up to the eighteenth of March, 1881, a period of five and a half months.

Under our statute, as interpreted by the decisions of this court, either one of the above defects would necessarily have proved fatal to the validity of the mortgage, if the question had been raised while the goods and merchandise continued in the possession of Tribe and Jefferay: General Statutes, 1883, pp. 159, 161, secs. 1, 10;

Crane et al. v. Chandler, 5 Colo., 21; Horner v. Stout, *Id.*, 166; Ctiy N. B. v. Goodrich, 3 Colo., 139.

Section 10 of the chattel mortgage act (general statutes, *supra*,) contains a saving clause as to the failure to record the mortgage, when an adverse right to the property is acquired with actual notice of the existence of the mortgage. This saving clause does not cure a defective acknowledgment.

The failure to properly acknowledge a chattel mortgage is, therefore, fatal to its validity, while the property remains with the mortgagor: Crane v. Chandler, *supra*.

The authorities also recognize an exception in favor of the mortgagee, where the mortgagor continues to sell the mortgaged goods in the usual course of trade, viz: where the possession in fact is in the mortgagee, and the mortgagor in good faith, and as agent for the mortgagee continues to sell, and appropriates the proceeds to the payment of the mortgage debt. But any understanding or arrangement by which the proceeds of sales should go to the mortgagor, or for his benefit, or for any other purpose than the liquidation of this debt, would render the whole transaction fraudulent and void as against creditors of the mortgagor: Jones on Chattel Mortgages, sec. 399, and authorities cited.

In the present case, Jackson did not attempt to assume possession or control of the mortgaged property until the eighteenth day of March, 1881. He admitted upon the trial that he permitted the mortgagors to continue their retail trade after the execution of the mortgage, and that they made additions to the stock. He did not pretend that the sales were made for his benefit, or that the proceeds were applied in liquidation of his demands against the firm.

This arrangement was wholly inconsistent with the purposes of the chattel mortgage act. The act was designed to give a creditor security for his claim by a conditional sale of specific property. To permit a debtor to dispose of the property during the continuance of the lien for any other purpose than in satisfaction of the mortgage debt would enable him to perpetrate a fraud upon his other creditors. If such a transaction was to be held valid, debtors would have an easy method of protecting their chattel property against the claims of creditors, leaving to themselves all the benefits of an unincumbered title. It is sufficient to say the law is otherwise. Had the property in controversy been seized upon attachment prior to the eighteenth day of March, the jury must have been told tha tthe mortgage was void as to creditors.

Another point fatal to a recovery under the mortgage, upon this record, is, that while the testimony shows that new goods were purchased and mixed with the original stock, from time to time, after the giving of the mortgage, there is no testimony establishing the identity of any portion of the goods attached, as the same goods mentioned in the mortgage. The mortgage makes no provision for goods to be afterwards acquired, but is a grant of property owned at the time of its execution.

Mr. Jackson himself declined to swear that the goods attached were the same goods mentioned in his mortgage. He could only swear that they were turned over to him as the same goods.

There could be no recovery under the mortgage upon such a state of facts: Farmer's Loan and Trust Co., 11 Wis., 207; Same v. Same, 15 Id., 424; Brainard v. Peck, 34 Vt., 496; Cameron v. Marvin, 26 Kan., 612; Jones on Chattel Mortgages, secs. 167, 168.

It is contended, however, that Mr. Jackson was in *possession* of the property at the time of the levy of the attachment under the mortgage, and under the written order of March 18th, 1881, referred to in the record as "Ex. B," and that his possession gave him a prior lien upon the stock.

It appears to be true that Jackson took possession of the store and goods on March 18th, but it is equally true that the character of that possession was such as gave no notice that any change had taken place in the ownership.

Such notice was essential to a right of recovery under the peculiar circumstances of this case. If anything was done to afford notice, actual or constructive, the fact was not proven.

Section 14 of the statute of "frauds and perjuries" provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive:" General Statutes, p. 509.

Interpreting this statute, this court has said that "the vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property:" Cook v. Mann, 6 Colo., 21.

Chief justice Elbert, who wrote the opinion in the above case, adds, that the possession must be exclusive of the vendor and that a concurrent or joint-possession is not admissible.

The evidence in the record does not come within the rule announced.

While it shows an actual change in possession it fails to show that the usual *indicia* of ownership were used by the plaintiff, or that there was a visible change of possession, such as to apprise the community, or creditors of the firm of such change. There was in fact nothing done, so far as appears, to put persons accustomed to deal with the former firm upon inquiry. The business was con-

tinued in the same building, the goods being sold at retail as before. The sign of Tribe & Jefferay was not removed nor was there a new sign put up to indicate a change of proprietors. Jackson did not devote his time to the business, but Charles Jefferay, a brother of the partner George H. Jefferay, was placed in charge. He was a clerk of the former firm and being accustomed to clerk there his appearance indicated no change. George H. Jefferay continued to be in the store for a considerable time after the transfer, writing up his books and at times selling goods. The only visible change that appears to have been made was the employment of another clerk, one Curtis.

It cannot be said that the mere employment of an additional clerk in a mercantile establishment is sufficient notice of a change of ownership to put creditors and purchasers upon the inquiry.

No notice was even given to Cantril the deputy United States marshal, who levied the attachment, that Jackson had any claim upon the stock. He says he went into the store and inquired of Charles Jefferay if the proprietors were in. The reply was that they were not in—that Tribe was in Leadville and the other partner was expected that evening. He went out to look up deputy United States marshal Dana, and upon his return told Charles Jefferay what his business was; made the levy, placed Dana in charge and proceeded to serve notices of the attachment, by leaving a copy at the residence of Tribe and notifying Jefferay; after which he met a Mr. Wolf who told him that Jackson had some claim upon the goods, which he says was the first information he received of that fact.

Jackson stated in his testimony that he notified the marshal of his claim before the levy, but subsequently corrected himself, by saying that he was not at home when the levy was made, but gave notice afterwards.

Charles Jefferay admits that he was in the store at the time of the levy, but remembers of no conversation with Cantril. When asked if anything had been done about the store that could be seen by any customer, either outside the door or in the store to indicate that the business was not being conducted by Tribe and Jefferay, his answer was; "Nothing except by Mr. Curtis being in the store." When asked if he had told people that Jackson had possession of the property, he answered that he had told several who had inquired about it, but could name no one whom he had told.

Mr. Dana, who was a constable at Colorado Springs and a deputy United States marshal, states that he was in the habit of passing the store and had seen nothing to indicate a change of possession from Tribe and Jefferay to another person.

L. J. Tell, a resident marshal of the city, says he saw nothing to indicate a change.

This being the condition of the testimony, it is our opinion that the question was improperly submitted to the jury whether Jansen, McClurg & Co., or their agent had actual notice of the change of ownership previous to, or at the time of the levy of the attachment.

It remains to consider the effect of the paper "exhibit B," as an independent source of title.

This instrument authorized Mr. Jackson to take possession of all the goods and chattels in the store in Colorado Springs and to sell the same according to the terms of the mortgage, and to apply the proceeds in payment of his demands against the firm of Tribe & Jefferay.

The position of counsel is that this transfer amounted to an independent pledging of the goods and property of the firm for the payment of Jackson's claim.

Counsel for plaintiffs in error deny the power of one partner, under the circumstances of this case, to make such a transfer. They further say that Jackson did not rely on this order upon the trial below, as appears from his own testimony, but upon the mortgage and upon his possession. That the order distinctly referred to the mortgage, and authorized the mortgagee to take possession of the goods described in the mortgage. That this was its sole purpose and effect.

Upon the last proposition, we are of opinion that the phraseology employed in the latter instrument may be construed as an intention to make an independent transfer of the goods then in the store, together with delivery of possession. This transfer, if valid, would obviate the difficulty of identifying the goods conveyed by the mortgage, and vest a title thereto independent of the mortgage. The reference therein to the mortgage for the terms of sale, does not conflict with this theory. The object of the reference was merely as to the matter of procedure, and in legal contemplation was equivalent to incorporating in the order the same provisions upon this subject which were contained in the mortgage.

The only question of importance to be considered in this connection is, did the partner Jefferay, under the circumstances of this case, have power by the execution of this order, to make a valid transfer of the property to Jackson without the knowledge and consent of his copartner. The record shows that both partners resided in Colorado Springs, and that they had two stores, one in Colorado Springs and one in Leadville, Lake county; the one containing the principal portion of the stock in trade being in the former place. That Jefferay gave most of his atttention to this store, and Tribe looked after the business in Leadville, although he, Tribe, appears to have been frequently at the place of his residence. It is a notorious fact that the two localities are not distant one from the other, and that telegraphic and railroad communication exists between them.

The testimony shows that Tribe was not consulted about this transfer, and that Jefferay and Jackson well knew that he was opposed to the giving of the mortgage and had at different times refused to sign it. We think this equivalent to notice that he was opposed to any transfer or assignment of the stock to Jackson.

Another feature of the case, and one which discloses more fully the object of the transaction, is, that on the same day on which the

property in Colorado Springs was transferred to Jackson by this document (Ex. B) Jefferay confessed judgment in favor of Jackson for the sum of twelve thousand five hundred ($12,500) dollars in El Paso county district court. Upon this judgment an execution was issued to Lake county, and by virtue of it the entire stock in trade in Leadville, and certain parcels of real estate belonging to the firm were sold.

Here, then, is presented a case where a partner attempts not only to give a preference to a single creditor, but to give it in such a manner as to divest both partners of possession and control of the entire partnership property, effects and business. His acts were destructive of the partnership itself. These acts were not only done without the knowledge and consent of the copartner, but in opposition to his wishes, as previously made known to his partner and to the preferred creditor, when they asked him to join in the execution of the mortgage. Can a transfer of this nature, made under such circumstances, be sustained? The power of a partner to act for and in the name of his firm, says Mr. Justice Story, extends to all purposes within the scope and objects of the partnership, and in the course of its trade and business.

Adopting the suggestion of a learned judge, he adds: "One partner, by virtue of that relation (of partnership) is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged:" Story on Part., sec. 101.

Among the powers enumerated by this learned author, which may be exercised by one partner within the foregoing limits, is the power and authority, in behalf of the firm, to transfer, pledge, exchange or otherwise dispose of the partnership property and effects.

Mr. Parsons says: "The right of each partner to sell, assign or transfer any part or the whole of the partnership property, in the way of the regular business of the partnership is absolute and unquestioned, * * * this, however, must be done in the regular course of the business of the firm, for outside of this he has no such power:" Parsons on Part., 163.

The views of Mr. Chancellor Kent are to the same effect: 3 Kent Com., 4 ed., p. 41.

The foregoing paragraphs concisely define the power of individual partners within the law applicable to general partnership. The substance of the rule is, that when acting in furtherance of the objects and business of the firm, and within the scope of its business, one partner is clothed with the full powers of all the partners, and is authorized to bind the firm in all transactions.

This power and authority is based on the principle of agency. The very nature and purposes of a partnership association necessarily constitutes, it is said, each active party a general agent of the firm, with implied authority to act for it in all matters of business

within the foregoing limits. The limitation referred to is of the highest importance. Upon it depends in a large measure the security of copartners. When an attempt is made by a single partner, without the consent of his associates, to bind the partnership in a transaction outside the usual scope of its objects and business, and one prejudicial to its interests, every principle of justice requires that courts should hold the act to be without validity. Especially should this be done, where, as in the present case, the contracting parties have notice of the copartner's dissent to such transaction.

The doctrine as to the effect of notice is thus stated in 1 Am. Ldg. Cases, 544: "The authority in a single partner, however, is not an insuperable legal consequence of an interest in the partnership, but is an actual agency, implied from the supposed assent of the other members; an express notice, therefore, from one member of a firm communicated to third persons, that he will not be bound by the acts, or by a particular act of another partner, puts a stop to the implied authority of that partner to bind the firm."

With these general principles before us, let us inquire more closely into the character of the transfer in the case at bar.

It was clearly not a sale, for no price was agreed upon at which the goods and effects should be taken and credited upon the indebtedness of the firm. Had it been an absolute transfer of the property in extinguishment of the debt, or a certain portion of it, a different question would arise.

Nor was it a pledge, for authority was given to sell all the property transferred. A pledge is defined to be a lien created by the owner of personal property by the mere delivery of it to another upon an express or implied understanding that it shall be retained as security for an existing or future debt. A pledge is subject to redemption, and the lien is immediately divested by a tender of the amount secured.

An action for possession may be maintained by the pledgor, if the pledgee refuses to restore the property. The title to the property remains in the pledgor, while the possession, actual or constructive, according to the nature of the property or circumstances of the case, is with the pledgee. The latter can only sell upon default of the pledgor to pay according to the contract: Bouvier's Law Dictionary, title "pledge;" 2 Parsons contracts, pp. 109–117; 3 Id., 271.

In Bowie & Sons v. Napier & Co., 1 McCord, 1, the court say: "By a pledge one understands not only a thing that may be redeemed, but, generally, one that is intended to be redeemed. Now, where goods are deposited with orders to sell, such an idea as that of redemption can never enter the mind, for the agent with whom they are deposited may, in the shortest space of time, alienate the right."

The effect of the transaction in the present instance was to transfer and surrender the property and stock in trade for the benefit of a single creditor, and at the same time to constitute such creditor the trustee of an implied or resulting trust in favor of the firm; the

terms of the trust were that Jackson should sell the property in a specified manner and apply the proceeds in liquidation of his claim.

If any surplus of money or property remained after satisfaction of his demands, as might have been the case, considering the simultaneous confession of judgment by the same partner, the assignee was bound to return the same.

It is evident then that this transfer was in the nature of, or analagous to, a voluntary assignment for the benefit of a creditor of the firm.

Says Mr. Burrill, in his valuable work upon assignments: "Voluntary assignments for the benefit of creditors are transfers without compulsion of law by debtors, of some or all of their property to an assignee or assignees, in trust to apply the same or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor." * * * The trusts of an assignment for the benefit of creditors, in one form or other, enter into the composition of all assignments which contemplate provisions or security for creditors, embracing not only such as are made to trustees, but such as are made directly to creditors themselves. Implied or resulting trusts are such as result from the transfer by intendment and operation of law: Burrill on Assignments, sections 2, 238, 240.

Both Mr. Justice Story and Mr. Parsons express grave doubts whether a partner can make a general assignment of all the property and effects of the partnership for the benefit of creditors. These doubts arise from the consideration that such a transaction is not in furtherance of the objects of a partnership, but of itself operates as a dissolution: Story on Partnership, sec. 101; Parsons, Part., * p. 166.

Mr. Parsons thinks the weight of authority is in favor of the power where the assignment is made without preferences of any kind. He qualifies the doctrine still further in a note to page *167, after reviewing the cases on the subject. The further qualification is: "if such an act is justified by the situation of the firm at the time, and if the other partners are absent from the country, or have made the assignor sole managing partner, or if in any other way, expressly or by implication, they may be supposed to have conferred upon the assigning partner sufficiently extensive authority."

The case under consideration does not come within any of the exceptions mentioned. The other partner was not absent from the country. No emergency existed to justify or excuse hasty action without consultation with the co-partners. Jefferay had not been constituted sole managing partner at Colorado Springs, as appears from Tribes' repeated refusals to ratify the mortgage, and from his visit to and conduct at the latter place upon hearing of the transfer.

Considering the contemporary acts of making the assignment and confessing the judgment in opposition to the known wishes of his co-partner, and in the light of their natural and actual consequences, viz, the destruction of the partnership in both places, it is evident

that the acts of March 18th were not based upon a supposed power of sole management at one point, but upon an assumed power of sole control, *nolens volens*, at both points and over the entire partnership business and property. The acts of Jefferay of March 18th were as destructive of the partnership as if the whole property of the firm had been included in a general assignment. These acts being contemporary, and having the effect of a general assignment for the benefit of a creditor, the law applicable to a general assignment becomes, by analogy, applicable to the assignment in the present case.

Concerning the power to make such an assignment, Mr. Justice Washington says, "But it may admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the partnership effects (otherwise than in the course of trade in which the firm is engaged) in such manner as to terminate the partnership:" Lord v. Graham, 4 Wash., C. C. 232.

The authorities bearing upon the subject are reviewed in Bowen v. Clark, 1 Bissell, 128. The conclusion arrived at is as follows: "The principle to be extracted from nearly all the decisions appears to be this, that as a general assignment, if it does not dissolve the partnership, it at least takes away from the partners the right of disposing of the effects assigned; all the members, if they are present, have a right to be consulted on such a step; that an assignment by one partner against the known wishes of another would be a fraud upon him and invalid, and an assignment without his knowledge would be presumptively so."

The New York court of appeals held in Wells v. March, 80 N. Y., 350, that such an act was outside the scope of the partnership enterprise and that the exercise of such a power amounted to a suspension or dissolution of the partnership itself. Said Mr. Justice Wright, "it is no part of the ordinary business of the partnership, but outside, and subversive of it. No such authority as that can be implied from the partnership relation."

The question was considered in Holland v. Drake, 29 Ohio St., 441. "Whether one member of an insolvent firm either before or after the dissolution of the partnership can make a valid assignment of all its effects for the benefit of creditors against the will of a copartner, or without procuring his assent, when present or accessible."

Chief-justice Welch, in delivering the opinion of the court, speaks of the want of conformity in the numerous decisions, and concludes as follows: "We have examined these cases with much care, and think the weight of authority as well as the better reasoning is with those who deny the validity of such an assignment. The power to make it is not within the contemplation of an ordinary partnership contract."

The opinion of the court is that the safer and juster rule is to require either the actual or implied assent of all the partners.

The court of appeals of Kentucky concedes the power and authority of each partner, in behalf of the firm, to transfer, pledge

or dispose of the partnership effects and property for any and all purposes within the scope of the partnership, and in the course of its trade and business, but declares it to be well settled upon principle and authority, that one partner cannot against the opposition of another, make a general assignment for the benefit of a portion of the firm creditors, when such creditors or their agent had notice of such opposition: Bull, etc. v. Harris, etc., 18 B. Monroe, 195.

Respecting the *implied* power of a partner to make such an assignment without the knowledge or consent of a co-partner, Chancellor Farnsworth says in Kirby v. Ingersol, Harrington's Ch., (Mich.) 172, 186. "There is no such implied power. The authority impliedly vested by each partner in the other is for the purpose of carrying on the concern and not for the purpose of breaking it up and destoying it. One partner does not by any implication confer a power upon his co-partner of divesting him of all interest in or authority over the concern.

"The elementary writers upon the subject do not sustain this position. The adjudged cases, when carefully examined do not sustain it; and assuredly it is not sustained by the reason of the thing or the dictates of justice. Every consideration of public policy or commercial convenience is against it."

Being of opinion that the authorities cited announce correct legal principles, and that they are applicable to transfers of the nature of the one under consideration, made under the circumstances disclosed by the evidence, we hold that the paper "exhibit B," conveyed no title of itself, and created no independent lien in favor of the plaintiff below, as against the creditors of the firm of Tribe & Jefferay.

In as much, therefore, as the trial below was conducted upon a theory at variance with the views of the majority of the court upon several points, the judgment is reversed and the cause remanded.

Judgment reversed.

Mr. Justice Helm took no part in the decision.

BRANDENBURG *v.* MILES.

Filed October 27, 1884.

CAUSE OF ACTION—STATEMENT OF DAMAGES.—An action for damages must rest upon facts showing a right on the part of the plaintiff to require the performance on the part of the defendant of some legal duty, a failure to perform such duty, and that the damages sought resulted therefrom. The complaint in this action *held* not to state facts in compliance with this rule.

ERROR to the district court of Arapahoe county. The opinion states the facts.

Brown & Putnam and *John W. Jenkins*, for the plantiff in error.

Decker & Yonley, for the defendant in error.

STONE, J. The only question in this case is as to the sufficiency of the complaint. The said complaint, to which a demurrer for insufficiency to state a cause of action, was sustained by the court below as follows:

"The plaintiff complains and alleges:

I. That, on the first day of January, A. D. 1880, he was the owner in fee simple of lot number twenty-four in block number forty-seven in the east division of the city of Denver in said state and county, and has been from thence hitherto, and is now, the owner thereof.

II. That, on the fifth day of April, A. D. 1880, he purchased from Joab O. Brown three inches off lot number twenty-five in said block adjoining his said lot twenty-four, and the said fraction of said lot was on said last named day conveyed to plaintiff in fee simple, and he is now the owner thereof.

III. The plaintiff having determined to construct a large and valuable brick building upon said lot and fraction at a cost of twenty thousand dollars to cover the entire frontage of said lot and fraction, being twenty-five feet and three inches on Larimer street in said city, employed a competent architect at a large expense to plaintiff, to draft plans and specifications for said building, the frontage of which building was by said plans and specifications to be twenty-five feet and three inches on said street.

IV. That said architect accordingly drew and completed said plans and specifications and submitted them to plaintiff, and that he approved the same on, to wit: the twenty-fifth day of April, A. D. 1880, and commenced the construction of his said building in pursuance thereto.

V. That at all of the dates aforesaid, and thence hitherto, the defendant was, and is, the owner of lot number twenty-three in said block forty-seven, adjoining said lot twenty-four, on which, on, to wit: the said twenty-fifth day of April, there was erected a frame building, which building extended over and on the lot twenty-four of plaintiff a distance of three inches, so that plaintiff could not occupy his entire lot.

VI. That on, to wit: the said twenty-fifth day of April, A. D. 1880, and at divers other times before and after that day, the plaintiff requested defendant to remove his said obstruction from his, the plaintiff's, lot, but that so to do the said defendant wholly neglected and refused.

VII. That in consequence of the said refusal of defendant and of his wrongful act in that behalf, plaintiff afterwards and on, to wit: the first day of May, was required to have all of his said plans and specifications changed and redrawn at an expense of, to wit: five hundred dollars, and was required to and did reduce the width of his said building to twenty-five feet, and that thereby the said three inches of said lot twenty-four was lost to the plaintiff.

VIII. That in consequence of the said wrongful acts of defendant, after the plaintiff had completed all of his arrangements for the

construction of his said building, he, the plaintiff, was delayed in the completion of his said building for the period of two months, at an actual loss to him in the sum of two thousand dollars, and suffered other losses in the change in the width of said building, in the loss of his first plans and specifications, and in the entire loss of the said three inches off said lot twenty-four, in said block, which plaintiff avers has been entirely lost to him, and is now of no value, in the further sum of three thousand dollars. And plaintiff avers that he was forced to construct his said building without occupying and using the said three inches of said lot twenty-four because of the refusal of defendant to remove his said building therefrom.

Wherefore, plaintiff demands judgment against defendant for the sum of five thousand dollars, his damages and for the costs of this action."

We do not think the court erred in sustaining the demurrer. The complaint does not state a cause of action in ejectment, nor in forcible entry or unlawful detainer, nor in trespass, nor for a specific recovery of the three inches in width of the ground specified. Nor does it appear that the plaintiff sought to state a cause of action for either of the above mentioned remedies. The only facts stated as ground for the recovery of the damages claimed are that plaintiff owned certain premises, on which he desired to build, so as to cover the whole width thereof, and made plans accordingly; that defendant owned a house which covered a portion of said premises; that plaintiff requested defendant to remove the house from the portion in controversy, and that defendant refused; that plaintiff thereupon, instead of seeking by legal means to obtain possession of that portion of his ground claimed to be covered by defendant's house, altered his architectural plans, built a smaller house than first designed, and thereafter brings this action to recover damages for delay in the construction of his house, loss "in the width of the building," the expense of altering plans, and "entire loss of the said three inches of said lot," and bases his right of recovery of the sum demanded as damages upon the alleged "wrongful act" of defendant in neglecting and refusing "to remove his said obstruction from the plaintiff's lot."

The complaint fails to state sufficient facts to show wherein the refusal of defendant to remove his house from the ground in controversy was wrongful or unlawful, or that the damages claimed were the direct result of a wrongful or unlawful dispossession, occupation, trespass or detention. For aught that appears in the complaint the defendant's alleged occupation of plaintiff's ground may have been by virtue of a previous unexpired lease, or some other lawful right, and such possibility of right is not precluded by the averment that the plaintiff was the owner in fee of the ground in question.

The recovery of damages must in all cases rest upon facts showing a right on the part of the plaintiff to require the performance on the part of the defendant of some legal duty, a failure to perform such duty, and that the damages sought resulted therefrom.

The complaint in the case falls far short of setting out a state of facts in compliance with this rule.

Plaintiff was given an opportunity by the court below to amend his complaint, but elected to stand thereby. Perceiving no error in the record, the judgment dismissing the complaint will be affirmed.

Judgment affirmed.

SUPREME COURT OF OREGON.

BROBACK *v.* HUFF.

Filed October 23, 1884.

WRIT OF REVIEW—DOES NOT LIE AFTER EXPIRATION OF TIME FOR APPEAL.—A writ of review does not lie to bring up the record of the proceedings of a county court in a civil action after the right of appeal has expired by the lapse of more than thirty days since the rendition of the judgment.

W. H. Holmes, for the appellant.

N. B. Knight, for the respondent.

WALDO, J. The question to be decided in this case is, whether the writ of review will go to bring up the record of the proceedings of a county court in a civil action after the right of appeal has gone by by the lapse of more than thirty days since the rendition of the judgment.

Section 875 of the civil code makes section 525 applicable to the review of the judgments of county courts in such actions, and section 525 expressly enacts that such judgments shall be reviewed on appeal and not otherwise. The attention of the court in Christian v. Evans was not called to these sections, and the dictum in that case, that review will lie to a county court after the time for appealing has gone by must be considered an error.

The judgment must be reversed.

SUPREME COURT OF WYOMING.

COOK *v.* TERRITORY.

Filed October 9, 1884.

MOTION TO QUASH INDICTMENT—PATENT DEFECTS.—A motion to quash an indictment, under the Compiled Laws, page 152, section 101, only lies for defects which are apparent upon the face of the record.

THE SAME—IRREGULARITIES IN FORMATION OF GRAND JURIES.—The validity of an indictment, for irregularities in the organization of the grand jury, not apparent upon the face of the record, can only be called in question by challenge or plea in abatement. A motion to quash the indictment does not lie.

SEPARATION OF JURORS DURING TRIAL.—A separation of one trial juror from his fellows during the progress of a trial for murder, for the purpose of speaking with a third person about a matter entirely disconnected with the trial, will not warrant a reversal.

INDICTMENT FOR MURDER—VERDICT—SUFFICIENCY OF.—Under an indictment, framed in but one count, which charges murder in the first degree, a verdict is sufficient which finds the defendant guilty as charged in the indictment.

DRUNKENNESS AS BEARING ON INTENTION IN COMMISSION OF CRIME.—The effect of a prisoner's inebriated condition, as bearing upon the intention with which he committed a crime, is a question for the jury.

INSTRUCTIONS GIVEN BY A COURT OF ITS OWN MOTION, to which no exceptions are taken, are not grounds for reversal.

JUSTIFICATION OF HOMICIDE—BURDEN OF PROOF—INSTRUCTIONS.—In a prosecution for murder, where, from all the circumstances surrounding the homicide, as detailed in evidence by the prosecution, nothing is disclosed in any way tending to excuse or justify the homicide, it is incumbent upon the defendant to show such justification or excuse, if any there be. If he neglect to offer any evidence in justification, an instruction which omits to charge concerning the law of self-defense is not error.

INSTRUCTIONS ASKED FOR, IF THE SAME HAVE ALREADY BEEN GIVEN in substance, may be refused.

AFFIDAVITS OF JURORS AND BAILIFF—ADMISSIBILITY OF.—The affidavits of jurors and the bailiff having the jury in charge, are admissible in support of the verdict.

ERROR to the district court. The opinion states the fact.

Downey & McIntyre, for the plaintiff in error.

J. W. Blake, for the defendant in error.

LACEY, C. J. The plaintiff in error was indicted on December 3d, 1883, in the district court of Albany county for the killing of James Blount. Trial was had upon the indictment resulting in a verdict of guilty.

The court below overruled the motion for a new trial and pronounced judgment and sentence of death upon the verdict.

The evidence is all in the record by bill of exceptions. The case is prosecuted here by petition in error.

The petition in error makes thirteen assignments of error as follows:

"1. That the court erred in overruling the motion of the defendant herein to quash the indictment in this cause found and returned."

"2. That the court erred in overruling the motion of the defendant herein, in his plea to the jurisdiction of the said district court."

"3. That the court erred in overruling the motion of the defendant for a continuance of the said cause to the next ensuing term thereof."

"4. That the said court erred in giving the instructions to the jury offered and asked for by and on the part of the prosecution on

the trial of said cause, and numbered one, two, three, four and one-half, five and six, respectively."

"5. That the court erred in refusing to give the instructions offered and asked for by the said defendant on the trial of said cause."

"6. That the said court erred in its instructions and remarks given and addressed to the jury on the trial of said cause of its own motion."

"7. That the said court erred in overruling the motion of the said defendant for a new trial of the said cause on the ground of all and every reason therein alleged by the defendant, to the overruling of which motion the defendant excepted at the time."

"8. That the jury in said cause, after being sworn therein, and before being discharged by the court, were permitted to separate and did separate."

"9. That the said court erred in admitting over the objection of the said defendant, on the said motion for a new trial in said cause, the affidavits of two of the jurors trying the same, to wit: F. E. Allyn and S. S Woods, and also the affidavit of one Richard Tregoing, the bailiff in charge of said jury and jurors, to which the defendant then and there excepted."

"10. That the said court erred in refusing to admit in evidence and in support of a motion for a new trial in said cause, the affidavit of one Wm. T. McIntyre, as to the hostility and bias of one F. E. Allyn, being one of the jurors who tried said cause, to which ruling of the court the said defendant then and there excepted."

"11. That the verdict of the said jury that tried said cause was contrary to law and the evidence adduced at said trial of said cause."

"12. That the verdict of the said jury did not define the crime of which the said defendant was found guilty, and was and is irregular, defective, void and insufficient in law to warrant the said court to pass sentence and judgment thereon."

"13. That the said judgment of the said court and the sentence thereon is and was contrary to law and the evidence in said cause."

The third, fourth, fifth, sixth, eighth, eleventh and twelfth assignments state causes for a new trial: Compiled Laws, page 162, section 181.

It was therefore necessary that they should be assigned as causes in the motion for a new trial in the court below, after which the question upon each would be properly raised by an assignment of error in this court calling in question the ruling upon the motion for a new trial. These assignments of error, therefore, do not present anything for the decision of this court, and will not be considered, although the same questions may be considered so far as they arise under the seventh amendment.

It remains to determine the questions raised by the first, second, seventh, ninth, tenth and thirteenth assignments in the petition in error.

The causes stated in the motion to quash the indictment are as follows:

"First. Because the indictment was not found and returned by a grand jury, returned, tried, impanneled, sworn and charged, according to law at the said October, A. D. 1883, term of this said court."

"Second. Because the said indictment was not found by the grand jury, drawn, returned, tried, impanneled, sworn and charged, and afterwards discharged by the court at this regular term of said court."

"Third. Because the said indictment purports to be found by said grand jury, returned, tried, impanneled, sworn and charged on the fifteenth day of October, A. D. 1883, by the said court and thereafter discharged and before said crime and crimes charged in said indictment were committed as alleged in said indictment."

"Fourth. Because the said alleged crime and crimes set forth in said indictment are therein charged as having been committed on the thirtieth day of November, A. D. 1883, and long after said grand jury had been charged, sworn and discharged."

"Fifth. Because said indictment is inconsistent, irregular, defective and void."

"Sixth. Because the same does not state any crime or crimes, offense or offenses, punishable under the laws of the territory of Wyoming."

By reference to the criminal code (Compiled Laws, page 152, section 101), it will be seen that a motion to quash reaches only defects which are "apparent upon the face of the record."

There is nothing apparent upon the face of the record in the case at bar which shows the existence of the facts relied upon in any one of the first four causes in the motion to quash.

On the contrary, the record, after giving the venue, the title of the court and of the cause, contains the following recitals:

"Be it remembered, that in the above case in the said court, there was returned into the said court at the October term, A. D. 1883, thereof, by the grand jury in attendance thereon and filed in said court on the third day of December, A. D. 1883, an indictment in said cause in the words and figures following, to wit:

"INDICTMENT.

"TERRITORY OF WYOMING, }
"County of Albany, } ss.

"In the district court of the second district. At a term of the district court, begun and held in the town of Laramie City, within and for the county of Albany, on the fifteenth day of October, A. D. 1883, the jurors of the grand jury of the county of Albany, good and lawful men, then and there returned, tried, impanneled, sworn, and charged, according to law, to inquire, etc., * * * do present, etc."

If one grand jury was discharged and another impanneled, as is contended in argument, there is no intimation of it "upon the face of the record."

As to the fifth and sixth causes in the motion to quash, we are unable to find any material defect in the indictment; nor have counsel for the plaintiff in error attempted to point out any defect.

There was no error in the ruling upon the motion to quash the indictment.

The plea to the jurisdiction attempts to call in question, for irregularities not apparent upon the face of the record, the organization of the grand jury. Under our statute, that question can only be raised by challenge or plea in abatement, see Compiled Laws, page 151, section 100, *et seq*; also, Bishop on Crim. Procedure, section 871 to section 889.

Twenty causes are stated in the motion for a new trial. The purport of each may be stated as follows:

1. Is based upon an alleged separation of the jury after being sworn, and before discharged.

2. Alleges that the verdict is defective in not finding the degree of the crime.

3. That the verdict is not sustained by sufficient evidence, and is contrary to law.

4. That the court erred in giving to the jury, of its own motion, certain instructions.

5, 6, 7, 8, 9, 10, 11, 12 and 13 are all based upon alleged errors in giving to the jury, at the request of the prosecution, certain instructions set forth in the motion.

14, 15, 16, 17, 18, 19 and 20, call in question the rulings of the court, in refusing certain instructions requested by the defendant.

The separation of the jury complained of is thus set forth in the motion of the plaintiff in error for a new trial:

"That certain persons, comprising, in part, the said jury, viz: Samuel S. Woods, T. J. Clark, and F. E. Allyn, were, Friday evening, December 7, 1883, separated from the rest of the jury, in violation of law, and the admonition of this honorable court to the contrary.

"That while so separated, as aforesaid, said Samuel S. Woods, T. J. Clark, and F. E. Allyn, were not accompanied by a bailiff, and that such separation from the bailiff was in violation of law and the admonition of this honorable court. That while the said jurors were so separated, as aforesaid, the said Samuel S. Woods was seen conversing with another person who was not a member of the said jury, the bailiff in charge of the same, nor any officer of this honorable court. That the separation of the jurors aforesaid was during the progress of said trial."

The affidavits read in support of the motion, supplemented by the counter affidavits, show that the facts were as follows: The jurors Clark and Allyn were separate from the remaining jurors on one occasion only, at which time they went to the cigar store of William

Menasse to purchase cigars. During the entire time of their separation they were in the immediate charge of the proper officer. The separation of the juror Samuel Woods was when he, in company with eight other members of the jury, all in the immediate charge of the proper officer, was walking about for exercise. When they reached the Frontier Hotel, in Laramie City, the juror Woods, by permission of the officer, went into the hotel office, the officer and the other jurors remaining just outside near the door, which remained open during all the time that Woods was in the office. Woods did not go further than three feet from the open door. The only persons with whom Woods had any conversation were one Piatt and one George Stokes.

The conversation with Piatt was solely in relation to bringing Stokes to Woods. The conversation with Stokes was solely in relation to hauling lumber for Woods. Stokes being then and before in the employ of Woods. Nothing was said by Woods or anyone in his hearing in relation to the cause upon which was then acting as a juror.

We think that the above facts do not show such a separation as could have prevented a fair trial of the cause.

It is urged that the verdict is defective in that it fails to find the degree of the offense. The verdict is in the following words:

"TERRITORY OF WYOMING,
v.
GEORGE COOK. } INDICTMENT FOR MURDER.

"We the jury, empanneled and sworn to try the isssue in the above stated case, do find the defendant, George Cook, guilty as charged in the indictment.

"U. L. C. BEARD, foreman."

Counsel state the objection to the verdict in these words:

"The indictment alleges in one count * * * that the said George Cook the said James Blount in manner and form aforesaid feloniously, unlawfully, willfully, purposely, deliberately, premeditatedly, maliciously and of his malice aforethought, did kill and murder, etc." Here are charged (1) a willful, deliberate and premeditated killing, which constitutes murder in the first degree. (2) a killing purposely and maliciously done, which constitutes murder in the second degree, and (3) an unlawful killing which constitutes manslaughter." And from this it is argued that it is impossible to ascertain which one of these three separate charges is found against the prisoner, since each is charged in the indictment. The authorities cited by counsel upon the proposition that the verdict must state the degree of the offense are with one exception from states where that requirement is made by statute, and the decisions are expressly based upon that statutory requirement. There is no such provision in our statutes. The one exception above referred to is the case of Hogan v. The State, 40 Wis., 428.

But in that case the court says: "The indictment fails to show by apt and proper averments, the degree of murder charged against

the accused." In the case at bar the indictment is in one count and charges by "apt and proper averments" murder in the first degree as defined by our statute.

It is true that if certain portions of the indictment be stricken out there would remain the charge of murder in the second degree, and if then still other portions be stricken out there would remain the charge of manslaughter. But as the indictment stands it charges but a single crime and that is murder in the first degree. The inferior offenses are merged in this highest crime.

There is a provision in our statutes that: "Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto:" Compiled Laws, page 159, section 157.

The jury, therefore, under this indictment with proper evidence, might have found the plaintiff in error guilty of murder in the second degree, or of manslaughter; but to do so they must have found (whether in express terms or not we need not decide), that he was not guilty of murder in the first degree; in other words, must have found against the territory as to certain averments contained in the indictment. Here the verdict finds in favor of the territory upon every averment. The jury have found the plaintiff in error "guilty as charged in the indictment."

"They have thus made the indictment a part of their verdict, and we are to consider the case as if they had found a special verdict stating the facts precisely as they are set forth in the indictment:" "Johnston v. Commonwealth, 24 Penn. St., 386. A general verdict of guilty will be interpreted as guilty of all that the indictment well alleges:" 1 Bishop on Crim. Procedure (3d ed.), sec. 1,005 *a*, and authorities there cited; see, also, People v. Marsh, 6 Cal., 543; Cook v. State, 24 N. J., 843; Fitzgerald v. People, 37 N. Y , 413; Kennedy v. People, 39 N. Y., 245; Leschi v. Territory, 1 Wash. Ter., 13; State v. Upton, 1 Dev. (N. C.), 513; O'Conner v. State, 9 Florida, 215; Bilansky v. State, 3 Minn., 427.

The verdict finds the plaintiff in error guilty of murder in the first degree, and is sufficient.

The plaintiff in error some eight hours before the shooting, gave as a reason for reclaiming his revolver from the repair-shop, that he wanted to use it. At one time during the day he threatened conditionally to "shoot off the eye-brows and toe-nails" of the deceased; and at another time he pulled off his coat to fight the deceased who refused to fight. About two hours before the shooting, the proprietor of Mechanics' Hotel asked the prisoner to allow him to keep the revolver until the prisoner's "passion" cooled down. The prisoner declined to part with the revolver, saying "he was going to use it." At the time of the homicide, the prisoner meeting the deceased, at once began to quarrel with him, or as the witness states it, "commenced to sass" him. The deceased urged that they should not quarrel, and, in token of his friendly feeling, invited the prisoner to walk into the saloon, near where they were standing, and

have a drink with him. The prisoner refused, and continued the abuse, whereupon the deceased said:

"I have a good mind to smash your nose." The prisoner then asked, "Do you mean what you say?" The prisoner then, without further words, pulled his revolver from his scabbard and shot the deceased through the head, killing him instantly. All this occurred on November 29th, 1883, in Albany county, in this territory. Counsel contended that the evidence shows that the slayer was intoxicated at the time of the homicide. Under our statute voluntary drunkedness is not an excuse for any crime, but it is provided that "where a crime rests in intention, the inebriated condition of the defendant at the time of committing the offense may be proven to the jury as bearing upon the question of intention:" Compiled Laws, page 249, section 9.

There was considerable conflict in the evidence concerning the condition of the defendant, with reference to sobriety. This was properly left to be weighed by the jury, as bearing upon the question of intention, and we cannot say that it did not receive full consideration, nor that the jury, under all the evidence, were not warranted in finding against the prisoner upon the question of intention. The verdict is sustained by sufficient evidence and is not contrary to law.

The plaintiff in error did not object, nor in any way except, in the court below, to the instructions given by the court upon its own motion, and hence, no question arises upon those instructions here.

Counsel seem to controvert seriously the correctness of but one of the instructions, given at the request of the prosecution. Nevertheless, we have carefully considered each of the other instructions so given, and do not find that there was any error in giving them. The instruction, earnestly controverted is as follows:

"No. 1. In order to constitute murder in the first degree, the killing must be done, not only with malice, which is presumed when the killing is with a deadly weapon, used in a deadly manner, but it must also be done with premeditation and deliberation, and wilfully and purposely; but, in order that there should be deliberation and premeditation, it is not necessary that the intention to kill should have existed in the mind of the slayer any appreciable period of time prior to the killing. If the deliberate and premeditated intention to kill is determined upon in the mind of the slayer, and he immediately carries that intention into execution, his offense is murder in the first degree, and it matters not whether the period of time between forming such intention and the killing was a few seconds or many hours."

The objection to this charge is thus stated by counsel: "This instruction puts upon the defendant the proof of self-defense, or any other ground of excusable or justifiable homicide."

There is nothing in the evidence tending to show justification or excuse. When, from all the circumstances surrounding the homicide, as detailed in evidence by the prosecution, nothing is disclosed

in any way tending to justify or excuse the homicide, it is incumbent upon the defendant to show such justification or excuse, if any there be: See 1 Bishop on Crim. Procedure, 3d ed., sec. 1,050, and authorities there cited; also, 2 Bishop on Crim. Procedure, sec. 599, and authorities there cited. In this case, the defendant has made no attempt in that direction, but, on the contrary, swears that he knew nothing of the killing, and hence cannot complain that the charge is silent upon that question.

Of the instructions asked by plaintiff in error, those refused by the court are the following:

"No. 2. The jury are further instructed, that if they believe from the evidence that the defendant, when he encountered the deceased at the time of the occurrence, they at once became engaged in a quarrel, and that during said quarrel, and in the heat of passion incident thereto, the defendant killed the deceased then and there, the jury are instructed that they cannot convict of murder, either in the first or second degree.

"No. 4. If the jury believe from the evidence that the defendant had on his person a deadly weapon, but had not armed himself for the purpose of using the same against the deceased, but while being thus armed, he became involved in a difficulty with the deceased, and then took the life of the deceased with such weapon, then the presumption of malice cannot be inferred from the fact of his using such deadly weapon."

"No. 5. You are further instructed, that if you are satisfied from the evidence that the defendant killed the deceased; yet, if the jury are satisfied from the evidence that the prisoner had reasonable grounds to apprehend a design on the part of the deceased to take the prisoner's life, or to do him great bodily harm, or great personal injury, and that there was imminent danger of such design being accomplished, then they must find the prisoner not guilty."

"No. 6. The jury are further instructed that if they believe from the evidence that the defendant and the deceased were, at the time of the occurrance, engaged in a drunken brawl, and that while so engaged in a drunken brawl, the defendant took the life of James Blount, then premeditation cannot be inferred and the jury cannot convict the defendant of murder in any degree."

"No. 8. The court instructs the jury that if there is any other reasonable hypothesis arising out of the evidence except the one that the defendant unlawfully killed the deceased, then the defendant is entitled to the benefit of such hypothesis and he ought to be acquitted."

"No. 10. If the evidence of the witnesses for the prosecution in this case shows any contradiction as to any of the circumstances of the alleged shooting of James Blount, as the drunkenness or intoxicated condition of the defendant at the time of such alleged shooting, you are bound to give the preference to the testimony of such witnesses, if you believe it to be equally true that is most favorable to the defendant."

"No. 16. The court instructs the jury that the policy of our law deems it better that many guilty persons should escape rather than that one innocent person should be convicted and punished, so that unless the jury, after a careful and thorough consideration of all the evidence in the case, can say and feel that every material allegation in the indictment is proved beyond a reasonable doubt, the jury should find the defendant not guilty."

We will not attempt to point out all of the objections to the above instructions. There was evidence at least tending to show that the plaintiff in error, several hours prior to the homicide, had threatened to kill the deceased, and that he sought and pressed whatever of quarreling there was for the purpose of furnishing an occasion for the killing; and that the deceased was at the time aware of the threats and the purpose. In the light of that evidence, instructions numbered two, four, five and six were correctly refused. All that is material in instructions numbered eight and sixteen, had already been given in instructions one, seven, nine, eleven and fourteen of those asked by the prisoner, hence it was not error to refuse further repetition.

As to instruction ten we think that the jury were not bound to prefer one truth above another "equally true."

There was no error in overruling the motion for a new trial.

The affidavits of jurors and the bailiff having the jury in charge, are admissible in support of the verdict. Such, we think, is the weight of recent authority.

There was, therefore, no error in admitting the affidavits mentioned in the ninth assignment of error.

The motion for a new trial contains no averment concerning any hostility or bias of the juror Allyn. Nor is there any averment in the motion for a new trial which the affidavit mentioned in the tenth assignment of error in any way tends to support. Therefore, without reference to the question whether or not it was in the nature of hearsay, the affidavit was properly excluded by the court.

The thirteenth error assigned in the petition in error raises no question that has not been already passed upon in this opinion.

The judgment of the court below is in all things affirmed. And the court now appoints Friday the twelfth (12th) day of December, in the year of Our Lord, one thousand eight hundred and eighty-four, for the execution of the sentence pronounced by the court below.

All the judges concurring.

SUPREME COURT OF CALIFORNIA.

No. 10,988.

PEOPLE v. LYLE.

Department One. Filed October 31, 1884.

MISCONDUCT OF JURY—ACCEPTING HOSPITALITY FROM COUNSEL—IMPEACHMENT OF VERDICT.—Jurors are presumed to do their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that, during a trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor, at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which rendered the act of invitation necessary; and of a supper at the hotel of his associate counsel, under like circumstances. Such acts, however improper or indiscreet, could not, in themselves, have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict of conviction.

MISCONDUCT OF JURY WHEN WILL AUTHORIZE A NEW TRIAL.—To warrant setting aside a verdict, and granting a new trial for irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found, was not injured by the misconduct, the verdict will not be disturbed.

NEWLY DISCOVERED EVIDENCE OF FACT KNOWN AT TRIAL—EVIDENCE FOR IMPEACHING WITNESS.—Newly discovered evidence of a fact, known at the trial, as to a matter about which one of the witnesses testified, is no ground for a new trial, when no diligence is shown for not using the fact as evidence, or when such evidence would merely tend to impeach a witness.

APPEAL from a judgment of the superior court for Contra Costa county, entered upon a verdict convicting the defendant of murder in the second degree, and from an order denying him a new trial. The opinion states the facts.

Mills & Jones and *E. J. Emmons*, for the appellant.

Attorney-General, for the respondent.

MCKEE, J. Appeal from an order denying a motion for a new trial, and from a judgment of conviction of murder in the second degree.

The motion was made upon statutory grounds; but the case itself has been argued and submitted mainly upon one of them, namely—misconduct of the jury, by which a fair and due consideration of the case was prevented. The alleged misconduct consisted of certain acts committed, during the progress of the trial, by the district attorney, his associate counsel, and some of the jurors. The acts were: That during the trial the district attorney, at his expense, treated some of the jurors to intoxicating liquors; that he presented one of them with a bottle of bitters, entertained him at his house with a dinner, and after dinner escorted him homeward; and that during the trial he and his associate counsel, at their expense, entertained the same juror, and also a witness in the case, at an oyster supper, at which liquors were drank

The affidavits read on the hearing of the motion show: That the trial of the case lasted over a month—commencing on the tenth of December, 1883, and ending, with intermissions, on the eleventh of January, 1884; that at each adjournment the jury were allowed to separate under the instructions of the court; that during the recesses

and adjournments of the court, it was the practice of counsel engaged in the trial of the case—as well those for the defense as those for the prosecution—jurors and witnesses to "interchange courtesies," by treating and drinking with some of the jurors at the bars of saloons. Twice during the progress of the trial the district attorney treated two or three of the jurors. Once he invited to dinner one of them, who was at his house to get from him a bottle of bitters which he had promised the juror two months before; and on another occasion, the same juror took supper with the district attorney and his associate counsel, under circumstances which rendered his invitation to supper unavoidable, except by a violation of the law of social intercourse. The acts of drinking and the entertainments of the juror were all done in the recess or adjournments of the court and at considerable intervals of time. On none of the occasions does it appear that there was any conversation between juror or jurors and counsel, or any of the persons present, about the case, or the trial thereof, or the defendant, or any thing in connection therewith. On the contrary, the affidavits clearly show, that there was not a word spoken, nor the slightest allusion made, to the trial or any of the parties connected with it, at either of the entertainments or on the occasions of drinking at the bars of saloons. It may be conceded that acts of ordinary and neighborly kindness, or of hospitality, to jurors sitting in the trial of a case—especially one of a criminal nature, by attorneys engaged in the trial, are "more honored in the breach than the observance." The exercise of such acts, during the progress of such a trial, serves to place the parties performing them in a position capable of being injuriously interpreted by those who may be adversely interested in the trial or who may be watching it from the stand point of sympathy or feeling with the litigants, and, in that way, confidence in judicial proceedings may be affected; but in themselves, unaccompanied by words or circumstances tending to show improper motives or that a bias might have been created in the minds of any of the jurors which injuriously affected the person against whom the verdict was rendered, they do not justify an inference that the jury were influenced by them in making up their verdict.

The legal presumption is, that jurors perform their duty in accordance with the oath they have taken: People v. Williams, 24 Cal., 31, and that presumption is not overcome by proof of the mere fact that, during a trial which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor, at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which rendered the act of invitation necessary; and of a supper at the hotel of his associate counsel, under like circumstances. Such acts, however improper or indiscreet, could not, in themselves, have affected the impartiality of anyone of the jurors or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict. "Whilst

the law," says chief-justice Sharkey, "is rightly vigilant in guarding and preserving the purity of jury trials, yet it will not for light or trivial causes, impugn the integrity of juries, or question the solemnity and impartiality of verdicts:" Hare v. The State, 4 How., 369. It is the settled rule that, to warrant the setting aside of a verdict and granting of a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct the verdict will not be disturbed.

There is nothing in The People v. Gray, 61 Cal., 164, which conflicts with this conclusion. In that case, the jury had, during the trial, drank freely if not grossly of liquors procured by themselves. Upon the submission of the case to them for their deliberation some of them took bottles of whiskey with them into the jury room, and there was evidence tending to show that one of them, while deliberating on the verdict, drank so much as to unfit him for the proper discharge of duty. There is no doubt that the actual drunkenness of a juror will always vitiate a verdict. But here there is no showing that any juror was under the influence of liquor while on duty, or that any liquor was drank at any time while on duty; and there is nothing in the acts charged from which the court could reasonably infer that they, in the slightest degree, influenced the result.

There is no basis for the charge that the sheriff improperly spoke to one of the jurors about the evidence in the case.

The alleged newly discovered evidence of a fact known at the trial as to a matter about which one of the witnesses testified, is no ground for a new trial. No diligence is shown for not using the fact as evidence. Besides, it merely tended to impeach the evidence of the witness on a former trial; and a new trial is not grantable for merely impeaching evidence.

There was no objection taken to the alleged transgression of the district attorney in the argument of the case. The court itself interposed to stop it, and the attorney desisted.

There was no error in the charge of the court.

Judgment and order affirmed.

McKINSTRY, J., and ROSS, J. We concur in the judgment, and in the conclusions reached in the foregoing opinion.

No. 8,334.

BANGS v. DUNN, AUDITOR, ETC., ET AL.

Department One. Filed October 31, 1884.

ASSIGNMENT OF OFFICIAL'S SALARY BEFORE IT BECOMES DUE.—The assignment by a public official of his salary before it becomes due, is contrary to public policy and void.

THE SAME—DEMAND FOR SALARY—ESTOPPEL OF OFFICER.—A deputy of a public officer, who delivers to his superior a demand upon the treasury for his salary, before the same is due, and endorses thereon the words "received payment," subscribing the same with his name, is not estopped from disputing the authority of such superior officer to make an assignment of such demand, if the same is made before the salary becomes due.

ERRONEOUS ORDER CONSOLIDATING ACTIONS, WHEN NO GROUNDS FOR REVERSAL.—An erroneous order consolidating certain actions is not ground for reversal, if it appears from the findings that the appellant is not entitled to a judgment.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant. The opinion states the fact.

Sidney V. Smith & Son, for the appellant.

Clitus Barbour, Cobb & Moore, Clarence Cook and *J. V. Coffey*, for the respondents.

MCKINSTRY, J. The respondents have not appeared nor filed any points in this court.

1. Appellant contends that the English rule, which holds that an assignment by an official of his salary before it becomes due is contrary to public policy and void, has no application in the condition of things in this country. It was so held in State Bank v. Hastings, 15 Wisc., 78. On the other hand, it was decided by the court of appeals of New York that such an assignment was against public policy and void: Bliss v. Lawrence, 58 N. Y., 442. We think the conclusion of the New York court is sustained by the more satisfactory reasoning.

2. Each of certain deputies and copyists in the office of the clerk of the city and county of San Francisco (in the early part of the month of July, 1881, or before the commencement of that month), delivered to the clerk a writing purporting to be a *demand* upon the treasury of said city for his compensation or salary as for said July, and having endorsed thereon the words "received payment," subscribed with the name of such deputy or copyist. The writing was immediately, and before the salary was due, delivered by the clerk to the petitioner for a valuable consideration.

It it contended by appellant that the defendant, Dunn, the Auditor, is estopped from setting up a want of authority on the part of the said clerk (Stuart). That if Stuart committed a fraud upon his deputies and copyists by negotiating or assigning the demands, it was a fraud which they gave him the power and helped him to commit, and they should suffer who conferred on the clerk the ostensible authority to deal with the demands. But the plaintiff received the demands "in the early part of July," and before the respective salaries for that month were earned. He thus took part in a transaction contrary to public policy, and must be held to have knowingly contravened the law.

3. The orders of the court below, consolidating certain actions, and directing or providing for interventions, were irregular: C. C. P., 387, 1048. But appellant did not except to the orders. Even if it should be conceded that the court below had no jurisdiction to make the orders, appellant was not injured by them, if upon the findings he was not entitled to a judgment in his favor.

Judgment affirmed.

ROSS and MCKEE concurred.

No. 8,500.

LEHN v. CITY AND COUNTY OF SAN FRANCISCO.

Department One. Filed October 31, 1884.

SAN FRANCISCO LIABLE FOR SEWAGE DISCHARGE.—The city and county of San Francisco is liable for damages caused by the discharge of a public sewer, even if it was part of a plan adopted by the board of supervisors, that such sewer shou'd be left open at the places through which its contents flowed.

PRESENTATION OF CLAIM AGAINST COUNTY—STATUTES REQUIRING NOT APPLICABLE TO SAN FRANCISCO.—Section 4,072 of the political code, requiring claims against counties to be presented to the board of supervisors before an action can be maintained thereon, has no application to the city and county of San Francisco The act of 1855 requiring such presentation, even if applicable to the city and county of San Francisco, has been repealed by the political code.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

J. F. Cowdery, for the appellant.

M. G. Cobb and *Saffold & Meux*, for the respondent.

MCKINSTRY, J. 1. The defendant is responsible for damages caused as alleged in the complaint, even if it was part of a *plan* adopted by the board of supervisors, that the sewers mentioned in the complaint should be left open at places through which their contents flowed on to the plaintiff's land: Guerin v. San Francisco, No. 6,090; Jessup v. San Francisco, No. 6,842.

2. Section 4,072 of the political code is inapplicable to the city and county of San Francisco: Pol. C., 4,087. No section or clause of the statutes which constitute the charter of San Francisco requires a claim or demand against the municipality to be presented to the supervisors before suit can be brought upon it. In People v. Supervisors, 28 Cal., 431, it was intimated—(although the point was not involved in the determination of the case)—that the provisions of the act of 1855, which made the presentation of a claim against a county to the supervisors and its rejection by them, a prerequisite to a suit upon it, applied to the city and county of San Francisco. Even if that case could be held to be authoritative as to the point prior to the adoption of the codes, the act of 1855 was repealed by the political code, and, as we have seen, the clause of that code as to presentation, is expressly declared to be inapplicable to San Francisco.

Judgment affirmed.

MCKEE, J., and ROSS, J., concurred.

9,635.

CHAFFEY ET AL. v. DEXTER.

Department Two. Filed November 1, 1884.

COMPROMISE OF ACTION BY ATTORNEY—INSTRUCTIONS OF CLIENT.—A compromise of an action, entered into by an attorney in accordance with his understanding of his client's wishes, as expressed by the client himself, will not be set aside simply because the attorney misunderstood his client's wishes.

APPEAL from an order of the superior court for San Bernardino county. The opinion states the facts.

H. M. Willis, for the appellants.

Henry Goodcell, Jr., for the respondent.

SHARPSTEIN, J. The plaintiffs, Geo. and Wm. B. Chaffey, and the Pomona Land and Water Company, brought an action against the defendant for the diversion of a large portion of the water of San Antonio creek which flows over the plaintiffs' lands. The defendant denied the material allegations of the complaint and alleged that he was the owner of the exclusive right to use and control forty inches, measured under a four inch presure, of the water of said stream for the purpose of irrigation, etc. The answer was filed on the fifteenth of October, 1883. On the twelfth of February, 1884, a judgment was entered in accordance with a written stipulation of the attorneys of the several parties, by which it was adjudged and decreed that the plaintiffs were entitled to the use and control of all the water flowing in said creek with the exception of twenty inches measured under a four inch pressure, which the defendant was entitled to use and control.

On the twenty-eighth of March, 1884, plaintiffs' attorney gave defendant's attorney notice that the plaintiffs would move the court that said stipulation and said judgment entered in pursuance thereof, be set aside, "on the ground that the said stipulation was made under mistake, inadvertence and excusable neglect of attorney for plaintiffs, H. M. Willis, and upon representations upon which he relied made by one Towner, attorney for Pomona Land and Water company, one of the plaintiffs," and that the motion would be made on the papers in the case and upon affidavits.

By the affidavit of Mr. Willis, it appears that at some time intermediate the date of the commencement of the action and the entry of the judgment, he had a conversation with the plaintiff, Geo. Chaffey, Jr., in regard to a compromise of the action, on terms, as Mr. Willis understood, expressed in the stipulation which he subseqently entered into with the defendant's attorney. We refer to the following clause in said affidavit: "That, in a previous conversation with his client, Geo. Chaffey, Jr., the proposition of allowing twenty inches of water to defendant was discussed between them, but defendant did not understand his client in the way said client, as he now informs him, intended to be understood, to wit: that they were willing to allow, as a compromise, the defendant to have the amount of a certain box or flume, leading from said creek mentioned

in the pleadings, to defendant's farm—said box or flume containing about twenty inches of water—to be used by him, defendant, on his land exclusively, adjacent to said stream, at stated periods, about once a week; that the deponent had no authority, in writing or verbal, from his client, in relation to said compromise, but acted solely in said matter on his understanding of his client's wishes, and upon representations made to him by said Turner."

From this it appears that the matter of a compromise was talked over between the client and his attorney, and that the attorney did compromise on the very terms to which he supposed his client had assented. We think, upon this evidence, that the Court was justified in finding that the client authorized his attorney to compromise as he did. Whether the attorney correctly understood his client, is a question which is left in doubt, and that being so, we cannot disturb the order of the Court below. The attorney undoubtedly acted according to his understanding of his client's wishes, as expressed by the client himself.

Order affirmed,

THORNTON and MYRICK concurred.

8261,

HARRIS ET AL v. HILLEGASS, ADMINISTRATRIX, &C. ET AL.

Department One. Filed November 6, 1884.

STALE DEMANDS—EQUITY MAY REFUSE TO ENTERTAIN.—A court of equity may refuse to entertain a suit, brought after unreasonable delay, although the defendant has not in his answer alleged that the claim is stale. A delay of more than twenty years in bringing this action held unreasonable.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the defendants, and from an order denying the plaintiffs a new trial.

E. J. Pringle, for the appellants.

Sidney V. Smith & Son, for the respondents.

MCKINSTRY, J. There was evidence to sustain the finding that the partnership, created by the contract of June 26, 1849, was dissolved more than twenty years before the commencement of this action. As the dissolution occurred more than twenty years before the commencement of this action, the court below—a court of equity—was justified in refusing to entertain plaintiffs' application for relief. And as *laches* deprives a plaintiff of the right to appeal to a court of equity, the court may refuse to entertain a suit brought after unreasonable delay, although the defendant has not in his answer alleged that the claim is stale: Sullivan v. Portland, 94. U. S., 811.

Judgment affirmed.

MCKEE, J., and ROSS, J., concurred.

No. 7,102.

WHITTIER ET AL. *v.* DIETZ.

Department One. Filed November 6, 1884.

TRADE MARK—EXCLUSIVE USE OF—RECORDING WITH SECRETARY OF STATE.—Subsequent to the adoption of the code a right to the exclusive use of a trade-mark or name, in this state cannot be acquired, unless it be filed for record with the secretary of state.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

Wheaton & Scrivner, for the appellant.

J. L. Boone, for the respondent.

MCKINSTRY, J. No points have been filed on the part of respondent.

We think the device alleged to have been used by defendant is not such a colorable imitation of the plaintiff's label as could deceive: Falkingburg v. Lucy, 35 Cal., 52. No one, since the codes went into operation, can acquire the exclusive use of a name or trade-mark in this state, except by filing it for record with the secretary of state: Pol. Code, 3,197. Section 3,199 only provides that one may become the owner of a name or trade-mark who has first adopted, recorded and used it—whether first used within or beyond the limits of the state. Only by making the clause "within or beyond the limits of the state," relate to the *use* of the name or trade-mark can effect be given to the word "recorded" in the same action. What is a legal *record* of a trade-mark in another state? It is manifest the record referred to is the record in the office of the secretary of state. Derringer v. Plate, 29 Cal., 292, was decided before the codes, and turned in part upon the point that the act of 1863, provided that the counterfeiting of a trade-mark should be a *misdemeanor*, punishable as such, and thus only creating a new penalty for a violation of the trade-mark provided by the statute; and, principally, upon the fact that the act of 1863, contained sections which clearly indicated the legislature did not intend to divest of existing rights in trade-marks, those who had acquired the right at common law, before the taking effect of the act.

Here the complaint shows that plaintiff's asserted right is claimed to have been acquired subsequent to the adoption of the codes, and neither the political nor civil code imposes any special or additional penalty upon violators of such rights, nor furnishes any remedy for their enforcement unknown to the common law.

Judgment affirmed.

MCKEE, J., and ROSS, J., concurred.

WEST COAST REPORTER.

WHOLE No. 47. NOVEMBER 20, 1884. VOL. IV. No. 8.

COMMUNITY PROPERTY.

The system of community property in this state, as established and regulated by the civil code, and as settled by judicial decisions, may produce some very curious and unexpected results. After the lapse of several years, it is possible, even if not probable, that the operations of the system may be found to have created a serious confusion and complexity among private titles,—especially among titles to real property, a confusion which the universal practice of recording conveyances, can do nothing to obviate, but will rather tend to increase. I purpose in the present article to point out some of these possible or probable effects. The main features of the community property system are clearly defined in a few sections of the civil code. After describing the separate property of each spouse, the code says: "§ 164. All other property acquired after marriage by either husband or wife, is community property." It should be carefully observed that in everything relating to the acquisition of community property, and to the determining what property *is* community property, both husband and wife are placed upon absolutely the same footing. This is the key to the whole position. My purposes do not require me to examine with any care the question, what property is community property? I only desire to emphasize the fact, that whatever belongs to the community property and to its acquisition, exactly the same rules apply to the husband and to the wife, with the single exception as to her earnings when living separate and apart from her husband. With regard to the power of controlling, managing, and disposing of the community property, the code provides: "§ 167. The property of the community is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereof executed by the husband." As the wife cannot bind the community property by her contracts, so *a fortiori* she cannot dispose of it absolutely by her conveyance or transfer. "§ 172. The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate." From the very commencement of the state government the separate property of the two spouses and the community property have existed in all respects essentially the same, and with sub-

stantially the same statutory regulations, as at present under the civil code. The only material differences were that under an early statute which was operative for a time, the rents, issues, and profits of the separate estate of each spouse were declared to be community property. This statute was held void, so far as it applied to the wife's separate property, on account of a clause of the state constitution defining and protecting her separate estate. And by another early statute, which remained in force for a while, the wife had not the complete, unrestricted power of disposing and conveying her separate property which is given to her by the code. With these exceptions, and so far as any questions to be examined in this article turn upon statutes, the statutory provisions concerning community property prior to the code, were essentially the same as those contained in the civil code. Decisions made upon this earlier legislation will, therefore, be applicable and binding at the present day.

In the judicial interpretation of this legislation, certain principles or general doctrines have been settled by the courts. One of these I have already mentioned in a previous article, that the theory of community property assumes it to be always the product of the joint labors and activity of the two spouses. Another most important principle, and which, in connection with the sections of the civil code quoted above, will be the foundation of all my subsequent speculations, relates to the acquisition of community property, and to the presumption which arises from the acquisition of any property *after* the marriage by either spouse.

It is the fundamental doctrine, established by an absolute unanimity of decision in all the states where the system exists, that all property acquired either by the husband or by the wife during the marriage, and especially where it appears to have been conveyed, assigned or purchased for a valuable consideration, is presumed to be community property, and the burden of proof lies upon the owner claiming it to be the separate property of either spouse. The leading case in this state is Meyer v. Kinzer.[1] Mr. Justice Field quotes from important decisions of the Texas and Louisiana courts, and then applies their doctrine to the law of California, as follows: "In Love v. Robertson,[2] the supreme court of Texas held this language: 'The presumption that property purchased during the marriage was community property, would certainly be very cogent, and would require to be repelled by clear and conclusive proof.' In Houston v. Carl,[3] the same court said: 'It is the settled doctrine and law that property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds either of the husband or of the wife, in which case it

[1] 12 Cal., 247, 252. [2] 7 Tex., 11. [3] 8 Tex., 240.

remains the separate property of the party whose money was employed in the acquisition.' And again in Chapman v. Allen,[4] the court said: 'The presumption that property purchased during the marriage is community property, is very cogent, and can only be repelled by clear and conclusive proof that it was purchased with individual money or property of one of the parties.' Where the property has not been preserved in specie or in kind, but, as in this case, has undergone mutations and changes, it is indispensable, in order to ascertain its separate character, that it be clearly and indisputably traced and identified.[5]

"To the same effect are the decisions of the supreme court of Louisiana. In Smalley v. Lawrence,[6] the plaintiff claimed to be owner of several tracts of land, by purchase from the United States, against an assignment of his property to his creditors by her husband. The parties were married in 1839, and the land was bid off at a land sale in 1841, and paid for by the husband, who took the receipts in the name of his wife, the plaintiff, and the court said: 'The land was purchased during the continuance of the community, and although the receipts or certificates are in the name of the wife, still the property *as much belongs to the community* as if it stood in the name of the husband, unless she can prove that the purchases were made with her own money or the property was given in payment of a debt owing to her in her own right. All property acquired by either spouse during the existence of the community, the law presumes to belong to it, and is liable for community debts. If the wife sets up a separate claim, she must make legal proof of it. *The title being in her name does not even raise a presumption in her favor.*"[7] This invariable presumption which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment of, or as the price of, the property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion and fraud." The principle so clearly laid down by Mr. Justice Field, has been reaffirmed in numerous subsequent decisions without exception, and is the settled doctrine of the law of this state.[8]

[4] 15 Tex., 278.

[5] See, also, Lott v. Keach, 5 Tex., 394; Hemmingway v. Matthews, 16 Id., 207; Parker v. Chance, 11 Id., 513; Wells v. Cockrum; 13 Id., 127; Clairborne v. Tanner, 13 Id., 69.

[6] 9 Rob., 201.

[7] See, also, Ford v. Ford, 1 La., 201; Davidson v. Stuart, 10 Id., 146; Dominguez v. Lee, 17 Id., 295; Comeau v. Fontenot, 19 Id., 405; Fisher v. Gordy, 2 La. An., 762; Provost v. Delahouseaye, 5 Id., 610; Prendergast v. Cassidy, 8 Id., 96; Webb v. Peet, 7 Id, 92; Andrew v. Bradley, 10 Id., 606; Forbes v. Forbes, 11 Id., 326.

[8] See the following cases among others: Smith v. Smith, 12 Cal., 216; Mott v. Smith, 16 Id., 533, 557; Burton v. Lies, 21 Id., 87; Adams v. Knowlton, 22 Id., 283; Riley v. Pehl, 23 Id., 70; McDonald v. Badger, 23 Id., 393; Landers v. Bolton, 26 Id., 393, 420; Ramsdell v. Fuller, 28 Id., 37; Peck v. Brummagim, 31 Id., 440; Althof v. Conheim, 38 Id., 230, 223.

While thus referring to the decisions, I shall quote two other cases, although their bearing is now directly upon points to be mentioned in a subsequent portion of the discussion. In Pixley v. Huggins,[9] the facts were as follows: One L. conveyed certain land by deed to the wife of M. for four thousand dollars, which sum was recited in the deed as the consideration thereof. Afterwards, M. and his wife, by a joint deed expressing a consideration of nine thousand five hundred dollars, conveyed the same land to the plaintiff, this deed being sufficiently acknowledged by the husband, M., but not so acknowledged by his wife as to make it a valid deed by her. The deed in this condition was recorded. Some time after this last conveyance, the defendants obtained a judgment against M., which was docketed in the county where the land was situated, and execution thereon was issued to the sheriff. He, therefore, levied on this land and advertised all of M.'s right and title in it for sale, claiming that the aforesaid deed from M. and his wife to the plaintiff was void. Plaintiff brought this action to restrain defendants and the said sheriff from selling the land under the execution. The court held that the injunction should be granted; because by the deed from L. to Mrs. M., the land thus conveyed to her became community property, and the husband M. had the absolute power to dispose of it, and the full title passed to the plaintiff by M.'s sole deed, even though M.'s wife had not attempted to join in it.

On the subject of the land being community property, and not the separate property of Mrs. M., the court further held that the fact that the deed from L. was taken in the name of M.'s wife alone, created no inference nor presumption that the property was her separate property, the deed having been made on a purchase; that the fact of a purchase from a third person excludes the supposition of an acquisition by gift, bequest, devise and descent; and that in the absence of proof that the purchase was made with the separate funds of the wife, the presumption that it is community property is absolute and conclusive; and that the husband could sell and convey the community property by his sole deed without the concurrence or consent of his wife. Again, in Tusten v. Faught,[10] it was held that when land is conveyed to a married woman by a deed which recites a consideration of money paid, as well as love and affection, the land so conveyed becomes community property, and the deed of the husband alone is sufficient to convey it to a third person.

My attention was directed to some of the peculiarities of the community property system, and to possible results which might flow from it, by the facts of a case which recently came under my notice. As this case furnishes a striking illustration of these possibilities, I shall briefly state its material facts, suppressing of course all names, places, and

[9] 15 Cal., 128. [10] 23 Cal., 237.

dates. It is enough that the case actually occurred in one of the counties of this state. A gentleman, whom I will call A., formerly resided in this state. He was married and owned property. A.'s wife's father, who lived in another state, possessed a considerable property. On the death of her father Mrs. A. received a considerable sum as her portion of his estate, either as a legacy, or as her distributive share. This amount she invested in lands, taking the title thereto in her own name. The deeds were in the ordinary form of simple conveyances, vesting the title in her as the grantee, reciting the purchase price as so much money paid by her, but not indicating in any manner that the price so paid was her separate estate, nor the source from which she derived it. All this took place many years ago, during their marriage, and before Mr. A.'s death. Mrs. A. continued to hold these lands during the remainder of her husband's life, and down to her own death. Some time after this conveyance to her Mr. A. died, leaving one child, and Mrs. A., his widow. His estate was regularly administered upon and settled. Several years afterwards elapsed and their only child died; and finally, not very long since, Mrs. A. died. The only parties interested in her estate were certain collateral relatives of Mr. A., and certain collateral relatives—say brothers and sisters—of Mrs. A. Thereupon the collateral relatives of the husband, Mr. A., perhaps then for the first time discovering the nature of Mrs. A.'s title, insisted that the lands so conveyed to Mrs. A. during the marriage, as above described, were not her separate property, but were community property, and as such, a portion thereof belonged to Mr. A., and they as his heirs were entitled to succeed to that portion. This claim of Mr. A.'s heirs was sustained by the doctrine that all property acquired by the wife by purchase during the marriage is presumed to be community property. Indeed, the cases hold, as has been shown, that, where a purchase is made from a third person, the fact of the title being taken in the name of the wife *does not raise the slightest inference* that the property so acquired by her is her private property. The heirs of Mrs. A. knew, with a moral certainty, that the lands were purchased by her with funds received by bequest or inheritance from her own father's estate, and they were therefore her separate property in which the heirs of Mr. A. had no interest whatever. But to overcome the contrary presumption and establish this fact, requires, as the decisions all hold, clear, convincing, and unequivocal *legal proof.*

On account of the lapse of many years since the lands were conveyed to her it was very difficult to obtain such proof, or in fact, *any legal* evidence. It required the evidence of some one who had a personal knowledge that the price paid for the lands was money received by Mrs A., as a legatee or distributee, from her father's estate. It so happened that the gentlemen, who had acted as legal advisers of Mr. and Mrs. A. at

and after the time, were dead. A gentleman who had long managed Mrs. A.'s business affairs as her agent was also dead. No evidence bearing upon the matter was preserved in the papers of these parties. Other probable witnesses were dead or had disappeared. At last, however, after much inquiry, a person was found who was instrumental in effecting the purchase, and through whose hands the purchase price had passed, and who was able to establish the fact from his own personal knowledge, that the consideration paid by Mrs. A. for the lands so conveyed to her was money received by her from the estate of her deceased father. From the information thus communicated by this gentleman, the relatives of Mr. A. were necessarily satisfied that the lands in question were Mrs. A.'s separate property, and abandoned their claim upon it without further controversy. If Mrs. A.'s relatives had been unable to procure such satisfactory legal proof, and a litigation had ensued, it is difficult to see how the heirs of Mr. A. could have been prevented from successfully maintaining the claim that the lands were community property, and that they were entitled to the portion of it belonging, in that case, to the deceased husband.

It thus becomes possible under this system that, at the expiration of many years after the husband's death, and after his estate has apparently been fully administered, settled and distributed, lands, of which the title is shown by the records to be held by the wife, may, on her death, be claimed by the husband's heirs as community property of the spouses; and the success of such claim may wholly depend upon the personal knowledge and recollection of witnesses as to facts which do not appear upon the record, althought the lands were conveyed to her during the marriage and have ever since remained in her ownership, and during all that time have been regarded and treated as her own separate property, and although they were in fact her separate property, having been paid for by her with money received by bequest. The presumption being in favor of the claim that the lands are community property, the success of the wife's heirs in overcoming the presumption and establishing her right of separate property, may rest wholly in their ability to prove by parol testimony this single fact that the purchase price was paid in such a manner. In other words, although a wife's apparent record to it may be perfect and unbroken, seeming to vest in her a complete legal ownership, yet it may be presumptively no title at all, and may be wholly defeated by parol proof of a fact outside of the record, and which need not appear on the record. The very same results might arise with respect to personal property. *J. N. P.*

(To be continued.)

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

IN THE MATTER OF LOOK TIN SING, ON HABEAS CORPUS.*

September 20, 1884

CITIZENSHIP OF PERSONS BORN IN THE UNITED STATES OF CHINESE PARENTS.—A person born within the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the Emperor of China, is a citizen of the United States.

CONSTRUCTION OF WORDS "SUBJECT TO JURISDICTION THEREOF," IN FIRST CLAUSE OF SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION.—Persons are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, with the consequent obligation to obey them when obedience can be rendered; but only those who are thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. Persons excepted from citizenship, notwithstanding their birth or naturalization in the United States.

ORIGIN OF THE CLAUSE IN THE AMENDMENT DECLARING WHO ARE CITIZENS OF THE UNITED STATES.—Previous to this amendment, the general doctrine, except as applied to Africans brought here and sold as slaves, and their descendants, was, that birth within the dominions and jurisdiction of the United States, of itself created citizenship. The amendment was adopted as an authoritative declaration of this doctrine as to the white race, and also to do away with the exception as to Africans and their descendants.

THE RESTRICTION ACTS NOT APPLICABLE TO CITIZENS.—The acts of congress of 1882 and 1884, restricting the immigration of Chinese laborers to the United States, are not applicable to citizens of the United States, though of Chinese parentage. No citizen can be excluded from the United States except in punishment for crime.

Before FIELD, Circuit Justice; SAWYER, Circuit Judge, and SABIN, District Judge.†

T. D. Riordan and *William M. Stewart*, for the petitioner.

S. G. Hilborn, United States attorney, *Carroll Cook*, assistant United States attorney, and *John N. Pomeroy*, for the United States.

BY THE COURT, FIELD, C. J. The petitioner belongs to the Chinese race, but he was born in Mendocino, in the state of California, in 1870. In 1879 he went to China, and returned to the port of San Francisco during the present month (September, 1884), and now seeks to land, claiming the right to do so as a natural born citizen of the United States. It is admitted by an agreed statement of facts that his parents are now residing in Mendocino in California, and have resided there for the last twenty years; that they are of the Chinese race, and have always been subjects of the Emperor of China; that his father sent the petitioner to China, but with the intention that he should return to this country; that the father is a merchant at Mendocino, and is not here in any diplomatic or other official capacity under the Emperor of China. The petitioner is without any certificate, under the act of 1882 or of 1884, and the district attorney of the United States, intervening for the government, objects to his landing for the want of such certificate.

The first section of the fourteenth amendment to the constitution declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

*[NOTE.—The opinion in this case as reported, ante, page 71, having been carefully revised, it is thought desirable to republish it in the form in which it will appear in the records of the court. No change has been made in the points decided, but they are more clearly stated and more fully illustrated.]

†Judge Hoffman did not sit on the hearing of this case, but he was on the bench when the opinion was delivered, and concurred in the views expressed.

States, and of the state wherein they reside." This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words "*subject to the jurisdiction thereof.*" They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them, when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This ex-territoriality of their residence secures to their children born here all the rights and privileges which would enure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, whilst within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States.

The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognize the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British crown, as belonging to every human being—God-given and inalienable—the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial dicta that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent when he published his Commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as citizens those belonging to our race, who, coming from other lands, manifest attachment to our institutions, and desire to be incorporated with us. So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that as soon as they are naturalized they are deemed entitled, with the native-born, to all

the protection which the government can extend to them, wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here, is accorded to them, as well as to the native-born, to transfer their allegiance from our government to that of other states.

In an opinion of attorney-general Black, in the case of a native Bavarian, who came to this country, and, after being naturalized, returned to Bavaria, and desired to resume his status as a Bavarian, this doctrine is maintained. "There is," he says, "no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with this government, if he sees proper to do so, in time of peace, and for a purpose not directly injurious to the interests of the country. There is no mode of renunciation prescribed. In my opinion, if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government—this would imply a dissolution of his previous relations with the United States, and I do not think we could, or would, afterwards claim from him any of the duties of a citizen:" Opinions of Attorney-generals, vol. IX, 62.

The doctrine thus stated has long been received in the United States as a settled rule of public law; and in the treaty of 1868, between China and this country, the right of man to change his home and allegiance is recognized as "inherent and inalienable:" Art. V., 16 Stats., 740. And in the recital of an act of congress passed nearly at the same time with the signing of the treaty, this right is assumed to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness;" and in the body of the act, "any declaration, instruction, opinion, order or decision of any officers of this government which denies, restricts, impairs or questions the right of expatriation," is declared to be "inconsistent with the fundamental principles" of our goverment: 13 Stats., 223; R. S., sec. 1,999.*

*The treaty was signed on the 28th of July, 1868. The following act of congress was approved the 27th of the same month.

CHAP. CCXLIX.—An act concerning the rights of American citizens in foreign states.

WHEREAS the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore,

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, That any declaration, instruction, opinion, order or decision of any officers of this government, which denies, restricts, impairs or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.

SEC. 2. And be it further enacted, That all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

SEC. 3. And be it further enacted, That whenever it shall be made known to the president that any citizen of the United States has been unjustly deprived of his liberty by or under

So, therefore, if persons born or naturalized in the United States have removed from the country and renounced, in any of the ordinary modes of renunciation, their citizenship, they thenceforth cease to be subject to the jurisdiction of the United States.*

With this explanation of the meaning of the words in the fourteenth amendment, "subject to the jurisdiction thereof," it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship; and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

The clause as to citizenship was inserted in the amendment, not merely as an authoritative declaration of the generally recognized law of the country so far as the white race is concerned, but also to overrule the doctrine of the Dred Scott case, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States nor capable of becoming such. The clause changed the entire status of these people. It lifted them from their condition of mere freedmen and conferred upon them, equally with all other native-born, the rights of citizenship. When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the status of either as citizens under the amendment in question.

the authority of any foreign government, it shall be the duty of the president forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the president shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the president to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts or proceedings relative thereto shall, as soon as practicable, be communicated by the president to congress.

Approved July 27, 1868.

The provisions of this statute are re-enacted in the revised statutes in sections 1,999, 2,000 and 2,001.

*Many other cases might be mentioned where persons would not be citizens though born in the country. Thus, as Kent says: "If a portion of the country be taken and held by conquest in war, the conquerer acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs:" 2 Comm., 42. By allegiance, as thus used, is meant the duty of obedience to the government or sovereign under which the children live, for the protection they receive. But, while they are in their infancy, they cannot, of course, perform that duty, and its performance must necessarily be respited until they arrive at the years of discretion and responsibility. They then owe obedience, not only for the protection then enjoyed, but, as observed by Judge Wilson, for that which they have received from their birth: 1 Wilson's Works, 313. By being born within the allegiance of a government is only meant, being born within the protection of its laws, with a consequent obligation to obey them when obedience can be rendered.

So also as to members of the Indian tribes within the limits of the United States; these tribes are independent political communities, retaining in many respects the right of self-government, notwithstanding they are under the protecting power of the United States, and a member thereof, though born in the country, is not by his birth a citizen of the United States under the fourteenth amendment. He is not born under their actual and exclusive jurisdiction, which the amendment contemplates: McKay v. Campbell, 2 Sawyer, 118; U. S. v. Osborne, 6 Ibid., 406; Worcester v. Georgia, 6 Peters, 515.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by assistant vice-chancellor Sanford, in Lynch against Clarke, found in the first volume of his reports. In that case, one Julia Lynch, born in New York, in 1819, of alien parents, during their temporary sojourn in that city, returned with them the same year to their native country, and always resided there afterwards. It was held that she was a citizen of the United States.

After an exhaustive examination of the law, the vice-chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural born citizen; and added, that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding, he mentions the fact, that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his parents were citizens or foreigners; it is enough that he was born here, whatever was the status of his parents. He shows also that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of the states, and establishes conclusively that there is on this subject a concurrence of legislative declaration with judicial opinion, and that both accord with the general understanding of the profession and of the public.*

Whether it be possible for an alien, who could be naturalized under our laws, to renounce for his children, whilst under the age of majority, the right of citizenship, which by those laws he could acquire for them, it is unnecessary to consider, as no such question is presented here. Nor is the further question before us whether, if he cannot become a citizen, he can, by his act, release any right conferred upon them by the constitution.

* In 1855 congress passed the following act, securing citizenship to children of citizens of the United States born without their limits:

CHAP. LXXI.—An act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

SEC. 2. And be it further enacted, that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen.

Approved February 10, 1855.

The provisions of this statute are re-enacted in the revised statutes in sections 1,993 and 1,994.

As to the position of the district attorney that the restriction act prevents the re-entry of the petitioner into the United States, even if he be a citizen, only a word is necessary. The petitioner is the son of a merchant, and not a laborer within the meaning of the act. Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States.* And no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws and beyond the power of Congress. The petitioner must be allowed to land, and it is so ordered.

SUPREME COURT OF CALIFORNIA.

No. 8,600.

IN RE ESTATE OF HOPPER.

Department One. Filed November 6, 1884.

DEVISE—CONSTRUCTION OF—SALE, AND RE-PURCHASE OF LAND DEVISED.—A testator devised to his son "all that portion of real estate he has enclosed and now has in his possession, supposed to contain one hundred and forty acres, more or less." By other provisions of the will an intention was manifested to dispose of all the property the testator possessed. Subsequent to the date of the will he sold a portion of the land devised, and afterwards bought the same back. *Held*, that the portion so sold and bought back passed to the son under the foregoing devise.

APPEAL from a judgment of the superior court for Napa county. The opinion states the facts.

Spencer & Henning, and *Stanly, Stoney & Hayes*, for the appellant.

Church & Johnson and *A. J. Hull*, for the respondents.

ROSS, J. Charles Hopper, on the first of April, 1868, made his last will and testament, which contained a devise to his son Thomas in these words: "I give, bequeath and devise to my son Thomas B. Hopper that portion of real estate he has inclosed and now has in his possession, supposed to be one hundred and forty (140) acres, more or less." At the date of the will, Thomas B. Hopper had inclosed and in his possession a portion of his father's land, containing about one hundred and forty acres. On the fourteenth of June, 1870, the testator sold and conveyed eighteen acres and a fraction of this tract to one Baldwin, which portion, for convenience, will be referred to as the Baldwin tract, and on the twenty-first of February,

* The restriction act of congress of July 5, 1884, amending the act of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," provides that every Chinese person other than a laborer, entitled to enter the United States under the treaty between our government and China, or under that act, shall obtain from the Chinese government or the government of which he is a subject, its permission to come within the United States, authenticated by its certificate containing various particulars of himself and family, so as to clearly identify him; and whilst such certificate is only *prima facia* evidence against our government, it is made the sole evidence permissible on the part of the person producing it to establish his right of entry into the United States: Chap. 220, sec. 6; Stats. of 1883-4, 115.

1871, sold and conveyed to one Forbes eighteen acres thereof. On the fourth of October, 1871, the testator executed a codicil to his will by which certain provisions of the will were altered, but which did not interfere with the devise to Thomas B. Hopper. On the nineteenth of July, 1872, the testator re-purchased the Baldwin tract, and thereupon entered into possession of it and remained in possession and seized in fee thereof until his death. On the twenty-fifth of January, 1878, the testator conveyed to his son Thomas by deed that portion of the property devised to him not embraced in the conveyance to Baldwin and Forbes. After the death of the testator, which occurred on the twenty-fourth of September, 1880, his will, with the codicil, was duly admitted to probate, and administration upon the estate duly had. Upon the final distribution of the estate the question involved in this appeal arose. That question is, Who is entitled to the Baldwin tract—Thomas B. Hooper or the residuary legatee?

According to the rule of the common law, after-acquired real estate did not pass by a will. And this rule was enforced so strictly, that a will was held to be inoperative upon real estate of which the testator was the owner at the time of the making of the will, and afterwards sold, re-purchased, and died seized—which is the exact case at bar. Tested, therefore, by the rule of the common law, it is plain that Thomas B. Hopper would not be entitled to the disputed premises. But in this state, as in many others, that rule has been changed by statute. Section 22 of the act of April 10, 1850, as amended in 1866 (Stats. 1865-6, p. 381), provides: "Any estate, right or interest in lands acquired by the testator after the making of his will, shall pass thereby and in like manner as if (possessed) at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms, denoting the intent of the testator to devise all the real estate of such testator, shall be construed to pass all such real estate which such testator was entitled to devise at the time of the decease of such testator."

If, therefore, from a fair reading of the will in question, it appears that it was the intent of the testator thereby to devise all of the property of which he should die seized, it is within the operation of the statute to give effect to that intention: Redfield on Wills, vol. 1, pp. 333, 338, 4th ed.; Brimmer v. Sohier, 1 Cush., 132; Winchester v. Forster, 3 Cush., 369; Laggett v Ward, 23 Mo., 127; Quinn v. Hardenburg, 54 N. Y., 87. "Every testator is aware," as said in Brimmer v. Sohier, *supra* "that his will can not take effect until after his death; that until that event all his property remains at his disposal, and, ordinarily, it is from that period that his intention to settle its final distribution may be presumed." But the language of the will we are considering makes manifest the intent of the testator to dispose thereby of all of the property he might own at his death. By it he first directs payment of all his legal debts, after

California; there could, therefore, have been no "pre-emption claim" to the land in a legal sense; but the term "pre-emption" was merely a false designation of a possessory right, which possessory right, at that time, under the laws of the state, was recognized as property and the subject of sale, etc.

As a false designation, however, it does not prejudice the other particulars of the description: sub. 1, sec. 2,077, C. C. P. The decree, therefore, distributed whatever interest the testator had in a tract of land containing "72 acres, situated at the Mission Dolores, to which the testator had a pre-emption right." In itself that would be considered insufficient to attach to any particular tract of land; but it is a description which may be capable of identification by extrinsic evidence. And assuming that it was proved, as the plaintiff offered to prove, that the testator died in possession of seventy-two acres of land near the Mission Dolores, to which he had, or claimed to have had, a possessory right, and that that land came to the knowledge and possession of the executors of his estate, and that it was inventoried and appraised as part of the estate, and accounted for by the executors in one of their annual accounts to the probate court, and that the land thus described and known, is the identical land described in the complaint by metes and bounds, such proofs would go far towards rendering certain the description of the land in the decree, and identifying it with the land described in the complaint. The evidence was therefore admissible. It is well settled, that when the meaning of a will, or other written instrument, is certain and intelligible, the subject or object to which it is to be applied may be ascertained by extrinsic evidence, and when so ascertained will be taken as the meaning of the parties: Case v. Young, 3 Minn., 209; Morgan v. Burrows, 45 Wis., 211: Stanly v. Green, 12 Cal., 148; Bruck v. Tucker, 32 *Id.*, 425.

We think the court erred in excluding the evidence offered by the plaintiff, and that it properly ordered a new trial.

Order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 8,495.

PEREIRA *v.* CENTRAL PACIFIC RAILROAD COMPANY.

Department One. Filed November 7, 1884.

LIABILITY OF RAILROAD COMPANY ON CONTRACT TO CARRY BEYOND TERMINUS—SHIPPING RECEIPT.—A railroad company that contracts to carry goods over its own and connecting roads, and deliver the same within a certain time at a destination beyond the terminus of its own line, is liable to the shipper for damages caused by delay in transportation over such connecting roads. Whether the contract of shipment provided for a carriage beyond such terminus is a question for the jury. Upon the determination of this question the provisions of the receipt delivered by the carrier to the shipper are not conclusive upon the latter.

APPEAL from a judgment of the superior court for San Joaquin county entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

W. L. Dudley, for the appellant.

Caleb Dorsey and *D. S. Terry*, for the respondent.

ROSS, J. The main question in this case is, whether the defendant, whose road ends at Ogden, in the territory of Utah, contracted with the plaintiff to carry his fruit beyond its own terminus over other roads to the city of New York. That question was submitted to a jury in the court below, and the finding in effect was, that defendant did so contract.

It appeared in evidence that the plaintiff being desirous of sending to the New York market a lot of pears, applied to the general freight agent of the defendant corporation to know what defendant would charge him per car load, to be sent by passenger train, plaintiff at the time informing the agent that it was necessary that the fruit should be transported to its destination within ten or twelve days. The agent replied that he did not then know what it would cost, but thought about one thousand five hundred dollars per car load, and, further, that he could not send it through to New York by passenger train, but could send it by passenger train as far as Omaha, and from there to New York by fast freight train, and that thus sent it would reach New York within the time mentioned. The agent promised to let plaintiff know within a few days as to the terms upon which defendant would take the fruit, and accordingly wrote and sent to the plaintiff this letter:

"CENTRAL PACIFIC RAILROAD COMPANY,
GENERAL FREIGHT OFFICE,
SACRAMENTO, CAL., NOV. 14, 1871.

"JOHN PEREIRA, ESQ., JAMESTOWN, TUOLUMNE CO., CAL.—*Dear Sir:* I am in receipt of your favor of November 10th, and have this day telegraphed you as follows: Fruit Stockton to New York, to Omaha by passenger train, thence by freight ten hundred and seventy-five ($1,075), C. Y., per car. Freight must be prepaid or else guaranteed by responsible parties. The current rates on wine Stockton to New York are as follows: Wine in wood, owner's risk of leakage, carloads of eighteen thousand pounds and over, two dollars and fifty cents per one hundred pounds—less than eighteen thousand pounds, and over three thousand, three dollars and fifty cents per one hundred pounds—three thousand pounds and under, four dollars and fifty cents per one hundred pounds. It is not probable that there will be any material change in these rates before next spring. Yours truly, C. W. SMITH, G. F. A.

Plaintiff accepted the terms thus proposed and accordingly delivered to the defendant on the twenty-third of November, 1871, one carload consisting of five hundred and thirty six boxes of pears, consigned to L. Benedict, New York city, and at the same time executed to defendant the guarantee it required that the freight money, one thousand and seventy-five dollars, would be paid to defendant on the delivery of the fruit in New York. Such delay occurred in the transportation of this lot of fruit to its destination, that the re-

sult was it was damaged to such an extent as rendered it almost worthless, and the consignee therefore refused to receive it.

The next lot consisting of two hundred and thirty-five boxes of pears was delivered to defendant upon the same terms, and with a similar guarantee, on the eight day of December, 1871, and was never transported to New York at all, and resulted in a total loss to the plaintiff.

The evidence put before the jury in this case in support of the special contract relied on by the plaintiff is quite as strong if not stronger than the evidence given in Railroad Company v. Pratt, 22 Wall., 131, to establish a similar contract; and in that case the supreme court of the United States held the evidence sufficient to sustain the verdict of the jury to the effect that the undertaking of the company was to carry the property through to the point of final destination. In the case at bar it was understood by both parties that it was necessary that the fruit should be carried through to New York within twelve days at the farthest, and that to accomplish this it was necessary that it should be sent a portion of the way at least by passenger train. Defendant accordingly expressly agreed to carry it by passenger train as far as Omaha—a point beyond the terminus of its own road—and thence by fast freight train to New York—demanding at the same time, as it had the right to do, a guarantee from the plaintiff that the freight money should be paid to *defendant* upon the delivery of the fruit in the city of New York.

When the first lot of fruit was delivered by plaintiff's teamster to the local agent of the defendant, the latter gave the teamster a receipt for the same, which was partly in print and partly in writing, acknowledging the receipt in apparent good order of the property, marked and consigned to L. Benedict, New York, and which receipt recites that "they (the railroad company) agree to deliver with as reasonable dispatch as their general business will permit, subject to the conditions mentioned below, in like good order (the danger incident to railroad transportation, loss or damage of combustible articles by fire while in transit, and unavoidable accidents excepted), at ——— station, upon the payment of charges. The company further agree to forward the property to the place of destination as per margin, but are not to be held liable on account thereof after the same shall be delivered as above. The company, however, guarantee the through rate of freight as designated below: Conditions: The company do not agree to carry the property by any particular train; nor in time for any particular market. * * * It is a part of this agreement that all other carriers transporting the property herein receipted for, as a part of the through line, shall be entitled to the benefit of all the exemptions and conditions above mentioned."

It seems that a similar receipt was given by the local agent of defendant to plaintiff's teamster for the second lot of fruit.

It is contended on behalf of defendant, and was so set up in its answer filed in the cause, that the terms and conditions, stated in

the receipt, constituted the contract between the parties of this action for the transportation of the fruit in question. Whether or not this was so, was a question for the jury to determine in view of all the evidence. The simple delivery of a receipt to the shipper is not conclusive upon the latter: Tyler v. W. U. T. Co., 60 Ill., 431; Mich. Cen. R. R. Co. v. Hale, 6 Mich., 244; Adams Express Co. v. Haynes, 42 Ill., 89; Ill. C. R. R. Co. v. Frankenberg, 54 *Id.*, 88. The court below properly left it the jury to say whether the shipments in question were made under the contract declared on by the plaintiff, or whether the terms and conditions stated in the receipts constituted the contract between the parties. The jury having found from evidence, which we think sufficient to support the verdict, that defendant undertook to carry the fruit through to New York, the the other companies are to be deemed the agents of the defendant, for whose fault it is responsible: Railroad Company v. Pratt, *supra.*

Some minor points are made for the defendant, which we have considered, but see in them no sufficient ground for disturbing the judgment.

Judgment and order affirmed.

McKINSTRY, J. and McKEE, J., concurred.

No. 8,502.

RATHGEB v. TISCORNIA ET AL.

Department Two. Filed November 7, 1884.

CHANGE OF VENUE WHEN DEFENDANTS RESIDE IN DIFFERENT COUNTIES.—A change o the place of trial of an action, to the county in which most of the defendants reside, may be had, when all of the defendants who were served or have appeared unite in a demand for such change.

THE SAME—DISQUALIFICATION OF JUDGE AS AFFECTING RIGHT TO CHANGE.—The disqualification of the judge of the county, to which such change is demanded, to try the case, does not affect the right of the defendants to have it transferred to such county for trial.

AFFIDAVIT OF MERITS—STATEMENT IN.—The statement in an affidavit of merits that the defendant "has fully and fairly stated the case in this action" is equivalent to a statement that he "has fully and fairly stated the facts of the said case."

APPEAL from an order of the superior court for the city and county of San Francisco, granting the defendants' motion for a change of the place of trial. The opinion states the facts.

C. V. Grey, for the appellant.

Reddick & Solinsky, and *A. C. Adams*, for the respondents.

SHARPSTEIN, J. This action was commenced in San Francisco against sixteen defendants—fourteen of them reside in Calaveras county, one in Santa Clara, and one on whom the summons has not been served, and who has not appeared in the action, is in Italy. The fifteen on whom the service was had, appeared and demanded that the place of trial be changed to Calaveras county, where fourteen of them resided. The motion was granted, and this appeal is

from that order. If all the defendants who united in the demand had resided in Calaveras county, their right to have the action tried there would be perfectly clear.

This is one of the actions which the code says, must be tried in the county in which the defendants *or some of them reside;* but which may be tried in the county in which it is commenced, unless the defendant demands that the trial be had in the proper county, *i. e.*, in the county in which the defendants or some them of resided at the commencement of the action. Calaveras county, is the county in which most of the defendants resided at the commencement of the action, and therefore was one of the proper counties for the trial; and as all the defendants who were served, or who have appeared in the action, united in a demand to have the trial in that county, we think the order to have it tried there was correct.

The disqualification of the judge of Calaveras county to try the case in no way affects the rights of the defendants to have it transferred to that county for trial.

If the judge of that county is disqualified, the code plainly points out the course to be pursued.

There is no essential difference between an affidavit of merits, which states that the defendant "has fully and fairly stated the case in this action," and one which states that he "has fully and fairly stated the facts of the said case."

Order affirmed.

THORNTON, J., and MYRICK, J., concurred.

No. 8,435.

CLARK *v.* CHILDS.

Department One. Filed November 7, 1884.

EXECUTION AND DELIVERY OF WRITTEN INSTRUMENT—CONSTRUCTION OF CODE.—The execution of a written instrument, within the meaning of section 448 of the code of civil procedure, includes its delivery.

RELEASE—DELIVERY—ESTOPPEL—ADMISSION OF DUE EXECUTION OF INSTRUMENT SET FORTH IN ANSWER.—A release which has never been delivered is not binding. And a defendant who sets up such release in his answer as a bar to the plaintiff's demand, and himself introduces evidence showing that the release was not in fact delivered, is estopped from claiming the benefit of the admission arising out of the plaintiff's failure to deny by affidavit the genuineness and due execution of the instrument.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

Latimer & Morrow, for the appellant.

J. M. Nougues, for the respondent.

MCKINSTRY, J. The action is to recover the proceeds of a sale by defendant of certain stocks, the property of plaintiff. The original

answer set out a release under seal (of date July 18, 1874), whereby plaintiff, in consideration of one dollar, as recited, remised, released and forever discharged the appellant, defendant, of and from all demands, etc. The amended answer avers certain payments on account of the indebtedness of defendant, aggregating one thousand and fifty dollars; and further alleges that, on the first day of July, 1874, defendant paid to plaintiff, and plaintiff accepted and received from defendant, two hundred and fifty dollars, in full satisfaction and discharge of the damages, liability, debt and cause of action set out in the complaint.

The plaintiff failed to file with the clerk within ten days after service of the original answer, the affidavit provided for in section 448 of the code of civil procedure. The genuinenss and due execution of the release pleaded were, therefore, admitted, and the "execution" of a written instrument, within the meaning of the section of the code, includes its delivery.

But defendant here did not ask for nonsuit, or for judgment on the pleadings, but called the plaintiff as a witness and proceeded to examine him with reference to the release set forth in the answer. The testimony of the witness was to the effect that the release recited in the original answer, was not in fact delivered to the defendant, but was given to the president of the San Francisco Stock and Exchange Board, under the circumstances following: The board had adopted certain rules, numbered 44 and 45, which read:

"Article 44—Arbitration claims of non-members:

"Any person not a member of the board shall have the right to bring a claim against a member of said board arising from any transaction in stocks or money loaned during his membership, on the conditions following, and not otherwise: The person making such claim shall execute a full release of his claim against said member, duly signed, and shall deliver the same to the president, to be held in trust to abide the event of the suit before said board.

"The president shall keep the said release in trust, to abide result of said suit, and shall deliver the same to the defendant on the happening of either of the three following events:

"First. In case the claimant shall not present his claim to the board within twenty days after executing said release.

"Second. In case judgment shall be rendered for said defendant by the board.

"Third. In case the defendant shall pay or offer to pay to such claimant the amount of judgment rendered in favor of said claimant.

"In case judgment shall be rendered against any member of the board, which he is unable or unwilling to pay, then such release shall be cancelled and returned to such claimant.

FORM OF RELEASE.

"Know all men by these presents: That I, ———, for and in consideration of the sum of one dollar, to me in hand paid by ———, the receipt of which is hereby acknowledged, have remised, released and forever discharged, and by these presents I do hereby

ermise, release, and forever discharge the said ——— of and from any and all demands heretofore existing, and due and owing to me, and the said ——— is hereby fully released and discharged from the same.

"Sealed with my seal, and dated San Francisco, this —— day ———, 18—."

"ARTICLE 45.—*Regarding suspension of members and legal proceedings*:

"In all cases where, and in accordance with the provisions of Article 44 of the by-laws, a judgment has been or shall be rendered against any member of the board by the board, such member shall, without further action of the board, stand suspended from the time of the rendition of such judgment until the same is fully paid or satisfied, or tendered and refused. Whenever any creditor of a member of this board, or any person asserting a claim against a member of this board, has voluntarily, or shall voluntarily, resort to any legal tribunal, or has voluntarily instituted, or shall voluntarily institute any legal proceedings against such member concerning his claim, such claim shall not be recognized or enforced by this board."

Sometime after the commencement of this action plaintiff brought his claim to the San Francisco stock and exchange board, against the defendant who was a member of the board, and signed, sealed and delivered to the president the release set forth in the original answer, in trust, as by article 44. The plaintiff a day or two after executing such release in consideration of two hundred and fifty dollars paid him by defendant, withdrew his claim from and dismissed his proceeding in the stock and exchange board, and executed and delivered to defendant at the same time a second release, in form like the first.

When the proceeding in the board was abandoned by plaintiff, at the request of defendant, which was before any one of the contingencies contemplated by the rule—as a circumstance to precede the delivery of the release to defendant—happened, that release ceased to have any office to perform. It was not therefore delivered.

In the amended answer defendant pleaded in effect an accord and satisfaction. But the evidence was that the two hundred and fifty dollars was not received in satisfaction of the indebtedness but solely in return for a dismissal of the proceeding before the stock board.

The verdict of the jury included a finding that the release pleaded was not delivered, and a finding that the averment in the amended answer, that plaintiff received two hundred and fifty dollars in full satisfaction of the discharge of defendant's debt was not sustained. In view of the evidence we are not authorized to set aside the verdict.

The charges to the jury objected to by appellant, which were to the effect that the burden of proof was on defendant to prove the execution of the release set out in the answer, but that the execution

(including delivery) *was proved* by reason of the failure of defendant to deny the same by affidavit, were—in view of the evidence introduced by defendant tending to prove that the release was not delivered—more favorable to appellant than he was entitled to ask.

The court, after giving to the jury the substance of the rules of the stock board above recited, said: "In this case the defendant has not introduced any evidence at all to show that either of these contingencies has happened, etc." This was a statement of a fact; the defendant had not introduced such evidence. But if the language be construed to be an intimation that the *onus* was on the defendant to prove the occurrence of one of the events mentioned in the rule, it could not have injured the defendant, since, as we have seen, the undisputed testimony on his part showed that the parties had contracted that the release should not be delivered.

For the same reason the court did not err in charging: "The mere circumstance that the defendant here produces this release, in and of itself alone, *in view of the other evidence offered in this case,* would not entitle him to a verdict."

And because the defendant himself went behind the release, and proved the real nature of the transactions between the parties, the eleventh and twelfth instructions given by the court to the jury, could not have prejudiced the appellant.

And the court below was justified in refusing the instruction requested: "Since the due execution and genuineness of the release have not been so denied (by affidavit) it constitutes a bar to the action, and the jury will therefore find for the defendant." If, as shown by the testimony of defendant's witness, it was agreed between plaintiff and defendant, for a valuable consideration, that the release should not be delivered, but should go for naught, the attempt to insert it as a bar and discharge of plaintiff's demand, was a fraud upon plaintiff, and as there was no conflict in the evidence that such contract was in fact entered into, the release was not a bar. The defendant, having himself introduced the evidence showing that the release was not in fact delivered, was estopped from claiming the benefit of the admission arising out of plaintiff's failure to deny by affidavit "the genuineness and due execution" of the instrument.

Every averment of new matter in an answer is taken to be denied, except that if the answer recite a written instrument, the genuineness and due execution of the instrument are not to be taken as denied, but, on the contrary, as admitted, unless the plaintiff shall expreisly deny the same under oath.

It has been repeatedly held here that where an averment of the complaint is not denied hy the answer, still, if an action is tried upon the assumption that the averment is denied, and evidence, *pro et con,* introduced with reference to the supposed issue, a court is justified in holding, upon a preponderance of the evidence, that the averment is not true. By parity of reason, where the written instrument set forth in the answer is not denied by affidavit, yet if

evidence in respect to that matter, and tending to show that the instrument was not genuine, or was not delivered, is introduced by plaintiff without objection on the part of defendant, or motion to strike out, and is met by counter evidence on the part of defendant, the latter ought not to be permitted to claim that the genuineness and due execution of the instrument is admitted, *a fortiori*, where such evidence is first introduced by the defendant.

Judgment and ordered affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 20,005.

PEOPLE *v.* RIGHETTI.

Department Two. Filed November 12, 1884.

INSTRUCTIONS ASKED FOR, WHICH HAVE ALREADY BEEN GIVEN in substance, may be refused.

APPEAL from a judgment of the superior court for San Luis Obispo county, entered upon a verdict convicting the defendant, and from an order denying him a new trial.

J. M. Wilcoxson, for the appellant.

Attorney-General, for the respondent.

THE COURT. Information for burglary; conviction, first degree.

1. The instructions asked and refused were properly refused, as the instructions given covered each phase of the instructions asked to be given.

2. No error appears in the transactions occuring when the jury were brought into court.

Judgment and order affirmed.

No 7,680.

EHRLICH *v.* EWALD.

Department Two. Filed November 13, 1884.

PLEDGOR AND PLEDGEE—ACTION TO RECOVER DEBT SECURED.—A pledgee may maintain an action to recover the debt secured, without first exhausting the subject of the pledge.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

G. F. & W. H. Sharp, for the appellant.

B. S. Brooks, for the respondent.

THE COURT. The court below found that defendant was indebted to plaintiff, for money loaned, to secure the payment whereof defendant had delivered to plaintiff certain personal property, which

property is still held by plaintiff, who had taken no steps to subject the same to sale for the payment of the debt. The action had been brought to recover judgment for the amount due with interest.

The defendant insists that according to section 726, C. C. P., the action cannot be maintained; that the plaintiff must first seek to enforce his lien before he can have an independent action for money. This view was taken by the court below, in refusing judgment for plaintiff on the findings, and in rendering judgment for defendant.

Section 726, C. C. P., refers in terms to a mortgage. Distinction between a mortgage and pledge is clearly recognized in section 2,920 and 2,928, civil code. In case of a pledge the pledgee may resort to a judicial sale (sec. 3,011, C. C.), or, he may sell on notice (secs 3,000–3,005, C. C.), without suit; the latter remedy not being given in case of a mortgage. We find nothing which will prevent a pledgee from having his action to recover the debt without first exhausting the subject of the pledge: Sonoma Bank v. Hill, 59 Cal., 107.

The order of the court below on a former hearing, granting a new trial, affirmed in 51 Cal., 172, is not the law of the case. The court below may have granted the new trial, for the reason above stated, among others, but this court, in its opinion, stated the ground on which the order was affirmed; which was not the point here presented.

The plaintiff was entitled to judgment for the amount stated in the findings with interest.

The judgment is reversed, and the cause is remanded with instructions to render judgment in accordance therewith.

No. 7,204.

DORLAND v. BERNAL ET AL.

Department Two. Filed November 13, 1884.

STREET ASSESSMENT—JUDGMENT AFFIRMED.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial.

M. G. Cobb, for the appellants.

Charles H. Parker, for the respondent.

THE COURT. This is a street assessment case.

Seven reasons are presented by the appellant why the judgment should be reversed. Several of them have been passed upon adversely to the appellants. We see no merit in those not so passed upon.

Judgment and order affirmed.

No. 11,000.

PEOPLE *v.* SAMUELS.

Department Two. Filed November 14, 1884.

JUROR NOT ON ASSESSMENT ROLL—NEW TRIAL—ARREST OF JUDGMENT.—The fact that a juror in a criminal prosecution is not assessed upon the assessment roll of the county, is not, after verdict, a ground for a new trial or for an arrest of judgment.

CRIMINAL LAW—MURDER—SELF DEFENSE—FEAR OF ASSAULT—INSTRUCTIONS.—An instruction given in a prosecution for murder, at the request of the people, that the "bare fear of an assault upon the defendant will not justify homicide, nor the fear that deceased was about to commit a felony, unless defendant believed there was imminent danger thereof," is no ground for reversal. Such instruction was more favorable to the defendant than he was entitled to, as it omitted the element of the reasonableness of the belief.

INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION need not be marked. It is sufficient if it appear that the charge was given.

MURDER AND MANSLAUGHTER—MALICE WHEN INFERRED.—The distinction between murder and manslaughter lies in the presence or absence of malice. The existence of malice, like any other fact, may be logically inferred by the jury from all the facts and circumstances of the case, legally proved, the weapon used, the action of the defendant at the time of the killing, and his previous acts and conduct.

MURDER—DEFENDANT'S GOOD CHARACTER.—If the jury believe the defendant guilty of murder, they must so find, notwithstanding his good character.

APPEAL from a judgment of the superior court for Santa Barbara county, entered upon a verdict convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

McNulta & Oglesby, for the appellant.

Attorney-General, for the respondent.

MYRICK, J. The defendant was informed againts for the crime of murder, and was convicted of murder in the second degree.

1. Two persons, being examined as to qualification to serve as jurors, answered that they were assessed upon the last assessment-roll of the county. After the verdict, the defendant caused the index of the assessment-roll to be examined, and not finding the name of either of the persons, moved for a new trial, and an arrest of judgment. People v. Fair, 43 Cal., 137, is directly in point, adverse to the appellant.

2. The court instructed the jury, at the request of the prosecution, that the "bare fear of an assault upon the defendant will not justify homicide, nor the fear that deceased was about to commit a felony, unless defendant believed there was imminent danger thereof." This instruction was more favorable to the defendant than he was entitled to, as it omitted the element of the reasonableness of the belief.

3. The statute does not require that the charge of the court, given of its own motion, should be marked by the judge; it is sufficient if it appear that the charge was given, which does appear in this case.

4. The court instructed the jury: "The distinction between murder and manslaughter lies in the presence or absence of malice. The existence of malice, like any other fact, may be logically inferred by the jury from the facts and circumstances of the case, legally proved, the weapon used, the action of the defendant at the time of the occurrence and his previous acts and conduct."

We fail to see any error in this instruction. The same may be said as to the instruction regarding character, viz.: "If you should believe the defendant guilty, you must so find, notwithstanding his good character."

We see no error.

Judgment and order affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

No. 20,004.

PEOPLE v. OILER

Department Two. Filed November 14, 1884.

ADMISSIBILITY OF DEPOSITION TAKEN BEFORE COMMITTING MAGISTRATE—CONSTITUTIONAL LAW.—On the trial of a defendant for having in his possession dies, plates, etc., designed for and used in counterfeiting coins current in this state, the deposition of a witness taken before the committing magistrate is admissible in evidence, upon proof that such witness is absent from the state. Sections 686 and 869 of the penal code, authorizing such evidence, are not in conflict with the last clause of section 13, article I of the constitution of 1879.

APPEAL from a judgment of the superior court for San Luis Obispo county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

J. M. Wilcoxson, for the appellant.

Attorney-General, for the respondent.

THORNTON, J. The defendant was accused, by information, of the offense of feloniously, willfully and knowingly having in his possession dies, plates, etc., designed for and made use of in counterfeiting silver coins current in this state, and was found guilty as charged.

On the trial, the prosecution offered in evidence the deposition of one Antonio Chavez, taken by the committing magistrate on the preliminary examination before him of defendant, having first shown the absence of said Chavez from the state. The deposition was taken through an interpreter, and before offering it, the interpreter was called, who testified that he correctly translated to the shorthand reporter and the court, on the examination referred to, the testimony of Chavez, and that the deposition shown him written out in long hand, was the testimony of Chavez given on such examination. The reporter and the magistrate who officiated at such examination were also called, who identified the deposition and testified to its correctness.

With this preliminary evidence the prosecution offered to read the deposition to the jury. The defendant objected to its being read, on the ground that it was irrelevant, immaterial, incompetent and hearsay. The court overruled the objection, and defendant reserved an exception.

We are of opinion that the court in this ruling committed no error. The deposition was taken in accordance with the provisions of law

in regard to the preliminary examinations before a magistrate: See Penal Code, sec. 869. The defendant was present at the examination and had an opportunity of cross-examining and did participate in cross-examining Chavez. It was proven before the deposition was offered that Chavez was absent from the state. Under these circumstances, the deposition was, by the express terms of section 686 of the penal code, admissible in evidence.

It is contended on behalf of defendant that sections 686 and 869, above cited, so far as they allow the deposition taken on the preliminary examination of a person charged with a public offense to be read in evidence on the trial of such person, are unconstitutional. And, to sustain this point, reference is made to the last clause of section 13, article I of the constitution of 1879. We are of opinion that this contention is untenable. The clause of the constitution referred to was intended to confer further power on the legislature in regard to the taking of evidence by deposition in criminal cases. This clause invests the legislature, under the circumstances mentioned in it, with power to authorize the taking of depositions in criminal cases, other than on the preliminary examination. It was not intended to take away a power long exercised by legislatures in regard to the depositions of witnesses taken on such preliminary examinations. Such a power as the latter was exercised by parliament in England in the sixteenth century (see Stats. 1 and 2 Phil and M., c. 13, secs. 4, 5; and 2 and 3 Phil. and M., c. 10), and from an early period in various states of the union, and it has been held to be properly exercised in the states, whose constitutions secured to an accused person the right to be confronted face to face with the witnesses against him: People v. Restell, 3 Hill, 289; State v. Johnson, 12 Nev., 121; Com. v. Richards, 18 Pick., 434; Summons v. The State, 5 Ohio St., 325; Bishop's Crim. Pro., secs. 1,194–5–6, etc., to close of chapter 79, and cases cited in notes.

We find no error in the record, and the judgment and order are affirmed.

SHARPSTEIN, J., and MCKINSTRY, J., concurred.

No. 7,612.

SHARP *v.* MILLER.

Department Two. Filed November 14, 1884.

ORDER MADE AFTER REVERSAL OF JUDGMENT NOT APPEALABLE.—An order made in an action after the judgment therein has been reversed in the supreme court, is not appealable as a special order made after final judgment. The effect of such reversal is to place the parties in the lower court in the same position as if the case had never been tried.

APPEAL from an order of the superior court for the city and county of San Francisco. The opinion states the facts.

P. B. Ladd, for the appellant.

G. F. & W. H. Sharp, for the respondent.

THE COURT. The order appealed from in this case is not appealable. The appellant contends that it is a special order made after final judgment. The judgment formerly rendered was reversed, and there was no judgment in the cause, when the order appealed from was made. The reversal of the judgment and order denying the motion for a new trial when the cause was here before (see 54 Cal., 329), placed the parties in the lower court in the same position as if the case had never been tried, with the exception that the opinion of this court must be followed, so far as applicable, in the new trial: Stearns v. Aguirre, 7 Cal., 447.

Appeal dismissed.

No. 8,377.

CARTER v. ALLEN ET AL.

Department Two. Filed November 14, 1884.

ERRORS OF LAW OCCURRING ON TRIAL MUST BE SPECIFIED.—Errors of law alleged to have occurred on the trial will not be considered on appeal unless the same are specified in the statement of the case.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Tully R. Wise, for the appellants.

Stanly, Stoney & Hayes, for the respondent.

THE COURT. The motion for a new trial was made on a statement of the case, and we cannot consider any alleged error of law, unless it is specified in the statement; and the ruling of the court on the defendant's offer "to show that the money in the hands of the administrator had come to his hands during the existence of the first bond" is not specified as one of the particular errors upon which the defendants would rely.

If the finding that the administrator received after the bond, on which the action is based, was executed, a sufficient sum of money to satisfy the plaintiff's demand, was justified by the evidence, the question whether the sureties would be liable, if their principal had not had, at any time after the date of the bond, any money in his hands belonging to the estate, does not arise in this case. The evidence, as we read it, justifies that finding.

We think the rulings of the court, on the objections to the introduction of the orders of the probate court, and the judgment-roll admitted in evidence, were correct.

Judgment and order affirmed.

BOOK REVIEWS.

A TREATISE ON LAW AND EQUITY, AS DISTINGUISHED AND ENFORCED IN THE COURTS OF THE UNITED STATES. By A. J. Peeler. Austin: Swindell's printing house; 1883.

The author says, at the commencement of his preface, in explanation of his work: "The distinction between *law* and *equity* is a distinguishing feature in the administration of remedial justice in the courts of the United States. A failure to appreciate and observe this distinction has resulted in the dismissal of many cases. After long and expensive litigation in the court below, it not unfrequently happens, when a case reaches the supreme court of the United States, it is dismissed because brought on the wrong side of the court, or reversed because the differences in pleading and practice between the two systems were totally disregarded. Scarcely a volume of the circuit decisions can be taken up which does not contain such examples of time, labor and money thrown away. No treatise, designed to assist the profession in avoiding the vexation and disappointment so frequently experienced on this subject, has ever been published." We can see no need nor foundation for such a treatise as is indicated by the above title, and described in the foregoing extract. We can conceive that a member of the bar in Texas or Louisiana, where the distinctions between common law and equity are wholly obliterated in the state jurisprudence, might meet with some difficulty from questions growing out of these distinctions in the jurisdiction of the federal courts, with which he was wholly unaccustomed; but in all the other states, where the two systems of law and equity still subsist in the local jurisprudence, any lawyer who is at all familiar with the doctrines of the common law and of equity generally, will meet with no special difficulty in the questions arising from the legal and the equitable jurisdictions of the United States courts.

The United States constitution gives to the federal courts jurisdiction in cases in equity as well as in cases of law. Under this grant it has been finally settled that the federal courts possess the full jurisdiction in equity held by the high courts of chancery in England; and that this jurisdiction exists uniformly and to its full extent throughout the whole union, identically the same in every state, unaffected by any state laws, or by any peculiar system of jurisprudence and legislation adopted by individual states. This being so, it necessarily follows that any treatise describing in full the equity jurisdiction of the federal courts, must be an exhaustive treatise upon the equity jurisdiction and jurisprudence as a whole. In other words, in order to determine the cases in equity over which the federal courts have jurisdiction, and the doctrines which they

apply in the decision of such cases, no other treatise is needed nor even possible than a complete and exhaustive work upon equity as one of the grand departments of our total system of jurisprudence. The author has not, however, confined himself entirely to the matters indicated in the foregoing extracts. As he goes on to say, a large part of the book is devoted to "an outline of the nature and general principles of federal jurisdiction, and of the jurisdiction of the several courts of the United States." A complete and accurate treatise on the jurisdiction of all the United States courts, with a full account of the procedure, practice, and pleadings therein in every kind of suit, would be a book, in our opinion, of great practical benefit to the profession, although the field is occupied by several works which partially treat of these subjects.

THE LAW OF MORTGAGES OF REAL AND PERSONAL PROPERTY, INCLUDING ALSO THE LAW OF PAWN, OR PLEDGE AND COLLATERAL SECURITIES, AS DETERMINED BY THE COURTS OF ENGLAND AND THE UNITED STATES. By Charles T. Boone, LL.B. San Francisco: Sumner Whitney & Co.

This little book is one of the duodecimo or pocket volumes, belonging to what the publishers have called the "Practitioner's Series." The author says: "The aim of this work is to present a complete but condensed view of the law relating to the practical subjects of mortgage, pledge, and collateral security, within the compass of a handy volume, uniform with the works now embraced in the Practitioner's Series." The plan of this book somewhat resembles that of Pollock's Digest of the Law of Partnership and similar works. There are no discussions of general principles, no explanations. The text consists of bare, naked propositions, expressed in an extremely condensed manner, somewhat in the form of the separate sections of a code, with the cases cited in notes at the end of each section or paragraph. From the very extensive ground covered by the work, as indicated in the title, it necessarily follows that the treatment of the various topics must be very perfunctory, and the statements of doctrines and rules very brief. The author says in his preface: "It is presumed that every lawyer is within easy reach of the statutes of his own state, and that he has a fair knowledge of their general provisions; no attempt has, therefore, been made here to give abstracts of statutory provisions relating to the subjects treated of." This, in our opinion, is a grave mistake. Why could it not be said with equal propriety that "it is presumed that every lawyer is within easy reach of the judicial decisions of his own state, and that he has a fair knowledge of the legal and equitable doctrines established by them," and thus obviate the necessity of writing any treatise at all? In a text-book intended for the use of lawyers in all the states, and dealing with a subject which forms an important part of the jurisprudence of every

state, its practical value will be greatly lessened, even if not almost destroyed, unless it deals with the statutes of each state relating to the subject matter. A really valuable treatise must describe the law as it actually is in all the states where it is intended to be used, and not merely describe an ideal or theoretical system of law which perhaps does not exist in a single commonwealth. The time has passed, in our opinion, when a legal text writer could ignore the statutory legislation upon the subject matter of his work. In no other country are text-books, intended as practical hand-books for the profession, written upon such a plan. While we must confess a serious doubt whether books of this kind will prove to be of any real benefit to the profession, we must also say that Mr. Boone has done the work which he intended to accomplish in this volume, in a very careful, thorough and conscientious manner.

FRAUDULENT MORTGAGES OF MERCHANDISE—A COMMENTARY ON THE AMERICAN PHASES OF TWYNE'S CASE. By James O. Pierce. St. Louis: F. H. THOMAS & Co.; 1884.

Since the sweeping changes made by the civil code in all the common law conceptions and doctrines as to chattel mortgages, the question discussed in this volume can rarely, if ever, arise in California. The book is a monograph upon fraudulent mortgages of chattels, and especially upon that form of chattel mortgage where the mortgagor of a stock of goods is permitted to go on and sell them to purchasers who would take them free from the lien of the mortgages. Upon the validity of such mortgages there has been, strange to say, some conflict of judicial opinion. The author maintains, upon principle and upon the weight of judicial authority: 1. That a mortgage of a stock of goods in trade, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion in the usual course of his business, is inherently and essentially fraudulent as to the creditors of the mortgagor, without reference or inquiry as to any assumed intent of the mortgagor; and, 2. This is still so in case the agreement or understanding between the mortgagee and mortgagor, permitting such sale, is not shown upon the face of the mortgage itself, but is proved by or inferred from evidence aliunde. We fully agree with the author in both of these conclusions. We will only add that the book contains some most admirable and, in our opinion, accurate discussions and conclusions as to the nature of fraud in general, as to fraudulent intent, "fraud in law," "fraud in fact," and fraud upon creditors,—questions concerning which a great deal has been written that is blind and confusing, as well as much that is clear, accurate and convincing. These general discussions will give a value to the book beyond the mere special purpose for which it was written.

WEST COAST REPORTER.

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COMMUNITY PROPERTY.

(CONTINUED.)

Having stated so far as was necessary, in the preceding article, the leading features of the system, I now purpose to suggest in a brief manner, some of the most striking anomalies, and some of the possible or probable effects which may be more plainly and seriously felt in the future, even if at present they are exhibited only to a partial extent.

1. The first of these peculiarities which I shall mention, is, that on the death of a husband, the administration and settlement of his estate should and must include and dispose of all the community property, real and personal, which stands in the name of his wife;—that is, all such property of which the legal title, according to the common law nomenclature and conceptions is vested in her. Whether she does in reality hold the legal title to such community property, or whether it is held by the husband, although apparently acquired by her, are questions which will be examined in the sequel. It is sufficient at present to say that all community property acquired by the wife, and held in her name, as much belongs to the "community" as that acquired by the husband and standing in his name; and it is to be treated in all respects in exactly the same manner. All such property, although standing in the name of the wife, with the legal title apparently vested in her, should therefore be inventoried, and should come under the control of the administrator or executor, to be administered, disposed of, and distributed as any other community property belonging to his estate. Furthermore, the husband has the same power of testamentary disposition over all such community property held by or standing in the name of his wife, which he has over the other community property of his estate;—that is, he may devise or bequeath one-half of the residue left after all the debts and expenses, chargeable upon it in the course of administration, are paid.

The practical result is, that on the death of a husband, it is both the power and the duty of his administrator or executor to enquire and ascertain what property, real or personal, held by the wife, or standing in her name, or acquired by her, is community property, and to claim and include all such property as part of the assets of the decedent's estate.

In making this inquiry, he must proceed upon the settled principle that all property, real and personal, held by the wife or standing in her name, which was acquired by her during the marriage,—except that which she acquired by *direct* conveyance or transfer from her husband, is presumed to be community property, and the burden of proof rests upon her to show it to be her own separate estate by clear, unequivocal, convincing evidence. Unless she had been living separate and apart from her husband in the manner described in the civil code (§ 169), even her accumulated earnings would be community property, and would be subject to the claim and disposition of the administrator, in any view, for all purposes except payment of the husband's debts. And if I am correct in the interpretation given to § 168 in a former article, such earnings would be liable, in the settlement of his estate, for those debts of the husband which were "community debts." If an administrator or executor should neglect to include such property as assets of the decedent's estate, he would violate his duty, and could be compelled to do so by a proper proceeding in the probate court. These conclusions may appear strange to a lawyer familiar with common law rules or with the systems prevailing in most of the other states of the Union; but they follow directly and inevitably from the definitions and other provisions of the civil code, and from the doctrines established by judicial decision, concerning community property.

2. The second peculiarity which I shall examine is the *real* nature of the interest, estate or ownership of each spouse in the community property. Much of our familiar common law notions as to legal title acquired by conveyance, assignment, etc., must be abandoned in determining the real nature of the system created by the code. From a comparison of all the provisions of the civil code, the conclusion seems irresistible that, whether acquired by the wife or by the husband, whether standing in her name or in his, whether conveyed to her or to him, the real, present, *legal* title to all the community property is vested alone in the husband during the marriage; the wife's interest in it during the marriage is only inchoate—a mere expectancy. Even if land, being community property, is conveyed to the wife during marriage, she takes *no real title* in it; the whole title, both real and equitable, at once vested in the husband by means of the deed to his wife. It is true there are some *dicta* opposed to this view, but they will not endure a moment's analysis. A very early statute of this state gave the husband "absolute power to dispose of" the community property, and did not, like our present code, expressly except the power of "testamentary disposition." In the early case of Beard v. Knox,[1] the court held that, from other statutory provisions, especially those defining the wife's

[1] 5 Cal., 252, 256.

fixed interest and share on her husband's death, the power of testamentary disposition by the husband was impliedly excepted, and his "absolute power of disposition" was necessarily limited to a disposal during their joint lives, thus making the rule exactly the same as it is under the code. In the course of his opinion, Murray, C. J., after some remarks as to the general intent of the community property as a protection for the wife after the husband's death, says: "The husband and wife during the coverture are *jointly seized* of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a *present, definite and certain interest* which becomes absolute at his death, * * * and the widow becomes seized of one-half of the property." This whole remark was a mere dictum, entirely unnecessary for the decision of the case; but it would be difficult to include more incorrect conceptions and statements in a shorter sentence. The utter inappropriateness of the word "seized" and of the legal conception involved in it, is evident when we reflect that community property might embrace goods, chattels, things in action and money, as well as land. The term and conception "joint" are even more incorrect. If the two spouses were *joint* owners or "jointly seized" of the community property, it would simply be impossible for the husband to convey away the whole during the marriage as he might do and still may do, or even to convey the complete title to any part of it, or to any specific thing forming a part of it,—not even to a horse, or a bushel of grain, or a yard of cloth, or an acre of land. And when we remember that the wife's interest in the entire community property or in any portion of it may be completely cut off, by a disposition made by her husband during the marriage, that she has no right to control, manage or possess it, that she cannot make it liable for her debts nor contracts, and that she is completely without any power to sell, convey, transfer, or otherwise dispose of it, we must plainly see that it is a misuse or perversion of words to say that her interest in the community property during the marriage is "a *present, certain and definite interest*, which becomes absolute at his death." Even at his death the community property is primarily and mainly liable for his debts before her right attaches as a fixed, certain and definite share.

In the latter case of Van Moren v. Johnson,[2] Mr. Justice Field described the real nature of the ownership of the commnnity property, and of the interest held by each spouse, during the marriage, with perfect accuracy. He said: "*The title to the community property vests in the husband.* He can dispose of the same absolutely [*i. e.* by a transfer *inter vivos*] as if it were his own separate property. *The interest of the wife is a mere expectancy*, like the interest which an heir may possess in the

[2] 15 Cal., 308, 311.

property of his living ancestor. Guice v. Lawrence.'"[3] This language describes the ownership of the community property during the marriage, under our law, with perfect accuracy. As the husband has the entire possession, control, and management of it, as he may convey it wholly or partially by his own deed or transfer without consent of the wife; as he may incumber it partially or to its full value by mortgages, judgments, debts and the like, and may thus leave none of it whatever at his death,—the only limitation upon his power being that he cannot devise or bequeath more than one-half of what he does leave at his death; and, on the other hand, as the wife cannot do any legal act with it during the life of her husband, and has only a right to one-half of what may be left at his death after the payment of all debts and liabilities chargeable upon it, it is plain that during his life she has no *interest* of any kind in the community property, and *a fortiori* no present, certain, and definite interest. She has simply an expectancy or a possibility that some portion may be left remaining, undisposed of by her husband during his lifetime; and if such be the case, she becomes at his death, and not before, vested with an absolute interest in one-half of what is thus remaining after all debts, liabilities, and expenses chargeable on the fund, have been subtracted. The fact that upon obtaining a divorce the wife may have a portion of the community property set apart for her absolutely, is not at all opposed to this view, but is in complete harmony with it. Divorce, when the wife is the innocent party, operates in exactly the same manner as the death of the husband, to terminate the community. Like his death, it ends her expectancy or possibility, and entitles her to receive a share of the community property in her own individual and absolute right. It cannot be said, therefore, with any truth, that during the marriage the wife has any interest or the slightest degree of ownership in the community property; indeed her right is less definite and more precarious than the wife's inchoate dower right at the common law. It would seem, in fact, that the term itself "community" property is somewhat of a misnomer.

If the wife has no interest during the marriage, then it necessarily follows, in the language of Judge Field, that all the title or ownership of the community property vests in the husband. Since the nature of community property, and the rules governing it, are exactly the same whether it is acquired by the husband or the wife, this conclusion as to

[3] 2 La. An. 226.—The same view was taken by the court in the subsequent case of Fuller v. Ferguson, 26 Cal., 546. The opinion said, in describing the Mexican law as to the community: "By the same system of Spanish-Mexican law, the wife during marriage has a fictitious and revocable dominion and possession of one-half of the community property, which dominion and possession she cannot in any way assert or exercise during the marriage, but after his death she becomes absolute owner of one-half of what he leaves." By the technical terms of the Mexican law here used, is really meant exactly the same sort of an interest which Judge Field describes in the passage quoted in the text,—*i. e.* a mere expectancy.

its title and ownership must be equally true when the community property is acquired and held in the name of the wife, and when it is acquired and held in the name of the husband. There can be no possible difference between the two situations; in each the only real legal title and ownership are vested in the husband. Even if land is so conveyed to the wife during marriage that is community property, and her legal title is only apparent not real; it is incorrect to say that the legal title is vested in her by such a conveyance. To all persons familiar with common law methods, this must seem to be a most striking anomaly, but it necessarily results from the fundamental doctrines of the system. Land conveyed by deed to Mrs. A., vests the real title and ownership in Mr. A. and vests no present title or ownership in her. Exactly the same is true of a transfer to her of personal property.

3. The power of disposal. That the husband alone has the title and ownership of the community property, and that the wife has no present, real interest in it during the marriage, may be thought by some as a purely speculative proposition, of no practical importance. Be this as it may, it is certain that the husband alone, to the complete exclusion of his wife, has the absolute power of disposal over all the community property during the marriage, as fully as he has of his own separate estate. From this absolute power given to the husband, which of itself is necessarily exclusive, and from the express provisions of the code placing it beyond the effect of her own contracts, it follows that she is completely without any disposing capacity. Even the portion of community property standing in her own name and acquired by her, she cannot convey nor transfer. On the other hand, the husband has the same power to convey or transfer *such* property by his own deed or assignment, which he has over the community property acquired by himself and standing in his own name. The decisions as to his power are unanimous.[4] In Ewald v. Corbett,[5] the possibilities of the community property system are strikingly illustrated. In a former divorce suit the decree directed an equal division of the land which was community property, that this land should be sold, and that if either party should purchase at the sale, his or her receipt should be taken for the amount due him or her. The divorced wife married again to one F. before the sale of this land, and at the sale she bought the whole land and turned in as part payment the receipt of the money due her under the decree on the decision, which sum was of course her separate property; and the balance of the purchase price she paid with monies which were community property of her

[4] In addition to the two quotations given in the last preceding article, see *In re* Buchanan's Estate, 8 Cal., 507; Scott v. Ward, 13 *Id.*, 458, 470; Van Maren v. Johnson, 15 *Id.*, 308, 311; Pixley v. Huggins, 15 *Id.*, 127, 131; Mott v. Smith, 16 *Id.*, 533, 557; Tustin v. Faught, 23 *Id.*, 232, 241; McDonald v. Badger, 23 *Id.*, 393, 398; Landers v. Bolton, 26 *Id.*, 393, 420; Lord v. Hough, 43 *Id.*, 581.

[5] 32 Cal., 493.

new husband F. The whole land thus purchased was conveyed to her. Held, that the land thus bought was partly community property of F., and partly the separate property of the wife; and that an undivided portion of it was community property as compared with the whole, in the same proportion which the amount of the community money paid bore to the entire purchase price. Afterwards F. and his wife gave a deed of all this land, but the wife's acknowledgment was so defective that her deed conveyed nothing, as was held, but the husband's deed was operative. The wife subsequently died, and her heirs at law claimed to have inherited the land. This action was brought by these heirs of Mrs. F. against the grantee of Mr. and Mrs. F. to recover the land. The court held, that as Mrs. F.'s deed was null and void, the deed of her husband alone conveyed the undivided portion of the land which was community property; and the grantee in that deed, therefore, became owner in common with Mrs. F., she continuing to own the undivided share which was her separate property. Finally, on her death her heirs inherited this undivided separate estate which had been hers. It thus turned out that the plaintiffs and the defendant were co-owners of the entire tract of land. This case is a good illustration of the curious freaks which the system of community property can produce.[6]

The husband has thus full power to sell, convey or dispose of all community property by his own act, and without his wife's consent. He may also give away reasonable portions of it. The only limit upon this power is that he cannot donate or transfer it in whole or in part, merely with the intent and for the purpose of defeating his wife's expectancy to the share which will remain to her after his death in case she survives him; in other words, he cannot transfer it merely with intent to defraud her of her possibility.[7] The utter inability of the wife to assign, convey or transfer any of the community property, even that which she herself has acquired and which stands in her name, is so plain that we must naturally expect few judicial authorities upon the precise question.

[6] I will state another curious working of the system, although the case has no direct bearing upon the matter now under discussion. In Althof v. Conheim, 38 Cal., 230, a married woman residing in California without her husband, borrowed from the plaintiff five hundred and twenty dollars to enable her to purchase a lot of land, and she actually used the money for that purpose, and took the conveyance to herself in her own name. Her husband soon after came to join her, and they took possession of the lot, and lived together on it ever afterwards. They sold a part of it and retained the balance. The price for the part sold was about equal to the sum originally paid for the whole; this price was received and appropriated by both the husband and wife; both joined in the conveyance; and both are in the use and occupation of the residue. The plaintiff sued both in this action for the money originally borrowed by the wife. The court held that as there was no evidence that the purchase price over and above the five hundred and twenty dollars borrowed was the wife's separate estate, the presumption was conclusive that it was community property. The lot was, therefore, community property and subject to disposition by the husband alone. No personal judgment against the wife was possible. But all the acts of the husband, as above stated, showed that he had ratified and adopted his wife's act and made the debt his own, and was therefore liable to a judgment for the amount.

[7] Lord v. Hough, 43 Cal., 581.

This conclusion, however, has been directly and expressly sustained by decisions in point. In Tryon v. Sutton,[8] a mortgage which was community property had been executed to a married woman and stood thus in her name. This mortgage she assigned in the ordinary manner by executing a written assignment thereof. The assignment was held to be utterly null and void. The court said that as the control and power of disposition of all community property was given to the husband, the wife had no power whatever to dispose of it. It thus appears that if, during the marriage, land which was community property should be conveyed to Mrs. A., she could not in any manner convey it to a third person, her deed of it would be a nullity. On the other hand her husband could convey it; his sole deed of it would convey a perfect title to the grantee therein. There is nothing in the case of Parry v. Kelly,[9] at all inconsistent with these conclusions; on the contrary they are confirmed by it. As that case was peculiar I will state briefly all of its material facts. Mrs. Kelly during the life of her husband gave her own individual note, and to secure it executed in her own name, without her husband joining, a mortgage on a certain tract of land which was community property. Her husband died intestate leaving Mrs. K. his widow, and leaving this tract of land and also other community property remaining after payment of all debts and liabilities chargeable against his estate. His widow of course became absolute owner of one-half of all the community property thus left remaining; and plainly her half might be so allotted as to embrace the tract of land which she had mortgaged. The mortgagee therefore brought this suit to foreclose his mortgage, the defendant claiming that it was wholly inoperative and void. The court said: "While it is clear that the mortgage executed by Mrs. Kelly created no lien on the community property, it was not void in the extreme sense." Quoting §158 of the civil code, the opinion proceeds: "Mrs. Kelly was therefore as competent in law to execute a mortgage as though she had been at the time a *femme sole.*"

[I remark that this broad proposition must be understood with the limitation necessarily implied. It cannot mean that she was then as competent to execute a mortgage *on the community property* as though she were unmarried. Its plain meaning is, that she was as competent to enter into the *contract of mortgage*, without taking into consideration the object upon which the mortgage was to create a lien, as though she was unmarried; or, to speak specifically, she was as competent to enter into a contract of mortgage which should at once accomplish its purpose of creating a lien upon *her own property*, as though she had been a *femme sole.* That this is the only meaning of the dictum clearly appears from what the court adds, namely]: "And while she may *then* have had no title

[8] 13 Cal., 490, 493. [9] 52 Cal., 334.

to the mortgaged premises on which she could create a lien, it does not follow that the mortgage was void *as a contract* between the mortgagor and the mortgagee. It stands on the same footing as a mortgage made by any person on property to which *he had at the time no title.* But though the mortgagor had no title at the date of the mortgage, yet if he subsequently acquire title, the mortgage under our code attaches to this subsequently acquired title. The civil code provides, "§ 2,930. Title acquired by the mortgagor subsequent to the execution of the mortgage enures to the mortgagee as security for the debt, in like manner as if acquired before the execution." Instead of being inconsistent with the positions heretofore maintained in this article, the whole argument proceeds upon the express assumption that the wife, during the marriage, has no title to nor present interest in the community property, and that her title and fixed interest only arise on the death of her husband in the portion which then becomes absolutely hers. The case decides no more than this: if a wife during the life of her husband gives her own individual mortgage on a tract of land which forms a part of the community property, and she survives her husband, and the tract so mortgaged is not conveyed away by her husband but remains a part of his community property on his death, after all debts and liabilities chargeable on such property are paid; and if such tract is or may be included in the one-half of the community property allotted to the wife as her portion absolutely, then the mortgage becomes operative and binding in all respects by virtue of the doctrines of estoppel which the civil code has enlarged and applied to mortgages in § 2,930. It is simply the case of a man giving a mortgage on land in which at the time he has no interest whatsoever; but if he afterwards becomes owner of the land, he is then estopped from denying the validity of his mortgage; the mortgagee, at the common law, is said to acquire title by estoppel. If Mr. Kelly had conveyed away the mortgaged tract before his death, his grantee would have taken it wholly free from the mortgage, even though he purchased with full notice of it. The tract could have been sold on execution against K., notwithstanding the mortgage. After Kelly's death, if the land as community property was required for the payment of his debts, the mortgage would have been no obstacle. Under all these circumstances the mortgage would have been wholly nugatory. Finally, the decision does not in any manner enlarge, nor even affect, the wife's power to convey, assign, or transfer community property during the life of her husband.

J. N. P.

(To be continued.)

CIRCUIT COURT, DISTRICT OF OREGON.

HICKOX v. ELLIOTT ET AL.

November 12, 1884.

LIMITATIONS.—A suit in equity may be maintained to enforce a security for a debt, although an action against the debtor directly upon the indebtedness is barred by lapse of time; and for such purpose the debt exists, notwithstanding the lapse of time.

SUIT TO SET ASIDE A CONVEYANCE.—A suit in equity to set aside an assignment or conveyance of property made to hinder or delay creditors, should ordinarily be brought within the same time after the right accrues, as an action at law to recover possession of the same property.

PARTIES TO A SUIT.—Where a trustee sues to recover possession of the trust property, for the benefit of the *cestui que trust*, merely, or simply to enforce his right thereto against third persons, such *cestui que trust* is not a necessary party thereto; and in a suit to set aside an assignment or conveyance made to hinder or delay creditors, the grantor or assignor therein, if he has parted with all his right in the property, is not a necessary party either.

EQUITABLE ASSIGNMENT—MAINTENANCE.—E. being a member of a railway construction firm, in Oregon, and defendant in a suit brought there by his partners to dissolve said firm and determine the rights of the parties therein, applied in California, to W., a citizen of that state, for a loan of money to aid him in asserting his rights in said suit, which W. agreed to and did advance on E.'s promise to repay the same with interest and his assignment to H., in trust for W., of all his interest in said firm, as a security for the repayment of said money and interest; in which suit there was afterwards a decree given in favor of E. and against his partners for a sum of money; and at the time of making such assignment E. also gave W. the option to take a portion of any railway property or bonds, that he might obtain in such suit, in lieu of said money and interest: *Held*, (1) That the assignment of E.'s interest in the firm embraced the decree in his favor for the sum of money which represented and stood for such interest and that the trustee therein became in equity the assignee of said decree, as soon as it came into existence, and might maintain a suit to set aside specific, covinous assignments and conveyances by the defendant therein, made with intent to hinder and delay the collection of the same; (2) The option given W. is not involved in the suit to enforce the decree, and therefore it is immaterial whether it is void for champerty or not; (3) The contract for the loan and repayment of the money was made and to be fulfilled in California, and therefore valid, whether champertous or not by the law of Oregon; and the fact that security was taken on property in Oregon for the performance of the contract, does not change its character in this respect.

SUIT to set aside conveyances to hinder and delay creditors. The opinion states the facts.

James K. Kelly and *C. E. S. Wood*, for the plaintiff.

Thomas N. Strong, for Joseph Holladay.

W. H. Holmes, for S. G. Elliott.

C. J. Macdougall, for Ben Holladay.

DEADY, J. The suit is brought by George C. Hickox, a citizen of California, against Simon G. Elliott, Ben Holladay, Joseph Holladay and William H. Effinger, citizens of Oregon, to subject certain property, the legal title of which is now in Joseph Holladay, to the payment of a certain decree heretofore given by the supreme court of Oregon, against Ben Holladay, on the ground that said property was assigned, transferred and conveyed to the former by the latter, to hinder and delay his creditors; and that the plaintiff is the assignee of said decree, in trust for Martin White, a creditor of said Elliott.

The defendants demur to the bill separately, and assign numerous and different causes of demurrer, that on the argument were resolved or condensed into these: (1) The non-joinder of necessary parties plaintiff and defendant; (2) the contract on which the plaint-

iff seeks to recover is void for champerty; and (3) the plaintiff has been guilty of laches.

The facts stated in the bill are substantially these: On September 12, 1868, Elliott formed a partnership with Ben Holladay and one C. Temple Emmett, by the name of "Ben Holladay & Co.," for the purpose of constructing and operating railways in Oregon, and thereafter the said partnership was engaged in the construction of the Oregon Central railway company until November 5, 1869, when Holladay and Emmett commenced a suit against Elliott in the circuit court for Multnomah county, to dissolve said partnership and settle the accounts thereof, which suit was afterwards transferred to the circuit court for the county of Marion, in which court on September 28, 1877, a decree was entered dissolving said partnership and adjudging Elliott to be indebted to the other members of the partnership in the sum of four hundred and seventy dollars; from which decree Elliott took an appeal to the supreme court of the state, wherein, on August 15, 1879, a decree was given, dissolving said partnership and providing that Elliott recover from Holladay the sum of twenty-one thousand nine hundred and nineteen dollars and forty-six cents, and from Emmet the sum of eight thousand five hundred and ninety-six dollars, with his costs and disbursements in that court, no part of which sums have been paid to Elliott, and there is now due on said decree from Ben Holladay said sum of twenty-one thousand nine hundred and nineteen dollars and forty-six cents, with legal interest from August 15, 1879.

On February 10, 1874, Elliott, being unable to meet the expense of this litigation with his partners, applied to Martin White, then and now a citizen of California, for a loan of twelve thousand dollars "to enable him to defend said suit and for other purposes," and offered to secure the payment of the same by an assignment "of all his right, title and interest" in said suit to the plaintiff, in trust for said White, whereupon the following contract was duly made and signed by the parties thereto:

"Memorandum of agreement between S. G. Elliott and Martin White, made the tenth day of February, 1874.

"A controversy exists between S. G. Elliott and Ben Holladay and others, relating to the right of said Elliott in and to the Oregon Central railway company and its stock, bonds, franchises and other property, which controversy involves substantially all the property and rights of the said company, and among other things at least three million two hundred thousand (3,200,000) dollars of the bonds of said company.

"For the purpose of asserting and maintaining his rights in said controversy, said Elliott has borrowed from Martin White the sum of twelve thousand (12,000) dollars in gold coin of the United States, and has agreed to repay the same within one year from the date of the last installment thereof as hereinafter provided (and within two years from the date hereof, whether the last installment shall be demanded by said Elliott within one year from the date hereof or

not), with interest on each installment from the date of the advance thereof at the rate of ten (10) per cent. per annum.

"And in consideration of the loan of said sum by said White upon the terms herein stated, said Elliott has granted to said White the option to be exercised within the period hereinafter limited, to take in lieu of the repayment of the sum loaned as aforesaid, free from all deductions or charges of any kind for any purpose, one-half of all the property aforesaid, of or pertaining to said railroad company (except the bonds thereof) that shall be recovered by said Elliott, and of the bonds of said company that shall be so recovered, after deducting one million dollars thereof for his, said Elliott's, use, and not exceeding one hundred thousand dollars thereof for R. P. & Jabish Clement in payment for legal services; said option to continue until sixty (60) days after said Elliott shall have received possession of said property, and notified White thereof; and if money or other property should be received in place of the property and bonds aforesaid, said option to exist and continue as to such money and property, the dividend thereof to be made in the proportions aforesaid according to actual value.

"And, to secure the performance of this agreement on his part and to secure the payment of any additional advances not exceeding thirteen thousand ($13,000) dollars that he may obtain from said White or other parties, said Elliott has assigned and conveyed in trust to George C. Hickox all his right, title, interest and claim in and to the property aforesaid.

"And in consideration of the agreement and acts of said Elliott, said White has agreed to loan to said Elliott said sum of twelve thousand ($12,000) dollars, in gold coin of the United States, and to advance the same upon his demand in installments from time to time as the same shall be required upon the terms aforesaid.

"Signed in duplicate, at San Francisco, California, this tenth day of February, 1874.

[Signed] "S. G. ELLIOTT,
"MARTIN WHITE."

And, in pursuance of said agreement, Elliott executed and delivered to the plaintiff the following sale and assignment, namely: "In consideration of the sum of twelve thousand dollars, in gold coin of the United States, to me paid, and other valuable considerations, I, S. G. Elliott, of the commonwealth of Massachusetts, have granted, bargained, sold and assigned, and by these presents do grant, bargain, sell and assign unto George C. Hickox, of the city and county of San Francisco, state of California, all my right, title, interest and claim, both in law and equity, in and upon the stock, property and assets of the Oregon Central Railroad Company of Salem, Oregon, and the Oregon and California Railroad Company of Portland, Oregon, the firm of A. J. Cook & Co., and the firm of Ben. Holladay & Co.

"In witness whereof I have hereunto set my hand and seal this thirteenth day of February, 1874."

[Signed] S. G. ELLIOTT. [SEAL.]

"Witnesses, Martin White, R. P. Clement."

Between this date and March 25, 1879, White, in pursuance of this agreement and upon the security of this sale and assignment, advanced to Elliott, and others for him, including two thousand dollars paid to the defendant, Effinger, the sum of twenty-two thousand five hundred and eighty-nine dollars and sixty-five cents, no part of which has been repaid.

The defendant Effinger was the attorney for Elliott in the litigation with Holladay and Emmet, and claims a lien on the decrees given by the supreme court against them, for his compensation as such attorney, and the plaintiff admits that he is "entitled to some compensation" for his services, but how much he does not know, and, therefore, he makes him a party defendant.

During the pendency of this litigation Ben Holladay was indebted to sundry persons, including Joseph Holladay, and in October, 1871, he gave the latter, on account of said indebtedness, his note for one hundred thousand dollars with interest at the rate of one per centum per month; and in November, 1876, gave a second note in discharge of the first one, for the sum of one hundred and sixty thousand dollars with interest at a like rate, and, to secure the payment of the same, transferred and conveyed to Joseph Holladay, at divers times between said last mentioned date and the date of said decree against him, all the real and personal property owned by him in Oregon, consisting of lands, stocks, notes, bonds, mortgages and other personal property then worth two hundred and twenty-five thousand dollars, and now worth five hundred thousand dollars. Portions of this property were in the name of and held by third persons as the naked trustees of Ben Holladay, and the transfers and conveyances thereof to Joseph Holladay were made by them on the direction of the former, of which the latter had knowledge.

The bill also alleges that Ben Holladay has had no property in his own name since the date of said decree out of which the same could be satisfied by legal process, and is now insolvent and unable to pay the same, except out of the property aforesaid; that the transfers and conveyances aforesaid were made and directed by Ben Holladay and received by Joseph Holladay with the understanding and agreement between them that the same were taken and received by the latter partly as a security for the payment of the said last-mentioned note, and also "that said property was to be held in the name of Joseph Holladay, so that the same could not be attached, levied upon or taken by the other creditors" of Ben Holladay, of whom Elliott was one; that the said transfers and conveyances were made by the latter "with intent to hinder and delay the said Elliott and other creditors of the said Ben Holladay in the collection of their lawful debts and demands;" that at the date of said transfers and agreements it was understood and agreed between Ben Holladay and Joseph Holladay that the former should receive a large portion of the profits of said property while the remainder should be retained by the latter on account of said note, and that in pursuance thereof he did from time to time send and deliver to Ben

Holladay large sums of money, the profits of said property, all of which is contrary to equity and good conscience and in contravention of the plaintiff's rights in the premises.

The objection of laches is not made by Elliott's demurrer and the ground on which it is made by the other defendants is not distinctly indicated. But has the plaintiff been guilty of laches or unreasonable delay in enforcing his right or claim? The suit was commenced on April 26, 1884. The money, for which the decree in Holladay v. Elliott is claimed to be a security, was advanced to Elliott by White at intervals of less than a year, and in almost every month of each year, except the year of 1878, from June 13, 1874, to March 25, 1879. It was advanced not on account, but on an agreement to do so, from time to time, as Elliott might demand or require it, and but for the provision in the agreement as to the time of payment, the right of action against Elliott to recover the same or any portion thereof, would not have accrued to White until the whole amount was delivered or advanced or offered and declined. But the agreement for the advance or loan provides that the first twelve thousand dollars shall be repaid within one year from the advance of the last installment thereof, which was made before September, 1874, and therefore the right of action to recover this sum accrued by September, 1875, and was barred in six years thereafter and before the commencement of this suit: Or. Code C. P., sec. 6, sub. 1. The delivery of the remaining ten thousand five hundred and eighty-nine dollars and sixty-five cents was completed on March 25, 1879, and without any contract as to when it should be repaid, and therefore it became payable at once, but even then the right of action to recover the same occurred within six years before the commencement of this suit. Upon this state of the case White could, at the commencement of this suit, have maintained an action against Elliott to recover this second sum, but not the first one.

But it is immaterial whether an action could now be maintained by White against Elliott to recover this money or not. This is not such an action, but a suit brought by a person claiming to be the assignee of a decree to subject the property of the debtor therein to its payment and satisfaction. And it can be maintained, although the right of action against Elliott to recover the money in question is barred by lapse of time. The statute bars the remedy against Elliott in six years, but does not destroy the debt, and it still exists for the purpose of enforcing any lien or pledge given to secure its payment: Quantock v. England, 5 Burr, 2628; Sparks et al v. Pico, 1 McAllister, 497; Myer v. Beal, 5 Or., 130; Goodwin v. Morris, 9 Or., 322; 2 Pars. Con., 379; Rap. & Law., Dic., Limitations.

Assuming, then, for the present, that the plaintiff is the assignee of the decree against Ben Holladay, and that the latter has no property in this jurisdiction subject to execution, except that which he has conveyed or disposed of to Joseph Holladay, with intent to hinder and delay the enforcement of said decree, the plaintiff has a clear right to maintain this suit to set aside said conveyance or dis-

position so far as it is an obstacle in the way of such enforcement, unless he has delayed the commencement of the same unreasonably: 3 Pom. Eq. Jur., sec. 1,415; Wait on F. C., sec. 60.

The only questions that Elliott can litigate in this case, are his indebtedness to White and the assignment to the plaintiff, both of which are confessed by his demurrer, subject to the objection that they are void for champerty. The indebtedness of Ben Holladay to the owner of the decree against him is also admitted, and the only other question open to contest in the case, is the validity of the transfers and conveyances to Joseph Holladay, and the extent of Effinger's claim for compensation as an attorney; and the objection of laches can only be made by said Holladay.

As was said by this Court, in Manning v. Hayden, 5 Saw., 379: "In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it;" and in Hall v. Russell, 4 Saw., 515, "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property." As has been said, so far as Joseph Holladay is concerned, this is a suit to set aside certain transfers and conveyances to him by Ben Holladay, so far as may be necessary to satisfy the decree against him, on the ground that they were made with intent to hinder and delay the plaintiff in the enforcement of the same, contrary to the statute of frauds: Or. laws, 528, sec. 51: ch. 5, 13 Eliz.; and upon the question of time, is analogous to an action to recover the possession of the property, and ought ordinarily to be considered as barred within the same time as such action. An action to recover the possession of real property is not barred in this state until ten years from the time the right to maintain it accrues: Ses. L., 1878, p. 22; and an action to recover the possession of personal property, or damages for the taking or detention thereof, may be brought within six years from the time the cause of action accrues.

The decree in question was obtained on August 15, 1879, and if the right to maintain this suit accrued then, as I think it did, the plaintiff has not been guilty of laches. Following the analogies of the statute, as applied to actions at law, the suit was commenced in time, both as to the real and personal property affected by the alleged invalid disposition to Joseph Holladay.

The assignment by Elliott, among other things, of all his right, title, interest and claim, both in law and in equity, in the firm of Ben Holladay & Co., was valid and operative, and transferred to the plaintiff all his interest in said firm: 1 Pom. Eq. Jur., sec. 168; Burr on Assignments, sec. 100. It also gave him the option to make himself a party to the litigation then pending between Elliott and his partners in said firm, to ascertain and determine their respective interests therein and liabilities thereto, or to allow it to proceed in the name of the assignor for his benefit: Ex parte railroad company, 95 U. S., 226.

But counsel for Joseph Holladay insists that this "secret assignment was a fraud upon the courts," and ought not, therefore, to be upheld. But this assertion is certainly unfounded in both law and fact. The contention with Holladay and Emmett, whether conducted in the name of Elliott or Hickox, turned, so far as the former was concerned, upon his rights and liabilities, and it could make no difference in the opinion or action of the court whether Elliott or his assignee had the ultimate benefit of its decree. Nor was the proceeding in violation of that provision of section 27 of the code of civil procedure, which declares that "every action shall be *prosecuted* in the name of the real party in interest." In my judgment the term "prosecuted" is used in this section in the sense of "commenced," and does not prevent a party from assigning his interest in the subject matter of an action after it has been duly commenced, or require that the assignee shall make himself a party thereto or dismiss the same and commence another action in his own name. And so the provision appears to have been construed in Garrique v. Loescher, 3 Bosw., 578, cited in Wait's annotated code, 115. But if a suit is even brought in the name of a party after he has assigned his interest in the subject matter, the objection is waived unless made by answer. Whether an action is brought in the name of the assignor or assignee is a mere matter of form and convenience and does not touch the merits of the controversy. The statute is enabling rather than restrictive, and is intended to authorize an assignee as a chose in action to sue in his own name rather than to compel him to. Besides, Elliott was not a plaintiff in the suit with his partners, and did not commence to prosecute it, although it may be inferred from the fact that a decree was given in his favor, that by a cross bill, or otherwise, he sought and obtained relief therein.

Elliott's interest in the firm of Ben Holladay & Co. having been duly assigned to the plaintiff, pending the suit in the state court, to dissolve the same and ascertain the interests of the several partners therein, thereafter the same was maintained and conducted, so far as Elliott was or is concerned, in his name for the benefit of his assignee according to the terms and purpose of the assignment. And the decree obtained therein in the name of Elliott is considered in equity as a decree in favor of Hickox, his assignee. The thing assigned was Elliott's interest in the partnership, a matter yet unknown and to be ascertained in the pending suit thereabout—and the subsequent decree therein represented and stood for that interest and passed by the assignment to Hickox as soon as it was made or came into existence: Field v. The Mayor, etc., 6 N. Y., 179; Williams v. Ingersoll, 89 N. Y., 508; Wright v. Parks, 10 Iowa, 342; 1 Pom. Eq. Jur., section 168; Story's Eq. Jur., section 1,040.

Another ground of the demurrer is that there is a defect of parties. And first it is claimed that Martin White, the *cestui que* trust, ought to have been joined in the bill with the trustee as plaintiff. It is admitted that the general rule is, that in a suit respecting trust property, brought either by or against the trustee, the *cestui que*

trust or beneficiary is a necessary party: Story's Eq. Plead., section 207. But to this rule there are exceptions, and this case falls within one of them. When the suit by the trustee is merely to recover or to reduce to possession the trust property, and is no wise intended to control the administration or disposition of it, or to affect the right or relation of the *cestui que* trust, the latter is not a necessary party; Story's Eq. Plea., section 212; Carey v. Brown, 92 U. S., 172.

In this case the trustee merely seeks to obtain the trust fund—the money due on the decree against Ben Holladay—for the use of White, the *cestui que* trust, according to the purport and effect of the trust.

It is also insisted that the several persons, to wit: Thomas Brown, W. H. Hampton, George W. Weidler, W. L. Halsey, Ben Holladay, Jr., L. R. Patton and the Oregon Real Estate Company, who held the legal title to much of this property, when it was transferred or conveyed to Joseph Holladay, are necessary parties defendant, to the suit.

These parties were the mere agents and employees of Ben Holladay, and held this property in trust for him as a matter of convenience, and absolutely subject to his direction. They were naked trustees without interest or discretion.

And first, this is not a purely creditor's bill, in which the plaintiff seeks to discover and subject to the payment of his debt equitable assets in the hands of the debtor or property which he has transferred to others under such circumstances as to leave an equitable interest in himself. But it is a suit to set aside specific, covinous transfers and conveyances made by the debtor which obstruct and prevent the plaintiff from enforcing his decree against the former, by execution levied on the property included in such transfers or conveyances. So far as Ben Holladay is concerned, his indebtedness to the assignor of the plaintiff, is established by the decree and is no longer open to controversy. And the transfers and conveyances in question are good against him, and can only be avoided at the suit of a creditor. He has then no interest in this controversy. His indebtedness is fixed and the property sought to be affected has passed beyond his control, and he cannot be prejudiced in any legal sense by a decree which may subject it to the payment of his debts: *In re* Estes, 6 Saw., 459; Collinson v. Jackson, 8 Saw., 365; Bump on F. C., 548; Wait on F. C., sections 129-171; Fox v. Moyer, 54 N. Y., 128.

It follows that while Ben Holladay is a proper party to this suit, he is not a necessary one, and might have been omitted from the bill. And his agents and trustees who conveyed this property to Joseph Holladay, under his direction, have less interest in the suit, or the subject matter of it, if possible, than he has. As against them also the conveyances are good. They passed the legal title to Joseph Holladay. These parties have no longer any interest in the property or power over it. No relief is sought against them, and

they cannot be prejudiced by any decree that may be given in the suit. The case of Gaylords v. Kelshaw, 1 Wall., 81, cited by counsel for Joseph Holladay, decides nothing to the contrary of this. Kelshaw, being the debtor and grantor in the alleged fraudulent conveyance, was a proper, although not a necessary, party, in that case. But being made a party defendant, without any averment as to his citizenship, it did not appear that the court had jurisdiction. Accordingly, the case was remanded with leave to the plaintiffs to amend their bill generally, which they might do by alleging the citizenship of Kelshaw, if it was sufficient to give the court jurisdiction, or by omitting his name from the bill.

The general rule is, that no person need be made a party to a suit who has no interest in it, and against whom nothing is demanded: Story's Eq. Plead., sections 153, 228-31; Kerr v. Watts, 6 Whea., 550; Trecothick v. Austin, 4 Mass., 44; Bump on F. C., 548.

This proposition is tacitly admitted by the counsel for Joseph Holladay, but he contends that the transfers and conveyances in question were in fact only mortgages, and, therefore, the legal title to the property is still in these trustees and they are necessary parties to any suit in which that title is sought to be affected or the legal estate disposed of.

But whatever the real fact may be as to the relations between Ben and Joseph Holladay concerning this property, there is nothing in the facts stated in the bill to warrant any such conclusion. On the contrary, the case made by the bill is one where a debtor transfers and conveys to one creditor his property with intent to thereby "hinder and delay" his other creditors, including the plaintiff. True, it is not alleged that these transfers and conveyances were made with intent to defraud. Neither is it necessary to the plaintiff's right to the relief demanded that they should be. Under the statute, it is sufficient if the conveyance is made with intent, either "to hinder, delay or defraud" creditors. These words are not synonymous and a conveyance made with either intent may be avoided by any "person so hindered, delayed or defrauded:" Wait on F. C., sec. 11; Bump on F. C., 19.

That these transfers and conveyances were made with intent to hinder and delay the debtor's creditors is directly alleged in the bill, and is sufficiently shown by the facts, that the property included in them is all that the debtor had—at least in this state—that its value was largely in excess of the debt due Joseph Holladay, who is his brother, and that the debtor has since regularly received to his own use a large portion of the rents and profits thereof.

And, lastly, is the contract upon which the money was advanced by White to Elliott, void for champerty?

And, first, in the mouth of Elliott, at least, this may be considered anything but a meritorious defense. In 1874, when he was needy and sore pressed by rich and powerful parties, who sought to exclude him from his share in an enterprise in which he appears to

have thought there were millions for him, he applied to White, the party for whose benefit this suit is brought, for aid in this struggle, who thereupon advanced him money to enable him to assert his rights in court and maintain himself generally, upon no other security for its repayment with legal interest than an assignment of his interest in the firm of Ben Holladay & Co., then involved in litigation.

The option or alternative contained in the writing of February 10, by which White was given the election to take, instead of his money and interest, one-half of the railway property that might be awarded to Elliott in the suit with Holladay and Emmett, after deducting the trifling sum of a million dollars' worth of the company bonds for Elliott's individual use and one hundred thousand dollars more for his private counsel, though undoubtedly champertous, as involving a division of the field or product of the litigation, is a distinct agreement from that involved in this suit. The assignment under which the plaintiff seeks to enforce the decree against Ben Holladay was not given to secure the performance of this option, but the repayment of the money loaned. The contingency upon which the right to exercise this option depended never occurred, for Elliott never obtained "the possession" of any of said property or notified White thereof. This suit is brought to enforce the assignment given by Elliott as security for money loaned him under the writing of February 10, which he has failed to repay. And while it does, in my judgment, steer clear of the champertous option clause, its maintenance does involve the recognition of the agreement under which the money was advanced to Elliott, to enable him to make good his defense in the suit with his partners; and if this is void for maintenance the assignment falls with it. The assignment or security stands no better, in this respect, than the debt or contract out of which it arose and for which it was given.

It does not appear that the courts of the state have ever passed on the question whether the old English law of maintenance is in force here as a part of the common law or not.

The evident modern drift of both the English and American courts is in the contrary direction, and the old doctrine of maintenance, which includes champerty, is treated as something belonging to the past and not suited to the circumstances of this age: Findon v. Parker, 11 Mes. & Welsh, 679; Wright v. Tibbitts, 1 Otto, 252; 6 Otto, 416; Small v. Mott, 22 Wend., 405; Thalhimer v. Brinkerhoff, 3 Cow., 643; Richardson v. Rowland, 40 Conn., 570; Sedgwick v. Stanton, 14 N. Y., 291; Mathewson v. Fitch, 22 Cal., 93; Hoffman v. Vallejo, 45 Cal., 566.

In Small v. Mott, *supra*, Chancellor Walworth says, "that most of the absurd rules relative to maintenance, which are found in the early reports of the English courts of justice were founded on the broad and sweeping provisions of the statutes" of Edward I and III, and the second Richard. For instance, chapters 25, 28 and 30 of 3 Edward I prohibited the king's officers, such as clerks,

sheriffs, justices, or "stewards of great men," from taking part in quarrels depending in the king's courts or maintaining any suits "hanging" in such courts for lands or other things on part or profit thereof.

There is no statute in Oregon against maintenance, and by express enactment a valid conveyance may be made of lands in the adverse possession of another, while choses in action may be sued on in the name of the assignee: Or. Laws, 516, sec. 8, 110, sec. 27. It is not likely that this contract would be held void here for maintenance. But it is not necessary for this court to anticipate the action of the state courts on this question.

This contract was made in California and in contemplation of law was to be fulfilled or performed there. It has been held in that state since 1863 that there is no law there against any form of maintenance: Mathewson v. Fitch, and Hoffman v. Vallejo, *supra*. And the contract being valid there, is valid here: Story's Con. Laws, secs. 242 (1) 279, 280.

But it is contended that the assignment or security taken for the performance of this contract related to property in Oregon, and could only be fulfilled or enforced here, and therefore the contract for the loan ought to be considered as made here, and its validity tested by the law of Oregon. But the authorities are uniformly otherwise: Story's Con. Laws, sec. 287; De Wolf v. Johnson, 10 Whea., 443. In the latter case, Mr. Justice Johnson, speaking for the court, says: "Taking foreign security does not necessarily draw after it the consequences that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract."

The demurrer is overruled, and the defendants have twenty days in which to answer.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

CITY AND COUNTY OF SAN FRANCISCO v. J. W. MACKEY.

November 17, 1884.

CONSTITUTION LAW—DOUBLE TAXATION.—The constitution of California does not authorize, but forbids, double taxation.

STOCK AND PROPERTY OF CORPORATION.—Taxing all the property of corporations to the corporation, and at the same time taxing the stock, which represents the property, to the holder, would constitute double taxation.

STOCK OF DOMESTIC CORPORATION—TANGIBLE PROPERTY IN ANOTHER STATE. — Shares of stock, owned by a citizen and resident of the state of Nevada, in a California corporation, having its principal place of business in California, but whose tangible property is all situate and taxed in Nevada, are not taxable to the owner under the constitution and laws of California, in the state of California. The *situs* of the stock, in such case, for the purposes of taxation, is the residence of the owner.

SITUS OF MONEY CREDITS AND OTHER SOLVENT CREDITS—TAXATION.—There being no statutory provision to the contrary, the *situs* of money credits, and other solvent credits, for the purposes of taxation, is the residence of the owner or creditor.

TAXATION OF RESIDENT OF NEVADA ON SOLVENT CREDITS.—A citizen and resident of Nevada is not taxable in California, under its constitution and laws, upon money credits and other solvent credits, not secured by mortgage, trust deed, etc., due from citizens, and residents of California.

McClure & Dwinelle, for the plaintiff.

B. C. Whitman, for the defendant.

SAWYER, CIRCUIT JRDGE. This is a demurrer to the amended complaint in an action to recover city and county, and state taxes, for the fiscal year 1880–81, assessed upon the capital stock of a large number of corporations, and upon solvent credits. A demurrer to the original complaint was sustained, on the ground, that the assessment is void, as being double taxation, and a violation of the state constitution: See opinion of the court, 3 W. C. Rep., 697. Leave to amend having been given, an amended complaint has been filed, and therein it is sought, by certain allegations, to obviate the objections to the original complaint, and to take the case out of the principle of the former decision. These new allegations, are, that the tax is assessed "on said shares of stock of companies severally incorporated under the law of, and having their principal offices in the state of California. That the aforesaid shares of stock, is and are, and each of them are, shares of stock of corporations, whose entire tangible property was situated in the state of Nevada; and that the entire property of said corporation was not assessed for said fiscal year 1880–1881." The allegation "whose entire tangible property was situated in the state of Nevada," at least, as to several of the corporations named, is, notoriously, and, manifestly, not true in fact; as, for example, as to the Nevada Bank, the San Francisco Gas Company, and other companies located at San Francisco. But assume the allegation to be true, for the purposes of the demurrer, the question arises, do the averments quoted, in connection with the other allegations of the complaint, show a good cause of action? In my judgment they do not.

Article XIII, section 1, provides that "all property, *in the state*, * * * shall be taxed," etc. It does not authorize the taxation of property *not in the state*. And section 10, of the same article, provides, that, "all property * * * shall be assessed in the county, city, city and county, town, township, or district, *in which it is situated*." And the statute follows the constitution in this respect (P. C., sec. 3,628). They do not authorize an assessment, except at the *situs* of the property. And section 3,627, of the Political Code, as it stood in 1880, (Stat., 1880, 6,), when this assessment was made, recognizing this principle, of the constitution and laws, and the inadmissibility of double taxation, provided, with reference to the stock of corporations, having their principal place of business in this state, that, "the proportionate value, of the capital stock of corporations, * * * having their principal place of business in this state, for the purposes of assessment, and taxation, shall be its

market value, deducting therefrom the value of all property assessed to them in this state, *or elsewhere*, of which such capital stock is the representative." Thus, the constitution does not authorize the taxation, in California, through the medium of its stock, of the tangible property of a California corporation, situate and taxed in the state of Nevada; but, by stating what property should be taxed, and limiting it to property within this state, and limiting the assessment to the particular district in which the property is situated, by plain and necessary implications, excludes it from taxation. So, also, the provision of the political code cited, in express terms, excludes taxation through the medium of the capital stock of the corporation, of all the property of the corporation, of which the capital stock of the corporation is the representative, assessed, either in this state, "*or elsewhere.*"

Now, all the tangible property of all these corporations, according to the allegations of the complaint, which, for the purposes of the demurrer, are taken to be true, is situate in the state of Nevada, and beyond the jurisdiction of California, and, presumably, nothing to the contrary being shown, was taxed under the laws of Nevada to raise revenue for the purposes of the state, and local governments of that commonwealth. The laws of Nevada, of which this court takes notice, require all property in that state to be taxed. It is true, that, to the allegation, "whose entire tangible property was situated in the state of Nevada," is added, "and the entire property of said corporations was not assessed for said fiscal year, 1880-1881." But this is, only, an allegation that it was not assessed in California for "said fiscal year." The state of Nevada had no relation to said fiscal year 1880–81, for which the assessment sued for was made, and the allegation is limited to the particular assessment for the particular fiscal year, upon which the suit is brought. No other is even alluded to in the complaint. This allegation as to the property not assessed, must, also, be construed with reference to the other allegations of the complaint, and, as referring only to the tangible property of the corporation, alleged to be situate in the state of Nevada. It is not, therefore, an allegation that the property was not assessed, "*elsewhere*," or, that any other property of the corporation was not assessed; and, doubtless, no such allegation could be, truthfully, made. It must be presumed, that the allegation was made as favorable to the complainant, as the facts would justify. Such is, always, the legal presumption in respect to the allegations of pleadings. It is, clearly, insufficient in this particular, to take the case out of the rule heretofore adopted in this case, and as established in Burke v. Badlam, 57 Cal., 594, as to all property situated in this state; and that situate, and taxed, "elsewhere," is not taxable at all; and, also, insufficient to bring it within the terms of the constitution, and the statute authorizing the assessment of the tax. The property, as such, alleged to be not taxed, is without the jurisdiction of the state, and cannot be, lawfully, taxed as tangible property, at all, in the state of California. It cannot be reached

as tangible property, and it is sought to reach it, through a taxation of the shares of stock representing it, of the corporation organized and existing within the jurisdiction of California. But this interest, as a share of the capital stock, is incorporeal and intangible; and it has no *situs* apart from the person of the owner. The defendant appears by the record, and that fact is now inconvertible, to be a citizen of the state of Nevada. It is on that ground, alone, that this court has jurisdiction of this case. In the absence of any averment to the contrary, he is presumably a resident of the state of which he is a citizen. There is no averment to the contrary, and we all know, as a matter of fact, that an averment could not be, truthfully, made that defendant was a resident of California, during the fiscal year 1880–81. We all know, as a historical, and publicly notorious fact, that defendant was not a resident of California during that fiscal year. It is as publicly notorious and well known a fact in California and Nevada, as that President Arthur was not a resident of California during that year.

The interest of defendant, in the capital stock of the corporation being incorporeal and intangible, and having no *situs* apart from the person of the owner, and he being a non-resident, without the jurisdiction of the state, and the tangible property of the corporation of which the capital stock is the representative, being, also, situate outside of the state, it was not, without some express constitutional or statutory provision making it so, if any such valid provision there could be, subject to the jurisdiction of the state, or to taxation within the state, through the medium of the shares of stock in the corporation, and, we have seen, that the provisions of the constitution and statute do not reach the case, as alleged in the complaint, there being no such express, unqualified provision. This view is fully sustained by the State Tax on Foreign Bonds case, 15 Wal., 300, and the cases therein cited. The case of San Francisco v. Fry, 11 Pa. Coast Law Jour., 393, cited and relied on by complainant, was for taxes against a citizen, and resident of California, over whom the state had jurisdiction, assessed for the year 1876–7, before the amendments of 1880, under which the present tax was assessed. And such, also, was the case in San Francisco v. Flood, 1 W. Co. Rep., 567, also, cited. In San Francisco v. Fry, as in the cases therein cited, as authority, the court rests its decision, sustaining the tax assessed, upon the stock of the corporation, whose tangible property was in the state of Nevada, upon the fact, that the owner of the shares was a citizen of California, and that the *situs* of this intangible property followed that of the owner, and, was, therefore, in contemplation of law, situate within the jurisdiction of, and taxable in the state of California. The court quotes from the Massachussetts case cited, this passage. "Thus shares in *foreign* railroad corporations held by *citizens of this state*, are fully taxed here, and no deduction is made for any taxation to which the corporations are subject in the states where they are situated. So it is in regard to shares held by our citizens in banks,

insurance companies, and other moneyed corporations *situated in other states*. Such shares, *when held by our citizens, are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this commonwealth*, regardless of what may be the foreign law, as to taxation of the capital, or of any part of it, elsewhere:' See State Tax on Foreign-held bonds, 15 Wall., 323–4; 18 Am. L. Reg. of 1879, U. S., and cases there cited:" 11 Pa. Coast Law Jour., 395. The court, then, adds: "The above quoted remarks are true of the system of taxation established in this state," *ib.*, thus, distinctly, recognizing the principle that the *situs* of incorporeal, intangible shares of stock, like that of a debt due, for the purposes of taxation, follows the person of the owner, and is the residence of the owner; and putting the decision on that ground. The court, it will be seen, also, cites State Railroad Tax on Foreign held Bonds, 15 Wall., 323–4, as sustaining the same position, thereby recognizing it as an authority directly on this point. The statute, itself, manifestly, recognizes and is framed upon the same principle, including the very sections cited by complainant as being entirely consistent with the provisions of section 3,627 of the political code as amended in 1880, cited and relied on by defendant. Section 3,629, P. C. Am. 1880, p. 7, provides, that the assessor "must exact from each person a statement * * * of all real and personal property owned by such person, or in his possession, or under his control, * * * showing, separately, among other things in subdivision 5 "the certificates of shares of the capital stock of any corporation, association, or joint stock company *not having its principal place of business in the state*." And section 3,640, *ib.*,9, provides, that, "each person, firm, or corporation, owning or having in his, or its possession, any of the shares of the capital stock of any corporation, association, or joint stock company shall be assessed therefor." And "the owner, or holder of capital stock in corporations, associations, and joint stock companies, whose principal place of business *is not within the state*, must be, *individually*, assessed for such stock. Shareholders, in the statement required by section 3,629 of this code, "shall specify the number of shares of stock held by them, and the name of the corporation." Now the persons mentioned, and intended, in section 3,629 and 3,640, and the owners and holders of shares of stock in foreign corporations who are to be "*individually*, assessed on such stock" under the latter sections, are, evidently, residents of the state, and taxing districts, *and no others*. The constitution does not contemplate any others than residents of the state. The provision is: "The legislature shall by law, require *each taxpayer in this state* to make and deliver to the county assessor annually a statement," etc. (Art. XIII, sec. 8.)

To no others than residents could they apply. No others could be required by the assessor to make the statement, or be called upon for that purpose. Non-resident owners of stock in domestic corporations could not be thus called upon, as they are out of the jurisdic-

tion of the state, and of the assessor of the taxing district. This provision, of the code, itself, then, as well as the supreme court, and the constitutional provision cited, clearly recognizes the principle, that the incorporeal, intangible right of property, in shares of stock in a corporation, follows the owner, and is taxable at the place of his residence, and, on that principle, requires that resident owners of stock in foreign corporations be taxed thereon, where they reside; and it is, only, upon this principle, that it can be so taxed. If the state insists upon this principle, with reference to resident owners of stock in foreign corporations, comity, at least, demands, that it should, also, recognize, it with respect to foreign residents owning stock in domestic corporations. It, certainly, should not take the advantages both ways. And there is nothing in any provision of the constitution, or statute, of California, brought to my notice, that indicates any intention to apply a different principle, as to the *situs* of incorporeal intangible personal property held by non-residents of the state, from that applicable to residents. The statutes are entirely consistent, and can have full force, and operation, upon the theory adopted as to residents, that the *situs* of incorporeal, intangible personal property, for purposes of taxation, is that of the residence of the owner, when living outside of the state, as well as, when living within it. While the other view would involve inconsistency in the principle adopted.

Under the other view, there would be one law to govern the rights of residents, and another those of non-residents. The constitution authorizes the taxation of property within the state, and the statute says it must be taxed in the "county, city and county, town, township, or district in which it is situate." If it be competent for the legislature to declare that the *situs* of incorporeal and intangible personal property shall be other than that of the residence of the non-resident owner, for the purposes of taxation, it has not done so, either in terms, or by any provision from which it can, reasonably, be implied. There is no definition, so far as I am aware, in the constitution, or statutes, of California, declaring what shall constitute the *situs* of such property for the purposes of taxation or otherwise; and in the absence of such definition, we must be governed by the general, and well established rules of law on the subject, and, that is, that it follows the person of the owner.

Upon the principle that the *situs* of this kind of property follows the owner, for the purposes of taxation, recognized and adopted by the supreme court in San Francisco v. Fry, and in the cases therein referred to; also, by the constitution and by the legislature in the provisions of the political code cited, the defendant was taxable upon the full value of all this identical stock in the state of Nevada. If this generally recognized principle subjected him to taxation in Nevada for the full value of the stock, where he resided, the same principle, certainly, ought to have exempted him from a similar taxation here, as both the person and property, on the theory recognized, were out of the jurisdiction of the state.

The obvious tendency of discrimination, double, unequal, and unjust taxation, is, to drive our citizens having a large amount of personal property, out of the state, to escape that kind of oppression. If, notwithstanding, their departure, they can still be taxed upon their incorporeal and intangible property, through their stock in domestic corporations, and, thereby, be taxed on the same property in both states, the next step will be, for business men either to withdraw their investments from the state, or change them from *domestic* into *foreign* corporations, as has sometimes been done, and the business will, hereafter, to a large extent, be carried on by non-residents, in their individual characters, or by foreign corporations, over which the state has little control, and the state will be confined for its revenue to the tangible property of such non-residents and foreign corporations found within its borders. A policy that recognizes the principle stated, for the purpose of taxing the stock of resident citizens in foreign corporations, as following the person, but repudiates it for the purpose of taxing the stock of citizens, and residents of other states in domestic corporations, thereby imposing upon them the burdens of taxation upon the same property in both states, cannot fail to be inimical to the best interests of the state, and to discourage investments by both resident and non-resident capitalists, thereby, greatly retarding the future development of its resources. The principle should be altogether repudiated, or made applicable both ways. I cannot impute to the legislature an intent to adopt a policy, so suicidal, as that claimed by the complainant, without provisions of the constitution, and statutes indicating such a purpose, far more specific, and unmistakable in their import, than any yet brought to my attention.

There are two items of property assessed as "solvent credits,—money, valued at two hundred and fifty thousand dollars—solvent credits, valued at two hundred and fifty thousand dollars." What is meant by the terms "solvent credits,—money," is not, entirely, clear. I suppose it means, money credits, or credits for moneys, as contra-distinguished from credits for goods, wares, merchandise, labor, etc. I do not find the terms in that form in any provision of the constitution, or statutes brought to my notice. As both the constitution and statutes, make a distinction between credits secured by a mortgage, and "solvent credits," not so secured, it may be that moneys loaned and due, secured by mortgage, are called, "solvent credits, money," or, the terms are more likely used to designate moneys deposited in solvent banks, subject to be drawn out as wanted on checks of the depositor in the ordinary course of business. I do not perceive that it can make any difference which it is. For in the former case, it is not taxable at all, as such, but the mortgage must be assessed, "as an interest in the land affected thereby," and it must be "assessed and taxed to the owner thereof, *in the county, city, or district in which the property affected thereby is situate:*" Const., art. XIII, sec. 4. And the code follows the constitution (P. C.,

sec. 3,627). But if taxable as "money credits," then in either class of credits, independently of statutory definition to the contrary, it can only be regarded as a solvent credit. No particular number of coins can be set aside, as belonging to any particular depositor. The general depositary has a right to mingle the money with other moneys, use the surplus moneys deposited, as his own, and at his own discretion. The deposit is not special. It is simply an open money account. The depositor is only entitled to so much money, in amount, and to no particular money, which may, or may not be paid, when his check is presented according to the ability, and will of the bank with which it is deposited. The depositor is, in law, only a creditor to the amount of the balance held by and due from the bank, or banker, on an open account. He could not replevy, or recover possession of any particular money. The only way to enforce payment would be to bring a suit for any balance due, as in case of money due on any other open account, as for goods sold and delivered. It is but a chose in action. Under the authorities cited, clearly, independent of statutory provisions to the contrary, such credits have no *situs* for taxation against the creditor apart from the person of the depositor: See 15, Wall., *supra;* People v. Eastman, 25 Cal., 603; People v. Whartenby, 38 Cal., 466–7.

The assessment in question seems to be an effort to reach for taxation tangible property in another state, through the stock in a domestic corporation owning it, held by a citizen, and resident of the state where such tangible property is situated. I do not find any authority in the constitution, or laws for accomplishing this purpose.

This view renders it unnecessary to consider the other grounds of demurrer to the complaint. The objection is radical, and complainant has been permitted to amend once after demurrer sustained. The demurrer must be sustained and final judgment for defendant be rendered on the demurrer, and it is so ordered.

SUPREME COURT OF UTAH.

MADSEN v. KENNER.

June, 1884.

A JUDGMENT WHICH IS SATISFIED IS NOT THE SUBJECT OF REVIEW BY CERTIORARI.—The judgment of an inferior court, though entered without jurisdiction, which is paid by the party against whom the judgment is rendered, and satisfaction of judgment entered, is not the subject of review by certiorari.

APPEAL from the first district court. The opinion states the facts.

Jacob Johnson, for the appellant.

Darke & Kenner, for the respondent.

TWISS, J. This is an application for writ of *certiorari* to review certain proceedings of the defendant Kenner, a justice of the peace in San Pete county.

The applicant alleges that complaint by one Martin Hansen was made on the twenty-fourth day of May, 1883, "in the justice's court, Manti city, San Pete county, territory of Utah, before F. R. Kenner, justice of the peace," charging the plaintiff with the crime of assault and battery. That the defendant, on the same day, issued a warrant commanding the officers to whom it was directed, to bring Madsen before him at his office, in the town of Manti city, in said Township. "Dated at Manti city in said township," and signed "F. R. Kenner, justice of the peace of said township."

The plaintiff was arrested and brought before the defendant "in the justice court, Manti city," and pleaded not guilty. He was represented by counsel, and waived a trial by jury. Witnesses on the part of the prosecution and the defense were sworn and examined.

The record contains the following item of May 25th: "Parties present; court ordered, adjudged and decreed that the defendant pay a fine of fifty dollars and costs of court, twenty-six dollars and sixty-five cents, and in case of his failure to pay such fine and costs to be confined in the county jail at the rate of one dollar per day until such fine and costs are paid."

A commitment was issued entitled as follows: "In the justice court, Manti precinct, county of San Pete, Utah territory." The people of the territory of Utah against Christopher Madsen, convicted of assault and battery," containing the usual recitals, but the record does not show that it was signed by any one. On the same day, May 25th, one o'clock P. M., the fine and costs were paid and the "prisoner released."

Upon these facts appearing of record, the plaintiff claims that the action against him, having been commenced in the justice's court of Manti city, and it not having been removed therefrom, the justice's court of Manti *precinct*, had no jurisdiction of the action, and without a verdict of guilty against the plaintiff the defendant Kenner had no authority to render judgment against him. That the judgment of the justice is uncertain, ambiguous and unintelligible and

void, because it directs that the plaintiff be imprisoned until such fine and costs be paid, in a manner not authorized by law, and that the law does not authorize imprisonment for costs, and because the defendant had no authority by law to remand the plaintiff to the custody of the marshall of Manti city, and alleges that he is without any plain, speedy or adequate remedy at law.

Without expressing any opinion as to whether the defendant had authority or jurisdiction to render the judgment shown by the record, or as to the effect of the irregularities complained of, or as to whether the plaintiff had a speedy, plain adequate remedy by appeal, or otherwise, at law, it is quite clear that the payment of the sums of money named in the alleged judgment as fine and costs determined the issues involved in the proceedings or action, which, by virtue of such payment were at an end, and the alleged judgment thereby satisfied and passed beyond review by *certiorari*: Ketchum v. Superior Court San Joaquin county, 3 West Coast Rep., 488.

It is ordered that the writ be dismissed.

HUNTER, C. J., and EMERSON, J., concurred.

CLAWSON'S CASE.

Filed November, 1884.

BAIL ON APPEAL DISCRETIONARY—ORDER DENYING BAIL WHEN NOT REVIEWED.—A defendant convicted and under sentence for a public offense, is not entitled as of right, to be admitted to bail pending an appeal by him, even though a certificate of probable cause for the appeal has issued, but bail in such cases is discretionary, and where the court in which the conviction was had, has in the exercise of its discretion, denied bail to a defendant pending an appeal by him, the appellate court will not revise its action, where it is not plainly to be seen that the discretion has been abused.

HABEAS CORPUS—REVIEW ON OF ORDER DENYING BAIL.—Whether the appellate court, in any event, can, by *habeas corpus*, review the action of the trial court in denying bail, considered doubtful but not decided; for the writ is not one of review and confers no appellate jurisdiction.

Rudger Clawson was convicted in the third district court of the crime of polygamy, and on the third day of November, 1884, was sentenced to imprisonment for four years, and to a fine of five hundred dollars with imprisonment until the fine was paid. The same day he appealed to the supreme court, and the judge before whom the cause was tried granted a certificate of probable cause under section 366 of the criminal practice act. After perfecting his appeal, defendant moved the district court in which the conviction was had, for an order admitting him to bail pending the appeal, and the district attorney, on behalf of the government, moved for the commitment of the defendant to abide the judgment of the appellate court; whereupon the following order was entered:

"The court having passed its sentence therein upon the defendant, the defendant now moves that bail be fixed pending the appeal and the motion is argued by counsel for the parties, and the court now having considered the same, and being of the opinion that the defendant ought not to be admitted to bail after conviction and sen-

tence, unless some extraordinary reason therefor is shown, and there being no sufficient reason shown in this court, it is ordered that the motion and application for bail be and the same is hereby denied, and the defendant is remanded to the custody of the United States marshal."

Subsequently the defendant applied to the supreme court for a writ of *habeas corpus*, which was issued, whereupon the foregoing facts were returned.

The criminal practice act provides:

Sec. 360. An appeal may be taken by the defendant.

1. From a final judgment of conviction;
2. From an order denying a new trial;
3. From an order made after judgment affecting the substantial rights of the party.

Section 358 of the act provides that appeals can be taken upon questions of law only.

Sec. 366. An appeal to the supreme court from a judgment of conviction stays the execution of the judgment, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise.

Sec. 367. If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal.

Sec. 388. After a conviction of an offense not punishable with death, a defendant, who has appealed, may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only;
2. As matter of discretion in all other cases.

Sec. 401. In the cases in which the defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having power to issue a writ of *habeas corpus*.

The laws of the United States provide for a writ of error from the supreme court of the United States to the supreme court of the territory from final judgment in polygamy cases.

F. S. Richards and *Bennett, Harkness & Kirkpatrick*, for the petitioner.

W. S. Dickson, U. S. attorney, for the respondent.

THE COURT, *per* TWISS, J., remanded the petitioner to custody, announcing *ore terme:*

1. After conviction for a public offense, and sentence of imprisonment pronounced thereon, a defendant is not entitled, as of right, to bail pending an appeal by him from the judgment, but the matter of admission to bail in such cases is discretionary, even though a certificate of probable cause for the appeal has been granted, and where the court in which the conviction was had, has, in the exer-

cise of its discretion, refused to admit a defendant to bail, the court will not revise such action where it was not plainly to be seen that the discretion thus exercised had been abused.

2. The court is not prepared to say, in view of section 360 of the criminal practice act, that the defendant can be released on *habeas corpus*, upon the giving of bail, as a consideration of this question would involve a review of the ruling of the district court ordering the defendant into custody, pending the appeal, and it is doubtful if this review can be had under the writ of *habeas corpus*, which is not a writ of review, and confers no appellate jurisdiction.

ZANE, C. J,, and Emerson, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,339.

JOHNSTON, EXECUTOR *v.* HANCOCK ET AL.

In Bank. Filed November 18, 1884.

NEW TRIAL—ORDER GRANTING WILL NOT BE PRESUMED ERRONEOUS.—The appellate court will not presume error nor an abuse of discretion in the action of the lower court in granting a new trial.

APPEAL from an order of the superior court for San Diego county, granting the plaintiff a new trial. The opinion states the facts.

J. O. W. Paine and *Works & Titus*, for the appellants.

Will M. Smith, for the respondent.

THE COURT. The plaintiff commenced an action of ejectment for certain lands described in the complaint, situate in the county of San Diego. Defendants had judgment and the court granted plaintiff's motion for a new trial. This appeal is by defendants from the order of the court below granting the motion for a new trial. The evidence in the case, clearly established plaintiff's title,—possessory title at least, to the land in controversy and the unlawful withholding thereof by the defendants, the appellants. The occupancy and cultivation of the land, as well as an actual residence thereon, by plaintiff's testatrix and the subsequent entry thereon by the defendants, all affirmatively appear in the evidence. It was with license too of the plaintiff, and under a full recognition of his right to the possession that the defendants made the first entry upon the premises in controversy, and after having surrendered the possession thereof, they made a second entry, which was without license, and wrongful, for the avowed purpose of holding the possession until a certain claim, or money demand made by Hancock's daughter, was satisfied.

We think it was a proper case for a new trial, and there was no abuse of discretion in granting the same. This court will not presume error: Thompson v. Morrow, 2 Cal., 99.

Order affirmed.

No. 8,323.

McCloskey v. City and County of San Francisco.

Department One. Filed November 18, 1884.

Assignment of Contract—Payments to Original Contractor after Notice of Assignment.—The assignee of a contract for grading a public square, in the city and county of San Francisco, upon performing the work contracted for, is entitled to payment of the full contract price. The amount of money paid by the city and county to the workmen of the original contractor for work done by them under the contract, after it had notice of the assignment of the same, cannot be deducted.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

J. F. Cowdery, for the appellant.

J. M. Wood, for the respondent.

McKee, J. This was an action to recover a balance due upon a contract in writing, by which the defendant promised to pay Thomas Barden the contract price of five cents per cubic yard for grading Jefferson square in the city and county of San Francisco—payment to be made when the work was finished.

On the 13th of April, 1873, the work called for by the contract was finished; and the defendant, in performance of the contract on its part, paid to the plaintiff's intestate, as assignee of the original contractor, the moneys due for the work, except a balance of $1,260, which it refused to pay him, because it had applied the money to pay workmen of the original contractor, for work and labor done by them upon the job for the contractor, and for which he was liable to them. But when the defendant applied the money for that purpose, it had notice of the assignment of the contract to the plaintiff, and that the right to the money was vested in him; the contract in the hands of the assignee was, therefore, not affected by the payment of the money to the creditors of the assignor.

But it is contended that the contract was not assignable, because "it contained a condition that it should be strictly non-transferable, and that neither of the contracting parties shall be permitted to assign or transfer the same, except by the consent of a majority of the Board of Supervisors."

The contention, however, is not predicated upon the record in the case, for the finding of the court below is, that the Board of Supervisors consented to the assignment.

There is no error in the record.

Judgment and order affirmed.

Ross, J., and McKinstry, J., concurred.

No. 10,984.

PEOPLE v. HICKS.

Department Two. Filed November 18, 1884.

LARCENY—INFORMATION—ALLEGATION OF OWNERSHIP—An information for larceny which alleges that "the property taken was the personal property in the possession of Frederick Schwartz, and that the same was taken from the person and against the will of him, the said Schwartz," sufficiently describes the ownership of the property.

APPEAL from a judgment of the superior court for Yuba county, entered upon a verdict of conviction. The opinion states the facts.

E. A. Davis, for the appellant.

Attorney-General, for the respondent.

MCKEE, J. The only point made by the appellant in this case is, that "the information fails to allege that the property taken was the property of some person other than the defendant." But the information contains this averment, viz., "that the property taken was the personal property in the possession of Frederick Schwartz * * * and that the same was taken from the person and against the will of him, the said Schwartz." We think this is a sufficient averment that the property belonged to Schwartz, and that it was taken from him by the defendant.

Judgment affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,683.

DORE v. DOUGHERTY ET AL.

Department One. Filed November 19, 1884.

APPEAL—MOTION FOR NEW TRIAL—SERVICE OF PROPOSED STATEMENT.—An appeal from an order denying a new trial will not be dismissed merely because the proposed statement, on which the motion for a new trial was based, was not served upon one of the adverse parties.

MOTION to dismiss an appeal from the superior court of the city and county of San Francisco. The opinion states the facts.

Jos. M. Nougues and *C. E. Nougues*, for the appellant Miller.

Mich. Mullaney, for the plaintiff.

H. C. Firebaugh, for the defendant Hallidie.

J. C. Bates, for the respondent Dougherty.

MCKEE, J. The respondent moves to dismiss the appeal taken from the order denying a motion for a new trial in this case, principally upon the ground that the transcript shows on its face that the proposed statement on the motion was not served upon one of the "adverse parties," as required by subdivision 3, section 659, C. C. P.

It is conceded that the proposed statement was served on all the parties, except one, viz., the defendant Hallidie; upon him it was

not served, but the court, as to the parties upon whom it was served, settled and allowed the same, certified to its correctness, and upon it, as certified, the motion for a new trial was submitted and denied. It may be that the court denied the motion because the proposed statement had not been served upon *all* the parties. If that were so, or if it were not so, it is not cause for a dismissal of the appeal. An appeal is dismissible for some irregularities in taking it, or for failure to prosecute it, or for want of appearance, or for consent of parties; but where it has been perfected according to law, and the appellant appears, he is entitled to be heard upon any question, or fact involved in the merits.

Motion denied.

Ross, J., and McKinstry, J., concurred.

No. 8,217.

McNeil et al v. First Congregational Society of San Francisco.

Department One. Filed November 19, 1884.

Estate of Decedents—Distribution under Mexican Law—Sale of Land under Order of Probate Court—Act of April 22, 1850, Construed—Statute of Limitations.—The estate of a person dying intestate, after the organization of the state government and before there was any legislation by the state regulating the administration, descent and distribution of estates, descended and was subject to the operation of the Mexican law in existence at the time of the cession of California to the United States. Under such law, on the death of an intestate his heirs succeeded immediately to the estate and became personally responsible for the debts of the deceased. No administration of such estate, in the common law sense, was needed or could be had. It was not subject to the administration of the alcaldes courts or court of first instance, nor to the operation of the probate law subsequently passed. An order of the probate court, made after the passage of the act of April 22, 1850, authorizing the persons appointed by the alcalde as administrators of such estate, to sell the real estate of such intestate, would be void for want of jurisdiction. That act had no application to the estates of persons who died before its passage. Section 1,573 of the code of civil procedure, limiting the time within which an heir or his grantee can maintain an action for the recovery of real estate sold by an executor or administrator to three years, has no application to such void sale.

Guardian and Ward—Sale of Land by Guardian Appointed by Foreign Court.—One appointed guardian of a minor by the courts of a foreign state has no authority, as such, to sell the lands of his ward situated in this state.

The Same—Natural Guardian—Sale of Land by—Legislative Authorization.—The mother of Francis W. Paty had no power, as his natural guardian, to transfer his real property, nor did she derive power for that purpose from the act of the legislature of May 6, 1861, authorizing his guardian to sell and convey certain real estate.

Partnership Lands—Sale of by one Partner to bona fide Purchaser.—The equitable interest of a partner, in land purchased by his co-partner, is discharged by a transfer of the legal title by the latter to a purchaser for value and without notice.

Sale of Land by Guardian—Statute of Limitations.—Section 1806 of the code of civil procedure prescribing three years next after the termination of the guardianship of a minor for a recovery by the minor or his grantee of real estate sold by his guardian, only applies to sales by guardians appointed by the probate courts of this state.

The Possession of one Tenant in Common is Presumed to be for the Benefit of all.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant and from an order denying the plaintiff a new trial. The opinion states the facts.

Stetson & Houghton, for the appellant.

Jos. Napthaly, for the respondent.

McKEE, J. Ejectment to recover an undivided interest in a portion of fifty-vara lot No. 145 in the city and county of San Francisco.

From the unchallenged findings of the court, it appears that William Paty on the thirteenth of November, 1849, acquired title to an undivided interest in the premises in dispute. After his acquisition of title he died, on the fourteenth of February, 1850, in the city of San Francisco, intestate, and leaving surviving him as his legal heirs, Martha Ann Paty, his widow, and three children, Ellen D., Charles M. and Francis W. Paty. Of these children, Charles M. died in the year 1857, a minor, unmarried and without issue. From Francis W. the plaintiffs claim to have derived his title to the premises; and they were, at the commencement of the action, vested with all the right, title and interest in said premises which the said Francis W. inherited as the heir-at-law of his deceased father and brother. Upon the case made by them they were therefore entitled to judgment for that interest against the defendants in possession, unless the latter showed a superior right to the possession.

Admittedly, the defendants were in possession, and had been, continuously, since the year 1852, by themselves and their grantor, under title to an undivided three-fourths interest in the property, derived from two of the heirs of the said William Paty, deceased. But they also claimed to have acquired the interest in the property of Francis W. as another of the heirs-at-law of said deceased. This claim of title is attempted to be derived from four sources. First—From a decree of confirmation by the probate court of San Francisco county of an administrator's sale of the real estate of said deceased made under an order of said court. Second—From a deed purporting to convey all the interest of Francis W. as an infant heir-at-law of his deceased father and brother, executed by the mother of said infant, under an act of the legislature of the state of California, approved May 6, 1861, entitled an act "to authorize the guardian of Francis W. Paty to sell and convey certain real estate." Third—From a deed purporting to convey all the premises in dispute, executed on the twenty-eighth of February, 1852, by John Paty, who was a brother and surviving partner of William Paty, deceased. Fourth—From the statute of limitations.

I. As to the first source: William Paty died February 14, 1850, after the organization of the state government and before there was any legislation by the state regulating the administration, descent and distribution of the estates of persons dying intestate within the state. His estate, therefore, descended and was subject to the operation of the Mexican law in existence at the time of the cession of California to the United States. As was said in Ryder v. Cohn, 37 Cal., 87. "It is a well-known principle that upon a conquest or cession of a foreign territory, the laws of the former sovereign will

prevail until they are abolished or supplanted by others enacted by the new sovereign."

And the constitution of 1849 embodied the same principle. Section 1 of the schedule, provided, "that * * * all laws in force at the time of the adoption of the constitution, and not inconsistent therewith, shall continue until altered or repealed by the legislature, as if the same had not been adopted."

No attempt was made to alter or repeal the Mexican law upon the subject of descent and distribution of estates of deceased persons until April 22, 1850. On that day the legislature, by an act entitled "an act to regulate the settlement of the estates of deceased persons" (stats. 1850, p. 377), regulated the subject of descent and distribution and conferred upon the newly appointed county courts, when sitting for the transaction of probate business, jurisdiction of such estates. About two months before that day, what purported to be letters of administration upon the estate of William Paty, deceased, were granted by John W. Geary, first alcalde and *ex officio* judge of the court of the first instance of the district of San Francisco, to John H. Gleason and John Paty; and those persons claimed to act as administrators of the said estate. But in Coppinger v. Rice, 33 Cal., 408, it was held that under the Mexican law, on the death of an intestate the heirs succeeded immediately to the estate and became personally responsible for the debts of the deceased, and that no administration, in the common law sense, was needed or could be had at any time. By force of the Mexican law, therefore, the estate of the intestate, William Paty, was transmitted to and became vested in his heirs; and it was not subject to administration in the alcalde's courts or court of first instance, nor to the operation of the probate law subsequently passed by the legislature; the order of the probate court, made after the passage of the act of April 22, 1850, authorizing the persons appointed by the alcalde as administrators of the estate, to sell the real estate of the intestate was, therefore, void for want of jurisdiction. That act, as has been determined by a series of decisions, had no application to the estates of persons who died before its passage: Grimes v. Norris, 6 Cal., 624; Ferris v. Pitcher, 10 *Id.*, 465; De La Guerra v. Packard, 17 *Id.*, 193; Soto v. Kroder, 19 *Id.*, 97; Downer v. Smith, 24 *Id.*, 114; People v. Senter, 28 *Id.*, 502; Wilson v. Castro, 31 *Id.*, 420; Coppinger v. Rice, *supra*; Seavern v. Gerke, 3d. Saw., 363.

Ryder v. Cohn, *supra*, is not in conflict with those cases. In that case, the question of title to the property in controversy in the case arose out of a final judgment founded upon proceedings which were had wholly in the court of first instance. The estate of the intestate had never been in the probate court. It is true that a majority of the court did hold that the court of first instance was a *de facto* court exercising general and unlimited jurisdiction in civil cases, and in matters of administration on the estates of deceased persons, prior to the enactment of a code of laws in this state in 1850; and that the judgments of said court, and titles acquired under them,

were valid, notwithstanding they might be void if tested by the strict rules of the common law.

Followed, however, to its logical conclusions, that decision would result in establishing the proposition that the court of first instance, before the code of laws enacted in 1850 went into effect, had jurisdiction of the estates of intestates, and that the probate court, subsequently established and organized under the code of 1850, had not, unless jurisdiction of such estates was conferred upon it by the code. But, although the constitution of 1849 provided for the removal of all cases pending in tribunals under the Mexican law to courts to be created by the legislature (sec. 2, Schedule), no provision was ever made by the legislature in carrying out the provisions of the constitution in that regard, for the removal of proceedings in estates pending in the court of first instance to the probate court. The court of first instance and alcalde courts were suspended by an act passed on the 28th of February, 1850 (Stats. 1850, p. 77), and by the provisions of that act: "All cases and proceedings pending before courts of first instance and alcalde courts" were made transferable to the newly created district courts and justices' courts. But neither in that act nor in the subsequent act of April 22, 1850, was there any provision made for the transfer of causes or provisions pending in those courts to the probate court. The probate court, therefore, acquired no jurisdiction of the estate of William Paty, deceased, although, as a matter of fact, the records and papers in the administration of the estate were sent to and deposited in the probate court.

II. As to the second source from which defendants claim title, the deed executed by the mother of Francis W. Paty under the act of the legislature was void, because, although she had been appointed guardian of the person of the minor by the probate court of the state of Massachusetts and by the supreme court of the Hawaiian islands, she had never been appointed guardian of his person and estate by the probate court of this state: Paty v. Smith, 50 Cal., 173. And, as the natural guardian of her infant son, the mother had no power to transfer his real property, nor did she derive power for that purpose from the act of the legislature: Brenham v. Story, 39 Cal., 179.

III. As to the third source, the deed from John Paty was ineffectual to transfer the title of Francis W. in the estate of his deceased father, because, although there was, at the time of the acquisition of the title to the property by William, a partnership between him and his brother John, the grantor, under the firm name of J. and W. Paty, in which they recognized each other as equal partners in all their business transactions, and the partnership continued until it was dissolved by the death of William, yet the court finds that the deed was not executed by John in the settlement of the affairs of such copartnership, nor for the purposes of a settlement thereof, nor to convey the property in controversy as surviving partner of the firm; and "that the plaintiffs purchased and acquired

the rights of Francis W. in the premises for value, and without notice of any copartnership interest of John Paty in the premises, or of any copartnership claim thereto by any one."

Assuming that John Paty, as the surviving partner of William, had an interest in the land purchased by the latter, it was a mere equity, which was subject to be discharged by a transfer of the legal title to a purchaser for value and without notice: 1 Leading Cases in Equity (White & Tudor), p. 287; Smith v. Yule, 31 Cal., 180. And when the plaintiffs acquired the title of Francis Paty, as found by the court, they took it against any equity existing in John Paty, as the surviving partner of William, and held it free from all trusts of which they had no notice at the date of their purchase. Therefore, the title acquired by them was not affected by the proceedings in the probate court on the estate of William Paty, deceased, nor by the deed executed by the mother of their grantor, Francis W. Paty, nor by the deed of John Paty, the brother of the intestate: McNeil v. Polk, 57 Cal., 323; and they became tenants in common with defendants in possession.

IV. As to the statute of limitations, the defendants pleaded: "That said plaintiffs ought not to have or maintain this action, because the alleged cause of action set out in said complaint is barred by the provisions of sections 318, 319, 320, 322 and 343, and sections 1,573 and 1,806 of the code of civil procedure of the state of California.

Section 1,806 prescribes three years next after the termination of the guardianship of a minor for a recovery by the minor or his grantee of real estate sold by the guardian. That section has no application to this case, because there was no guardian, and no sale by a guardian, appointed by a probate court in this state. Section 1,573 prescribes three years next after sale of an estate by an executor or administrator under the provisions of the probate law, for the recovery of the real estate sold; but that section is not applicable, because the premises in controversy were not subject to sale and were not sold under its provisions: Harlan v. Peck, 33 Cal., 515.

The other sections relate to the bar of the statute of limitations of five years. But Francis W. Paty was born on the sixth day of December, 1845, and the action in hand was commenced on the fourth of December, 1871. So that under section 328, C. C. P., his right was not barred. Besides, as the plaintiffs and the defendants were tenants in common of the land, the defendants are presumed to have held the possession for the benefit of theselves and the plaintiffs. There is no finding that this possession became adverse to the plaintiffs at any time, until the defendants refused to let the plaintiffs into possession, on their demand made to be let in, just before the commencement of this action.

Upon the findings the plaintiffs were entitled to judgment.

Judgment reversed and cause remanded with directions to the court below to enter judgment upon the findings, in favor of the plaintiffs.

ROSS, J., MCKINSTRY, J. No sale of the interest of the deceased William Paty in the real estate in question was ever made by order of the court of first instance, and as the legislature of the state made no provision for the transfer of proceedings relating to the administration of the estates of deceased persons from the courts of first instance to the court of probate provided for by the probate act of April 22, 1850, the probate court under that acquired no jurisdiction of the estate of the deceased Paty, who died February 14, 1850: Grimes v. Norris, 6 Cal., 624; Tevis v. Pitcher, 10 Cal., 465; De la Guerra v. Packard, 17 Cal., 193; Soto v. Kroder, 19 Cal., 97; Downer v. Smith, 24 Cal., 114; People v. Senter, 28 Cal., 502; Wilson v. Castro, 31 Cal., 420; Coppinger v. Rice, 33 Cal., 408; Rider v. Cohn, 37 Cal., 69. Nor did the defendants acquire the title of Francis W. Paty in the premises by any of the other means relied on, and which are stated in the opinion of Mr. Justice McKee.

We concur in the judgment.

No. 8,461.

ERENBIRG ET AL. *v.* PETERS ET AL.

Department Two. Filed November 20, 1884.

LEASE—CONTRACT IN WRITING—ALTERATION OF BY PAROL AGREEMENT.—The terms an provisions of a written lease cannot be altered by an unexecuted oral agreement between the lessor and lessee.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs. The opinion states the facts.

J. B. Hart, for the appellants.

Jos. Rothchild, for the respondents.

THE COURT. Action to recover rent due on a written lease; defense, a substituted oral agreement.

On the seventh of January, 1874, plaintiffs leased to defendants, by a lease in writing, a lot of land for five years; and during the term defendants erected a building thereon. On the seventh of January, 1879, another lease was executed for a term from February 11, 1879, to January 31, 1884. During the second term, to wit., January 27, 1881, the building was burned. An oral agreement was then made between plaintiffs and defendants, that the plaintiffs would erect another building on the lot, and that the plaintiffs would rent such building to defendants at an increased rent of ten dollars per month for the unexpired term of the second lease. The plaintiffs omitted to erect the building, and the defendants paid no rent after the fire.

The court below held that the lease of January 7, 1877, was still in force, and that the oral agreement was invalid and not binding, as

it was not an executed oral agreement. We think the court was correct.

Section 1,638, civil code: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, *and not otherwise.*"

We think the case is clearly within this section. The lease was a contract, not only on the part of the lessors, but on the part of the lessees, viz., to pay the rent named therein. The agreement set up by the defendants, would have the effect of altering the contract.

Judgment affirmed.

No. 8,481.

EVANS v. BAILEY ET AL.

Department Two. Filed November 20, 1884.

ACTION FOR GOODS SOLD AND DELIVERED—EVIDENCE—VARIANCE.—A complaint for certain cattle sold and delivered is not sustained by evidence that such cattle were delivered to the defendant to be slaughtered and the meat sold on commission.

CORPORATION HOLDING STOCK OF ANOTHER CORPORATION—ULTRA VIRES.—It is not presumptively *ultra vires* for one corporation to hold or acquire the stock of another corporation.

SUBSCRIPTION FOR STOCK—SHAREHOLDER—BOOKS OF COMPANY.—The books of a corporation are competent evidence to prove the number of shares which had been subscribed for and issued at the time an alleged indebtedness arose, and who were the shareholders.

THE SAME—ARTICLES OF INCORPORATION.—The articles of incorporation of a company, dated in 1877, do not necessarily show who were the shareholders, or in what amounts respectively, during a subsequent period.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendants a new trial. The opinion states the facts.

Estee & Boalt and *Ramon E. Wilson*, for the appellants.

A. B. Hart, *G. A. Heinlen* and *W. Saunders*, for the respondent.

THE COURT. 1. The cause of action, as stated in the complaint, is for goods sold and delivered to the defendant, the California Fruit and Meat Shipping Company, viz.: cattle to the amount of five thousand two hundred and fifty-three dollars and sixty cents, with a credit of seven hundred and fifty dollars, and that said defendant undertook and promised to pay said sum with interest. The plaintiff was the only witness sworn on his behalf; from his testimony it appears that one hundred and thirty-three head of the cattle were delivered to said company to be by it slaughtered and the meat sold on commission. The proof does not correspond with the allegation; the evidence does not sustain the finding in that regard.

2. The question of *ultra vires*, raised by the People's Ice Company, is not tenable. It does not appear that is was not within the scope of the powers of the People's Ice Company to acquire or hold stock of the California Fruit and Meat Shipping Company, under

any circumstance or for any purpose; and it does not appear under what circumstances the stock was acquired or held: Miners' Ditch Co. v. Zellerbach, 37 Cal., 578.

3. The books of the company were competent evidence to prove the number of shares which had been subscribed for and issued at the time the alleged indebtedness arose, and who were the shareholders.

4. The articles of incorporation, dated in 1877, would not necessarily show who were the shareholders, or in what amounts respectively, during the time from December, 1878, to February, 1879; therefore, no error is manifest in ruling out the articles.

For the error above noted, the judgment and order are reversed and the cause is remanded for a new trial.

No. 8,444.

PARKER *v.* BERNAL ET AL.

Department Two. Filed November 20, 1884.

ACTION TO ENFORCE STREET ASSESSMENT—PARTIES DEFENDANT—HEIRS NEED NOT BE JOINED.—An action for the enforcement of the lien of a street assessment under section 17 of the act of April 1, 1872, may be brought against an executrix, without joining the heirs, of a deceased person, although the latter are in fact the owners of the land assessed. Such heirs, if originally joined in the action, may be dismissed, and judgment rendered against the executrix.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

M. G. Cobb, for the appellants.

Charles H. Parker, for the respondent.

THE COURT. Street assessment suit.

The action was brought against several persons, heirs of one José Jesus Bernal, deceased, and two persons, executrixes of the will of deceased. The executrixes alone answered. After trial, the court found that at the time of the assessment, the said defendants were the owners of the premises on which the lien is claimed to exist. Some two years after, in rendering judgment, the action was dismissed as to all the defendants, except the executrixes, and thereupon judgment was rendered for plaintiff. We see no error in this affecting any substantial right of the defendants. According to section 17 of the act of April 1, 1872 (Stat. 1871-2, p. 818), the person owning the fee, or in the possession of the premises, or exercising acts of ownership for himself, or as administrator or guardian, or the person in whom the legal title appears by recorded deeds to be, shall be deemed the owner for the purposes of the act. It was, therefore, competent that the action should have been brought against the executrixes (equivalent for this purpose to administra-

tor), even though the heirs of a deceased person be in fact the owners. That being the case, there was no error in dismissing as to the heirs, and rendering judgment as to the executrixes.

We cannot say that the description given *does not* give the boundaries of any land.

The other questions presented have been passed on by this court.

Judgment affirmed.

No. 8,649.

GILMAN v. CURTIS.

In Bank. Filed November 20, 1884.

ASSIGNMENT OF POLICY OF LIFE INSURANCE AS COLLATERAL—RIGHTS OF ASSIGNEE.—The assignment of a policy of life insurance as collateral security for advances to be and which were made by the assignee, vests the legal title to the policy in the latter. The interest of the owner of the policy only extends to what remains of it after such advances have been repaid. Until such repayment the assignee cannot be made to surrender the policy.

FINDINGS HELD INDEFINITE, UNCERTAIN AND INCONSISTENT.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts appear in the opinion, and in the opinion of the department reported, 2 West Coast Rep., 135.

C. F. Hanlon and *G. W. Tyler*, for the appellant.

H. G. Seiberst and *G. F. Sharp*, for the respondent.

ROSS, J. Taking the most favorable view for the plaintiff of this case, as presented, it is clear that the decree entered in the court below cannot stand. Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant to be held by him as collateral security for certain advances to be and which were made by him, the legal title to the policy passed by the assignment to the defendant. The court should not, therefore, have adjudged the plaintiff the owner of the policy and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of fact, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied, and defendant cannot be made to surrender it to the plaintiff until the advances made by him are repaid.

But the special issues, which were adopted by the court below as its findings, are indefinite, uncertain and inconsistent. For example, upon an important question in the case the answers of the jury to questions propounded were as follows:

"8. When plaintiff reassigned the policy to her mother, did she make such assignment absolutely for the benefit of her mother?

"Answer—For the benefit of her mother.

"9. If such assignment was not made absolutely and solely for the mother's benefit, was it made with an understanding that Mrs.

Curtis or defendant, Gilbert Curtis, should hold the policy subject to a trust in favor of plaintiff?

"Answer—Yes."

Judgment and order reversed and cause remanded with leave to the parties to amend their pleadings if they shall be so advised.

MORRISON, C. J., SHARPSTEIN, J., MYRICK, J., MCKEE, J., THORNTON, J., and MCKINSTRY, J., concurred.

No. 7,923.

MARTIN *v.* HILL ET AL.

In Bank. Filed November 20, 1884.

JUDGMENT AND ORDER AFFIRMED after construing the contract sued on.

APPEAL from a judgment of the superior court for Marin county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts. The opinion of the department is reported in 2 West Coast Rep., 895.

E. S. Lippitt, for the appellant.

A. W. Thompson, for the respondents.

ROSS, J. Each of the parties to the agreement we are called upon to construe in this case was, at the time of its execution, in possession of a distinct portion of the Bojorques rancho, for the partition of which rancho an action of partition, entitled Gates v. Salmon et al., was then pending in one of the district courts of the state. Some of the parties to the agreement were holding under deeds from tenants in common of the rancho, purporting to convey the distinct parcels so possessed, and others of them were holding under deeds from tenants in common of the rancho, purporting to convey an undivided interest therein. The purpose of the agreement in question was to secure to the respective parties to it the portions of the rancho of which they were respectively in possession; and, lest it should turn out in the partition that their respective interests should not be sufficient to cover their respective possessions, it was determined to purchase, in the name of certain trustees, other and sufficient undivided interests in the rancho to carry out the wishes of the parties. The money required for such purchases was to be contributed by the parties to the agreement in proportion to the number of acres and value of the land included within their respective possessions. All this is embodied in the agreement, as we read it. Omitting some of its contents, not necessary to be stated, the agreement then proceeds: "And it is further agreed, that the property so acquired shall be used for and devoted to the purpose of quieting title to the said lands so in possession severally of the parties hereto, and for this purpose, and for all purposes under this agreement, it is stipulated that the parties hereto,

known as claimants 'by special location,' shall be deemed and admitted to be, respectively, the owners in fee simple of the tracts of land described in their respective deeds under said special location, and that for any lands in their possession not included within the lands described within their said deeds, they and each of them may purchase of the parties hereto, acting jointly as aforesaid, such title as may be requisite for their protection in and acquirement of title to the said lands outside of the special locations, or not included within said descriptions in the deeds, and the price to be paid therefor shall be at the rate per acre that the title by them so bought has cost in the original purchase of undivided interests in the whole rancho; the number of acres pertaining to the undivided interests so bought to be ascertained from the report of the commissioners in partition, without reduction by reason of special locations. And the parties claiming as tenants in common shall also have the privilege of buying, in the same manner and at the same price as last above provided, whatever number of acres they may have in possession in excess of their present undivided interest in said rancho, as shown by the report and survey of said commissioners in partition. And it is further agreed that all property, advantages and profit derived from purchases made under this agreement shall belong to the parties hereto in proportion to their several contributions, and that none of the provisions of this agreement shall inure to or in any way protect any person not a party to these presents."

The plaintiff, who was a party to this agreement, was, at the time of its execution, the owner of an undivided interest in the rancho, and was in possession of that portion thereof involved in the present action. He derived his undivided interest from one Walker, pending the partition suit—Walker retaining other interests therein. Subsequent to the agreement, and pending the partition action, the trustees named purchased certain undivided interests in the rancho, for the purpose contemplated by the agreement—the money with which the purchases were made being contributed by the respective parties to the agreement in proportion to the number of acres and the value of the land embraced in the respective possessions.

The plaintiff was not made a party to the action of partition after his purchase from Walker of an undivided interest in the rancho, but, with respect to that interest, the action was continued in the name of Walker; and in the final decree of partition there was awarded to Walker a portion of the rancho equivalent to the undivided interest conveyed by him to the present plaintiff, and to the undivided interest retained by him after that conveyance. The portion of the rancho so awarded to Walker did not include any portion of the tract actually possessed by this plaintiff, but the tract actually possessed by the plaintiff was, in and by the final decree in the action of partition, awarded to the trustees named in the agreement in question in lieu of the undivided interest in the rancho purchased by them, pending the action of partition, under and by virtue of the agreement, and with money contributed in ac-

cordance with its provisions. And the plaintiff brings this action to compel the assignee (with notice) of the trustees to convey to him the title to the portion of the rancho actually possessed by him at the time of the execution of the agreement, upon the payment by him, which he tenders, of a price at the rate per acre paid by the trustees in their purchase of the undivided interests in pursuance of the provisions of the contract.

It will be seen, therefore, that the case turns upon the construction to be placed on the agreement in question, the most material part of which has been hereinbefore quoted. If, under that agreement, the plaintiff could permit the undivided interest, which he held in the rancho at the time of the execution of the agreement, to be set off in the name of his grantor, so as not to include any part of the land in his actual possession, and then claim to purchase the whole of the land so actually possessed by him from the trustees under the agreement, then the plaintiff should recover in the action. If, on the other hand, the purpose of the agreement was to enable plaintiff to obtain the title to such portion of the land actually possessed by him as his individual interests might prove insufficient to cover, then he should not succeed in his present suit. The latter, we think the true construction of the agreement, and the judgment and order are therefore affirmed.

SHARPSTEIN, J., and MCKINSTRY, J., concurred.

MCKEE, J.—I concur in the judgment.

THORNTON, J., dissented.

No. 8,297.

KELLEHER *v.* KENNEY ET AL.

Department Two. Filed November 21, 1884.

NEW TRIAL—NEW DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.—An order refusing a new trial on the ground of newly discovered evidence will not be reversed if the newly discovered evidence is merely cumulative, and every material fact stated in the moving party's affidavits, is contradicted by counter affidavits.

APPEAL from an order of the superior court for the city and county of San Francisco, denying the plaintiff a new trial. The opinion states the facts.

P. G. Galpin, for the appellant.

Pillsbury & Titus, for the respondents.

THE COURT. Plaintiff moved for a new trial on newly-discovered evidence. Affidavits and counter-affidavits were filed. We are not informed, except by the certificate of the clerk, that the affidavits were used on the motion; but no point being made thereon, we pass to the point presented.

The evidence set forth in the affidavits of plaintiff was clearly cumulative. It was in effect denied by the counter-affidavits. The

real issue on the trial of the case was, whether plaintiff's intestate had delivered to defendants certificates for the six hundred shares of stock in dispute; not whether they were delivered on the tenth of December, 1877, or on or about the tenth of January, 1878. The date of delivery was not the material fact.

If the alleged newly-discovered evidence is merely cumulative, and every material fact is contradicted by counter affidavits, and the appellate court cannot clearly say that the court below erred in refusing it, the order refusing it will not be reversed: Doyle v. Sturla, 38 Cal., 456. See also People v. McCauley, 45 Cal., 146.

Order affirmed.

No. 9,192.

CALKINS v. STEINBACH.

Department One. Filed November 21, 1884.

REDEMPTION BY TENANT IN COMMON—RIGHTS AND LIABILITIES OF CO-TENANTS.—A tenant in common of land, or his successor in interest, who redeems the whole of the common property from a sale under a judgment against all the co-tenants, acquires thereby an equitable lien upon the interests of his co-tenants for their just proportion of the money paid by him in effecting the redemption; and he may maintain an action to recover such proportion and a decree to the effect that, in default of such payment, the interests of the co-tenant in the land be foreclosed.

THE SAME—EFFECT OF REDEMPTION BY JUDGMENT DEBTOR.—The effect attending a redemption of property sold subject to redemption, depends upon the character of the person making the redemption. If made by a "redemptioner," as that term is defined in subdivision 2 of section 701 of the code of civil procedure, and there be no further redemption within the statutory period, the redemptioner is entitled to a deed from the sheriff, conveying to him the interest of the judgment debtor therein. But if made by the judgment debtor or his successor in interest, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption and a note thereof on the margin of the certificate of sale.

APPEAL from a judgment of the superior court for Santa Barbara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

B. S. Brooks and *Gordon Blanding*, for the appellant.

Estee & Boalt and *P. R. Wright*, for the respondent.

ROSS, J. The case made by the complaint is this: Three persons—Gallagher, Mahé and Pavillier—were seized in fee of certain lands. Being so seized, they executed a mortgage upon the lands to secure the payment of their promissory note to Gasper Orena and wife.

The mortgage was subsequently foreclosed, because of default in the payment of the money, and under and pursuant to the decree of foreclosure, the lands were regularly sold at public auction to one Le Roy for eighteen thousand eight hundred and thirty-seven dollars and eighty-nine cents, who received from the sheriff a proper certificate of sale, which was duly recorded in the county where the lands were situated. Within six months after the sale, one of the mortgagors and judgment debtors—Gallagher—executed to the plaintiff

a deed conveying to him all of his (Gallagher's) interest in the lands, which deed was duly recorded in the proper county; and within six months from the date of the sheriff's sale, plaintiff as successor in interest of the judgment debtor Gallagher, redeemed the lands by paying to the sheriff the full amount of money necessary for that purpose, aggregating twenty thousand nine hundred and eighty-five dollars and forty cents, upon the receipt of which the sheriff executed to plaintiff a proper certificate of redemption, which was duly recorded in the office of the recorder of the county, and afterwards paid over the redemption money to Le Roy, who received it in full satisfaction of his rights as purchaser at the foreclosure sale. Prior to the plaintiff's purchase from Gallagher, the defendant Steinbach acquired by purchase the interest of Pavillier in the lands, a deed for which was put of record, and subsequently, but before the commencement of the present action, Steinbach acquired through a sale made under and pursuant to proper probate proceedings, all of the interest of the estate of Mahé in the lands, Mahé having deceased.

The complaint alleges these facts and then avers "that more than sixty days have expired since the plaintiff redeemed the above described land and premises from foreclosure sale, and neither of the defendants herein (defendants being Steinbach, one Dussol and the administrator of the estate of the deceased Mahé) have redeemed, or offered to redeem, any part or portion of said land or premises, or interest therein, from him. That all of the defendants herein have had notice of plaintiff's said redemption, and plaintiff has frequently since said redemption demanded of the said defendants, and each of them, that they and each of them pay to the plaintiff such proportion of the said sum of twenty thousand nine hundred and eighty-five dollars and forty cents, so as aforesaid paid by plaintiff in redeeming said land and premises, together with interest thereon, as the interest of each of said defendants in said land and premises bears to the whole thereof. That nevertheless the said defendants claim some right or title to said land and premises by reason of the former co-tenancy as aforesaid. That the defendants and each of them hitherto wholly refused and still do continue to refuse to pay to plaintiff or contribute any portion of said money so paid by him on said redemption." And the prayer of the complaint is:

"1. That the defendants and each of them be forever barred from setting up any claim to the said land and premises or any part thereof.

"2. That plaintiff be decreed to be the owner in fee of the whole of said land and premises.

"3. For costs of suit and for such other or further relief as to the court may seem meet and equitable."

The court below adjudged the plaintiff the owner in fee of the entire lands, and further decreed that the defendants and each of them "be and are forever barred from setting up any claim to said lands and premises or any part thereof."

The judgment is clearly erroneous. The effect of the redemption by plaintiff was precisely the same as if it had been made by Gallagher, it was as successor in interest of Gallagher that plaintiff became entitled to redeem: Code of civil procedure, section 701. Upon his redemption the effect of the sale was terminated and he thereupon acquired an equitable lien upon the interests of his co-tenants in the lands for their just proportion of the money paid by him in effecting the redemption; and he had his action to recover such proportion and a decree to the effect that, in default of such payment, the interests of the co-tenants in the lands be foreclosed. Those were the relative rights and duties of the respective parties. There is no such thing under our statute as a redemption from a successor in interest of one of two or more judgment debtors who redeems lands sold subject to redemption. Our code provides for the redemption of the property so sold, first, by the judgment debtor or his successor in interest in the whole or any part of the property, and second, by a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

The persons mentioned in the *second* subdivision of the statute are termed redemptioners. If property sold be redeemed by such a redemptioner, another redemptioner may, within sixty days after the redemption, again redeem it from the last redemptioner, on making the payments prescribed by section 403 of the code of civil procedure. And the property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, upon making the payments and taking the steps prescribed by the statute. If so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof has been given, and the time for redemption has expired, the last redemptioner or his assignee is entitled to the sheriff's deed. If, however, the debtor—who in all cases has the entire period of six months from the date of the sale for the purpose—redeem, the effect of the sale is terminated and he is restored to his estate. The same effect must be held to attend a redemption by the successor in interest of the judgment debtor, since the right of redemption which is by the statute given to the judgment debtor, is also given to his successor in interest. Where the redemption is by the debtor (or his successor in interest), the person to whom the payment is made is required to execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property, which certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder is required to note the record thereof in the margin of the record of the certificate of sale: Sections 701-2-3, code of civil procecure.

It will be seen therefore that the effect attending a redemption of property, sold subject to redemption, depends upon the character of

the person making the redemption. If made by a "redemptioner" (defined in the second subdivision of section 701 of the statute) and there be no further redemption within the statutory period, the redemptioner is entitled to a deed from the sheriff, conveying to him the interest of the judgment debtor therein. But if made by the judgment debtor or his successor in interest, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption and a note thereof on the margin of the certificate of sale.

The conduct of the defendant, Steinbach, as evidenced by his answer, does not commend itself to a court of equity, but it has not worked a forfeiture of any of his interest in the lands in question. He is bound to the plaintiff for such proportion of the redemption money, with interest, as his interest in the lands bears to the whole thereof, and as security for payment of such sum, plaintiff holds an equitable lien upon all of the interest of Steinbach in the property. To enforce the relative rights and obligations of the respective parties, it is necessary that this amount be judicially ascertained, a day fixed within which it be paid and a decree to the effect that in default of such payment, defendant be forever foreclosed of all right or interest in the lands.

Judgment and order reversed and cause remanded for further proceedings, with leave to the parties to amend their pleadings if they shall be so advised.

McKEE, J., and McKINSTRY, J., concurred.

No. 8,045.

EASTIN *v.* BANK OF STOCKTON.

In Bank. Filed November 22, 1884.

MALICIOUS PROSECUTION — PROBABLE CAUSE — QUESTION FOR COURT.—In an action for malicious prosecution, whether the facts as found by the jury constitute probable cause or the contrary, is a question for the court.

THE SAME—MEASURE OF DAMAGES—REASONABLE EXPENSES.—In such action, the plaintiff, if successful, is not entitled to recover all that he paid out and expended in the defense of the former suit, but only so much thereof as was reasonably laid out and expended.

ACTION FOR MALICIOUS PROSECUTION OF CIVIL ACTION.—In this state an action can be maintained for the malicious prosecution of a civil action in which no process other than the summons was issued.

APPEAL from a judgment of the superior court for Stanislaus county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Byers & Elliott, for the appellants.

W. E. Turner and *D. S. Terry*, for the respondent.

ROSS, J. The cause of action set forth in the complaint is, that in the month of August, 1874, the plaintiff executed to the firm of

J. H. Barney & Co. his two certain promissory notes—one for the sum of one hundred and sixty dollars, and the other for the sum of three hundred and forty-one dollars—which notes he paid in December of the same year at the Bank of Stockton, with the knowledge of the president, cashier and managing agent of the bank; that after the notes had been so paid and had been delivered up, plaintiff lost them and the bank, by some means to the plaintiff unknown, became possessed of them; that, thereafter, and in the year 1876, the bank and its co-defendant, Hogan, entered into a conspiracy for the purpose of blackmailing plaintiff and extorting money from him by means of the possession of the notes and the supposed inability of the plaintiff to produce evidence of their payment, and that it was agreed and understood between the bank and Hogan that each should receive an equal part of whatever money they might succeed in extorting from the plaintiff, and that each should bear an equal part of the expenses incurred in carrying out the conspiracy; that in pursuance of the conspiracy defendant, on the fifth of August, 1878, willfully, maliciously, and without reasonable or probable cause, and with intent to vex, harass and injure the credit of plaintiff, and to put him to cost in and about his defense, or to compel him to submit to their extortionate demands, commenced an action in the district court of the fifth judicial district of the state of California for the recovery of the sums for which the notes had been given, but which defendants at the time well knew had been fully paid; that process in that action was served on the present plaintiff, who was obliged to employ counsel to defend the suit at a cost of six hundred dollars and to incur a further expenditure in defense thereof of seventy-five dollars; that by reason of the commencement and prosecution of that action the plaintiff was damaged in the further sum of five thousand dollars by way of injury to his credit, neglect of his business, etc.; that the action resulted in a judgment for the then defendant—plaintiff here.

The answer of the defendants put in issue the material averments of the complaint and a trial was had with a jury, resulting in a verdict for the plaintiff for the sum of three thousand dollars; and judgment was entered against the defendants for that sum and costs.

A large number of objections were taken by the defendants to the proceedings in the court below—among them exceptions to the giving and the refusal to give certain instructions to the jury. The instructions were erroneous in several particulars. In several instances the jury was told in effect that it was for them to decide whether or not there was probable cause for the prosecution of the suit against the plaintiff. Thus, the court told the jury: "If from the evidence you find that in the instituting of the suit of the Bank of Stockton v. Eastin, there was no probable cause, and that the defendants were actuated from malice, either actual or implied, then I charge you that in assessing the damages sustained by Eastin you are not limited to the actual amount paid out or expended by him," etc. Again, the jury was told: "If the facts offered to show a want

of probable cause are undisputed, it is the sole province of the court to determine whether or not such evidence establishes a want of probable cause, and in that case the jury would have nothing to do with the matter. If, however, the facts are disputed, then it becomes your duty first to determine what are the facts proven, and *next*, under the instructions of the court, *to see whether those facts constitute a want of probable cause.* Now, in this case, that is a disputed proposition, and unless you find affirmatively from the testimony that there was a want of probable cause in the institution of the suit of Bank of Stockton v. Eastin, then you must find for the defendants." Continuing the court said: "In determining whether or not there was a want of probable cause in the bringing of that suit, the court calls your attention particularly to the fact which, in its judgment will determine that question either one way or the other."

It is quite clear that by these instructions the court left it with the jury to say whether or not there was probable cause for the bringing of the suit against the plaintiff. In doing so, the court committed to the jury more than it was their legitimate province to determine, as was held in Grant v. Moore, 29 Cal., 652, and where this court said: "The law makes it the duty of the judge who tries an action for malicious prosecution, to instruct the jury that as they may find and determine certain questions of fact, properly submitted to them, to be true or untrue, so must be their verdict for the plaintiff or the defendant, not that they should determine the question of the want of probable cause or the contrary."

The court below also erred in instructing the jury, as it did, that in the event of their finding a verdict for the plaintiff, it would be their duty to allow him all that he paid out and expended in the defense of the former suit, "both counsel fees and all other expenses paid out by him," without reference to whether such counsel fees and other expenses were reasonable and proper or not. Under no circumstances would plaintiff be entitled to recover extravagant and unnecessary fees and expenses.

As the case must be sent back for a new trial, it is proper to decide another question raised, and that is, whether in this state an action can be maintained for the malicious prosecution of a civil action in which no process other than the summons was issued. The weight of the authorities, American as well as English, is against the maintenance of such an action; and so are most of the text-writers. The question has never been determined in this state, and we are, therefore, at liberty to adopt the rule that we think is founded on the better reason. The point was made in the case of Smith v. George, reported in 52 Cal., 344, but was not decided, the court holding that it was unnecessary to decide it, but remarking that "the adjudged cases in England and America are conflicting upon the question, and depending to a considerable degree, it would seem, upon the prevailing statutory provisions as to the recovery of costs by the defendant upon the determination of a civil action in his favor." The cases are collected and reviewed by Mr. Lawson,

in an instructive article upon the subject published in the American Law Register, and which will be found in the 21st volume at pages 281-353. The cases are too numerous to be here referred to in detail. The English cases which deny the right to maintain the action stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute. Those costs, it seems, include the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The reason upon which the English rule rests would not therefore seem to apply here where the costs recoverable under the statute are confined to much narrower limits. Under our system the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal right to complain when the suit is brought and prosecuted in good faith, because, as said in Classon v. Staples, 42 Vt., 209, "It is the ordinary and natural consequence of a uniform and well-regulated system to which all parties in civil actions are required to conform. But when the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted, without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action in the case.

Two other objections made to the maintenance of the action, that is to say, first, the claim that if such suits are allowed, litigation will become interminable, because every unsuccessful action will be followed by another, alleging malice in the prosecution of the former, and, second, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defense, are well answered in the article already alluded to: "To the first objection it is enough to say, that the action will never lie for an unsuccessful prosecution unless begun and carried on *with malice and without probable cause.* With the burden of this difficult proof upon him, the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion;

if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege."

Judgment and order reversed, and cause remanded for a new trial.

MYRICK, J., and MCKINSTRY, J., concurred.

MORRISON, C. J., concurring: In his charge to the jury the court said: "I charge you that it will be your duty to allow him (the plaintiff) all that he paid out and expended in the defense of the former suit, both counsel fees and all other expenses paid out by him, and in addition thereto you may award such damages, in all not exceeding five thousand six hundred dollars, by way of exemplary or punitive damages."

I think the foregoing instruction erroneous. The jury was told that they should allow the plaintiff all *that he paid out and expended in the defense of the former suit.* The allowance in this respect should have been confined to such an amount as was *reasonably* laid out and expended.

Without expressing any opinion on other points decided in the main opinion, I concur in the reversal of the judgment, on the ground above stated, and I think the action maintainable.

THORNTON, J. I concur in the judgment of reversal herein, on the ground that, assuming as true the strongest case which on a fair consideration of the evidence is made out against the defendants, there is no want of probable cause for the course which they pursued.

I agree that in a proper case an action such as the one before us, can be maintained against an attorney. But it cannot, in my opinion, be held that an attorney who is told by his client that a note is due and unpaid, is guilty of the malicious prosecution of a suit when he brings an action on the note against its maker, though he has been told by the maker that he has paid the note. The law does not impose on the attorney the determination of any such case. Nor will it hold him guilty of a direlection of duty or trespass on the rights of others, if he determine to act, and does act, in accordance with the statements of his client and constituent. Such, I understand, is the case made by the evidence against the defendant Hogan.

As to the bank, its responsibility is made out through the alleged fault of its president and servant. As I read the evidence in the case, the utmost that can be said in regard to his relation to the note sued on, is, that it was left in doubt whether the bank had the right to recover on the note or not. Under such circumstances, when he directed the suit to be brought, he was acting in the line of his duty, and was conducting himself as a faithful servant should have acted. Of such conduct neither malice nor want of probable cause can be predicated.

BOOK REVIEWS.

A TREATISE ON THE PRINCIPLES AND PRATICE GOVERNING THE TRIAL OF TITLE TO LAND; INCLUDING EJECTMENT, TRESPASS TO TRY TITLE, WRITS OF ENTRY, STATUTORY REMEDIES FOR THE RECOVERY OF REAL PROPERTY; TOGETHER WITH THE RESULTING CLAIMS FOR MESNE PROFITS AND IMPROVEMENTS; EMBRACING A CONSIDERATION OF COLOR OF TITLE, TITLE BY POSSESSION, AND ADVERSE POSSESSION. By Arthur G. Sedgwick and Frederick S. Wait. New York: Baker, Voorhis & Co.; 1882.

The authors say in their preface: "The principles and practice regulating remedies for the trial of title and recovery of possession of real property are in the main uniform in this country. This may be explained, historically, by the fact that in most of our states the existing statutory remedies are based upon the common law action of ejectment. The system of real actions is practically extinct in America, excepting in parts of New England. It may be stated generally that our modern remedies constitute a single general system of procedure, disguised under a variety of names." The very elaborate title quoted above plainly suggests a work dealing with all kinds of actions and judicial modes of trying and determining title to land; but the volume is substantially a treatise on the legal action of ejectment, discussing the cases when the action will lie, by and against whom it may be brought, the parties, pleading, and procedure, the verdict, judgment, and execution, with various incidents, such as new trials, ancillary reliefs of injunction and the like, mesne profits, damages, and improvements. To this main body of the work are added chapters on possession, adverse possession, claim of right, and color of title. Although the title-page includes "statutory remedies for the recovery of real property," yet so far as we can find after a careful examination, the book wholly omits all consideration or even reference to the important statutory "action to quiet title." The index contains only two references under the head "Action to quiet title." One of these (§ 354), is a paragraph stating that in New York a party desiring to quiet title to land must proceed under the statute for that purpose or by suit in equity, and not by ejectment. The other (§ 586), is a paragraph which says that in Indiana a trial may be had as a matter of right in suits for quieting title, as in actions of ejectment. We have carefully looked through all the chapters and can find no treatment or consideration of the statutory "action to quiet title." This we regard as a very grave omission in a work which professes to treat of trial of title to land. In twenty-two states and territories the "action to quiet title" is established and regulated by stat-

ute, and is extended much beyond the original jurisdiction of equity. In many of these states, especially at the west, the statutory action has come to be the ordinary mode of trying disputed titles. According to the provisions of the statute in a majority of these states, the plaintiff must be in possession in order to maintain the action; but in several of them, namely California, Dakota, Idaho, Indiana, Iowa, Mississipi, Nebraska, and also in Illinois and Minnesota, where the land is unoccupied and unimproved, the plaintiff may be either in possession or out of possession of the land in controversy. The statutes in almost all of these states allow the action to be maintained by persons having either equitable or legal titles; but in Wisconsin and Kentucky, and formerly in Ohio, the plaintiff is required to have a legal title. The reports of the states and territories in the great Mississippi valley and on the Pacific show how exceedingly important this action is in most of them; while in those states which permit the suit to be brought by a plaintiff out of, as well as in, possession, and whose title to the land is either legal or equitable, this statutory action to quiet title has come to be the ordinary means of determining controverted titles, and has to a great extent displaced the action of ejectment. It certainly possesses many advantages over ejectment, arising from the fact that it can take cognizance of, pass upon, and establish equitable as well as legal titles, and even both kinds of titles in the same suit. The failure to consider this purely American action in a work of such a description as the one under notice, seems to us to be a serious omission. The concluding chapters on Possession, Adverse Possession, Claim of Right, and Color of Title, we think, from the examination we have given them, will be of much service to the profession. The subjects which they discuss sometimes present questions of great intricacy and difficulty.

A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK. By Henry O. Taylor. Philadelphia: Key & Brothers; 1884.

The author says in his preface: "The object of this treatise is to give an accurate statement of the law regulating business enterprises which are prosecuted through the instrumentality of corporate organization; to define the rights and liabilities of the different classes of persons interested; and to treat those rights and liabilities according to the manner in which they come before the courts for determination." In a subsequent part of his preface the author states, what is, in our opinion, an undeniable and even patent truth, but one which has been almost entirely overlooked by American decisions and text books, even those most recent. He says: "It is the opinion of the writer that the fiction of the 'legal person' has outlived its usefulness, and is no longer ade-

quate for the purposes of an accurate treatment of the legal relations arising through the prosecution of a corporate enterprise. By dismissing this fiction a clearer view may be had of the actual human beings interested, whose rights may then be determined without unnecessary mystification." The author has here touched upon, although he has not fully developed, a fact which, in our opinion, must ere long be recognized and acted upon by the courts in dealing with the law of corporations. The common law conception of the "legal personality" of the metaphysical entity constituting the corporation, entirely distinct from its individual numbers, arose at a time when corporations were all created by special charters generally granted by the crown; when very few of them were "stock" corporations; when they were mostly perpetual in existence; when absolutely no personal liability was imposed upon the individual corporators, but the legal status of the corporators was wholly swallowed up in the "legal person" of the corporation, and when corporations were in reality, as a necessary result from this creation and legal position, monoplies. In the United States, at the present day, almost all private corporations, whether business or otherwise, are formed under general laws, and in many states the legislatures are expressly forbidden from granting special charters. Under these general laws, persons complying with a few formal requisites can organize themselves into a company for almost any business purpose. The associations thus formed are limited in duration; they are under complete control of the legislature; the individual corporators are all personally liable to some extent and in some manner, and in many instances they are fully liable as though they were the immediate parties and debtors. In truth, except in the features that they can sue and be sued, make contracts, acquire rights and incur liabilities in and by *their corporate names*, and that a change of membership does not work their dissolution, these associations differ very little in their essential attributes from partnerships.

And yet our American courts, both state and national, have, with few exceptions, gone on and applied the same language, the same conceptions, and the same doctrines to these associations, which were originally applied to corporations as they existed under purely common-law notions and regulations. The English courts have never fallen into this error. Of late years parliament has enacted statutes similar, in their scope and effect, to our general laws for the formation of private corporations. The English courts have never treated the joint-stock companies with limited liability, formed under these statutes, as being identical with common-law corporations, but have always carefully distinguished between them. In our opinion, the American courts must, in time, recognize and enforce the same distinctions.

In pursuance of the thought expressed in our last quotation, Mr. Taylor has adopted an order of arrangement, in dealing with the subject matter, which appears to us both scientifically correct and therefore practically convenient. In the opening chapters he examines the notion of a corporation in the Roman law and in the common law, carefully analyses the actual conception in our modern jurisprudence, and points out the resemblances between corporations and certain other legal institutions. In the fifth and sixth chapters he discusses two most important subjects—namely, the legal relations arising through the promotion of a corporation, and those consequent upon an agreement to take shares in the stock of a corportion to be organized. Chapter seventh, which includes at least a third of the volume, discusses the legal effect of acts done by or on behalf of a corporation—that is, the legal relations between it and outsiders. This chapter treats of corporate powers, and acts of all kinds within and beyond these powers; and includes, among other matters, a section upon a topic of great importance in this country—namely, the status of a body of men incorporated by the legislation of two or more states. The remaining chapters treat of the relations between the state on the one side and the corporation, its stockholders, officers, and creditors, on the other; between the corporation, and its stockholders, officers, and creditors; between the stockholders and the officers and the creditors; between the officers and the creditors; and, finally, among persons of the same class, that is, among stockholders, among officers, and among creditors. This brief summary of the chapters shows that the arrangement is comprehensive, scientific, and practical. From the examination which we have made, we believe that Mr. Taylor's work is a valuable contribution to the literature of the most important subject of which it treats.

WEST COAST REPORTER.

WHOLE No. 49. DECEMBER 4, 1884. VOL. IV. No. 10.

COMMUNITY PROPERTY.

(CONTINUED.)

Pursuing the subject from the last preceding article, I shall mention another possible and even probable effect of the system under examination, namely :

4th. The uncertainties, discrepancies, and contradictions in record titles apparently regular and perfect which may be produced by the community property system. A little reflection will show that the community property, by virtue of the peculiar doctrines heretofore described, not only may, but almost certainly *must*, produce uncertainties, discrepancies, and even contradictions in record titles—especially land titles,—which are apparently regular, complete, and, perfect. That is, while a claim of recorded conveyances may be complete and unbroken, and may show an apparently perfect title, so far as the recorded instruments are concerned, vested in a certain person A., extrinsic facts not on the record, and which need not be and ordinarily could not be on the record, and which rest perhaps upon verbal testimony alone, may nevertheless show that A. has really no title, or that the title is held by another person B. Or the record may disclose two conflicting chains of title, one of them regular, unbroken, and apparently perfect and vesting the title in A., and the other irregular, broken, imperfect and purporting, so far as it goes, to vest the title in B.; and the latter, by virtue of such extrinsic facts outside the record, shall in reality be the true and legal title. The system of recording all instruments which can affect the title to real estate, is the peculiarity of our American legislation, and exists substantially the same in every state of the Union. The theory of this legislation is, that the proper record of every such instrument should be absolute notice of its contents, and of all the rights, titles, or interests, legal and equitable, created by or embraced within it, to every person subsequently dealing with the subject matter whose duty or interest it is to make a search of the records. The intention is to compel every person receiving such an instrument to place it upon the records, in order that he may thereby protect his own rights as well as those of all others who may afterwards acquire an interest in the same property. The ultimate design is, that the public records should, in this manner,

furnish an accurate and complete transcript and exhibition of all estates, titles, interests, claims, encumbrances, and charges, both legal and equitable, in and upon every parcel of land which has come into private ownership within the territorial limits over which the particular record extends; and that a person about to deal with respect to any parcel of land, should be able to discover, or find the means of discovering, every existing outstanding estate, title, or interest in it which could affect the rights of a *bona fide* purchaser. The ideal of the system is, that a person about to purchase a parcel of land should be able, from an accurate search of the records, to find *everything which could possibly affect the validity of the title;* so that, if the title of his intended grantor *appeared* on the records to be perfect, then as a matter of fact it *necessarily would be perfect.* This is the theory of the legislation as established by judicial interpretation; and the general design has, as far as possible, been carried into effect by the courts.[1]

In New York, and many other states where the common law dower still exists unaltered as a part of the law of real estate, an objection is sometimes urged against the continuance of this dower right, because titles apparently good on the record, may be, and often are, invalidated or impaired by claims for dower not appearing on the record, but resting upon and established by facts entirely *dehors* the record, and of which the record gives no notice, and could not give any. For example, the record shows a complete chain of conveyances vesting the title to a certain parcel of land in Samuel Brown; it also shows a deed of the same parcel from Samuel Brown, and other subsequent conveyances, regularly connected from grantor to grantee, and finally conveying the land to the present owner, Peter Jones. When Jones purchased, the record showed what was apparently a perfect, valid, unincumbered title in his immediate grantor; and, relying upon such apparently perfect record title, he purchased the land, took a conveyance of it, and paid a price equal to its full value. And yet the land in his hands is liable to a claim of dower in favor of Samuel Brown's widow,—a claim of which the records give, and could give, no intimation. At the time of the conveyance to him Brown was married; as his wife did not join in his deed of the land, her inchoate right of dower still attached to it and followed it in the hands of all subsequent grantees, and, finally, when her husband died, leaving her as his widow, her dower right became consummate, and could be enforced upon the land in the hands of its then owner—Jones. The claim of dower would thus depend upon the fact of Brown's marriage, and of his death, leaving a widow surviving him,—facts which would not

[1] This general intent of the recording system was well stated by the court in United States Ins. Co. v. Shierer, 3 Md. Ch. 381, as follows: The legislative intent was "that all rights, incumbrances, or conveyances, touching, connected with, or in any way concerning land, should appear on the public records."

and could not appear on the records, unless the whole record system should be supplemented by the additional requirement that all marriages, divorces, and deaths of husbands and wives, should be registered. Such legislation would be a very great improvement of the whole system of recording, and would remove nearly all the obstacles to the absolute perfection of *record titles* in all those states where the community property system does not prevail. It would not, however, in the slightest degree obviate or remove the uncertainties resulting from the existence of community property. In this country, in pursuance of the design of the system, as above described, it has become the general practice of purchasers, mortgagees, and other incumbrancers, to rely upon the titles as shown by the record. If a search properly made discloses a title apparently perfect on the record as held by the intended grantor, or mortgagor, or other owner, then, as a general rule, and according to the general practice, reliance could be placed upon the title thus exhibited by the records, as being actually valid, and no further inquiry or investigation would be made into its validity. A reliance thus reposed upon the validity of titles as appearing on the records, has become habitual with all persons dealing with land in this country. If the system of recording is so perfect and complete that it always justifies such reliance, then no more admirable system could be contrived. If, on the other hand, the system of recording frequently fails to justify such reliance; if, for any reason, persons dealing with land are liable to be misled by the records; if, through imperfections of the method, titles apparently valid and perfect on the record may, to any considerable extent, be actually invalid; if the actual validity of titles apparently perfect on the record may, in numerous instances, depend upon facts entirely outside of the record, facts which are not, and cannot be, disclosed by the record, but which must be established by extrinsic and perhaps verbal evidence; then a system so imperfect and misleading *might* be more injurious in its practical effects, and might be productive of greater inconvenience, than an entire absence of any system of recording. In such a case, it might be better to abolish the whole system of recording, and to return to the methods which still prevail in England.

The uncertainties of record titles resulting from claims of dower in New York and many other states, are serious, and the objections thence arising to the continued existence of dower in those states, are certainly weighty; but, in my opinion, the uncertainties, discrepancies, and even contradictions among record titles which may, and it would seem necessarily must, arise in this state from the community property system, are much greater in number and importance than those which can possibly result from the common law dower. Among these uncertainties I will mention the following:

1. In certain instances of acquiring and conveying community property, there must *of necessity* be a break or interruption in the chain of record title. That is, a continued chain of conveyances on record will show the title to a parcel of land as vested in a certain person A., and will there end; while a second chain of conveyances of the same parcel will start from another person B., and the record will not necessarily disclose anything showing the existence of any legal relation between these two persons,—a legal relation by virtue of which B. *could* convey the title which had thus been vested in A. The excellency of the recording system, as a means of protection to intended purchasers and incumbrancers, consists chiefly in this, that a chain of title can be traced unbroken on the records from the present owner up through each grantee and grantor to the original source of title. Anything which interrupts or breaks this chain, which prevents a party from tracing it throughout its whole length until it reaches its original source of title—any link left out—may destroy the entire benefit of the records as a notice;—that is, may interrupt and mislead a party in making a search.

This result must or may always happen whenever land, being community property, is acquired by and conveyed to a wife during the marriage. The deed to her put on record shows a perfect chain from the original source of title to her. There is no deed on record from her; the record chain of title ends in her. A deed of the same parcel of land is afterwards given by the husband alone, in his own name, and from this deed when recorded begins a new chain of record title. The records do not, or need not disclose the existence of the marriage relation between them; and from the mere fact of their having the same name, no presumption arises that they are husband and wife. If the husband conveys the land, and through subsequent conveyances it comes into the ownership of a certain person, and an intended purchaser from such owner should make a search, he could trace the title up to the husband, Mr. A.; and then, so far as the records show, the title would stop. The records would give no intimation that the land was community property, and no intimation of where the title came from to Mr. A. The records would not show that A. was married; and even if by chance the intended purchaser should see the deed to Mrs. A., the records might give no intimation that she was the wife of Mr. A. In such cases, unless the deeds themselves contained the proper explanatory recitals, there would necessarily be an interruption and break in the chain of record title.

J. N. P.

(To be continued.)

CIRCUIT COURT, DISTRICT OF COLORADO.

IRON SILVER MINING COMPANY v. REYNOLDS ET AL.

November 18, 1884.

LODE SITUATE WITHIN PLACER MINE—RIGHT TO POSSESSION OF.—As against a mere intruder the grantees under a placer patent are entitled to the possession of a lode situated within the placer grant, although at the time of the application for such patent the applicants knew of the existence of such lode.

ACTION for possession of specific real property. The instructions state the facts.

G. G. Symes, for the plaintiff.

Morrison, Wenzell, Thomas and *Patterson*, for the defendants.

HALLETT, D. J. (Instructing the jury.) The evidence tends to prove that the lode in controversy was known to Wells and Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff claims title. Also that Wm. H. Stevens, one of the grantees of Wells and Moyer and a grantor of plaintiff, knew of the existence of the lode at the time application was made by Wells and Moyer for the placer patent, procured such application to be made with a view to acquire title to himself and his associates to the territory described, and probably with a view and an intention to acquire title to the lode now in dispute in this action. Assuming the placer patent to have been obtained with knowledge and intention on the part of the patentees, as stated, the question is whether any right or interest in the lode in controversy, was conveyed by the patent. That is a question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode, or an intention to claim the same according to local law and the acts of congress. But here the defendants show no title or right in the lode at the place in controversy. They assume the right to follow the lode and its dip without the side line of the Pinnacle location and under the Wells and Moyer placer location. So that it is essential that they have the top and apex of the lode within their location, in the general direction of the location. A small segment of the top and apex of the lode is shown within the Crown Point location; but it extends, not with the length of the location, but across it, so as to convert the side lines of the claim into end lines, and to limit the direction in which it may be pursued to the space enclosed by those lines. The place in controversy is not within the side lines of either of defendants' locations, nor within the extension of those lines. No other ground is perceived upon which defendants may assert title or right of possession to the place in controversy, and therefore they are to be regarded as naked intruders. And as to such intruders the plaintiffs' placer title may give a right of possession and recovery.

The jury is advised to find for plaintiff, with the value of the ore removed from the placer ground by defendants.

SUPREME COURT OF COLORADO.

HUGHES v. BREWER.

Filed October 31, 1884.

ACTION BY ASSIGNEE—ALLEGATIONS OF ASSIGNMENT—DENIAL OF ON INFORMATION AND BELIEF.—In an action by an assignee of a judgment, allegations of assignment are material and proof thereof are essential to a recovery by the plaintiff. The facts connected with such assignment are not presumptively within the knowledge of the defendant. He may, therefore, specifically deny the allegations of assignment, basing his denials upon information and belief. An answer containing such denials should not be stricken from the files as sham.

JURISDICTION OF COUNTY COURT—AMOUNT IN CONTROVERSY—AVERMENT OF.—A complaint in an action in the county court need not allege, in the very words of the statute, that the amount in controversy does not exceed two thousand dollars. It is sufficient if it affirmatively appears from the complaint that the value of the property in controversy, or the amount involved for which relief is sought, does not exceed that sum.

APPEAL from the county court of Arapahoe county. The opinion states the facts.

J. B. Brockway, for the appellant.

A. B. McKinley, I. N. Stevens and *Allen & Furgeson*, for the appellee.

BECK, C. J. This was an action upon a judgment rendered by the district court of Albany county, Wyoming territory, in favor of one John McLean and against the appellant Hughes.

The action was brought in the court below by the appellee Brewer, who alleged in his complaint: that said judgment had been assigned to him for a valuable consideration, and that no part of the judgment had been paid.

The questions of law involved arise upon the answer of the defendant Hughes, and the rulings and action of the county court therein.

The answer is as follows: "And now comes the said defendant, and for answer to the said plaintiff's complaint herein, says: that, as to the allegation in said complaint, 'That on the second day of December, A. D. 1880, for a valuable consideration, by said plaintiff, Brewer, unto the said McLean paid, the said John McLean did assign and convey unto plaintiff the judgment,' defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and, therefore, denies that said plaintiff paid said McLean anything whatever for said judgment, and denies that the said judgment was assigned by said McLean to said Brewer, and denies that said Brewer is the owner of said judgment; and avers that said McLean is now the real owner of said judgment; and avers that said McLean is the real party in interest in this suit: Wherefore, defendant demands that he be allowed to go hence without day, and have judgment for his costs in this suit."

The answer was properly verified. The plaintiff moved the court to strike the answer from the files, and for judgment for want of an answer, on the ground that the answer was a sham pleading, and sought to raise an immaterial issue.

The court sustained the motion, and gave judgment upon the complaint for the amount of plaintiff's demand, to which ruling and action of the court the defendant duly excepted.

Two questions are presented for our consideration by the assignment of errors, viz: *First:* Did the court err in striking the answer from the files? *Second:* Were the allegations of the complaint sufficient to invest the court with jurisdiction of the subject-matter of the controversy?

The objection to the answer, that it presents an immaterial issue cannot be sustained. The averments, that the judgment was not assigned by McLean to Brewer; that Brewer is not the owner of the judgment, and that McLean is the owner of the judgment, go directly to the plaintiff's right of action. His right of action depends upon the averment of the complaint, that the judgment has been assigned to him, and proof of that fact is essential to a recovery of a judgment in his favor against the defendant.

This being so, a denial of the truth of the allegation necessarily presents a material issue. It only remains, therefore, to inquire whether the denial, as pleaded, was in proper form.

The answer was made upon information and belief, and it is probable that the court adjudged it to be a sham pleading, because the averments contained therein were not in the positive form. The provision of the civil code upon this subject is as follows:

"In denying any allegation in the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state, as to any such allegation, he has not, and cannot obtain, sufficient knowledge or information upon which to base a belief:" Code, Revision 1883, sec. 61.

Whether a *bona fide* assignment of the judgment had been made to the plaintiff, and whether the plaintiff was the owner thereof at the time of bringing his suit, were facts presumptively within the knowledge of the plaintiff, but not presumptively within the knowledge of the defendant.

The defendant has the right to controvert and put in issue every material averment of the complaint. This is to be done by means of specific denials, and such denials may be made upon information and belief when the facts are not presumptively within the defendant's knowledge.

It does not apper, from the record, that the court below had any other information that the defendant's answer was a sham than the answer itself, which, being in substance and form in compliance with the requirements of the statute, was sufficient to put in issue the allegations of the complaint, which it denied.

The action of the court, therefore, in striking the answer from the files and rendering judgment upon the complaint, was not a mere irregularity, as insisted upon by one of the counsel for the appellee, but an error which affected the substantial rights of the appellant.

The next question is, whether the allegations of the complaint were sufficient to give the county court jurisdiction of the case.

The objection to the complaint is, that it fails to allege in the words of the statute, that the amount in controversy did not exceed the sum of two thousand dollars: Gen. Laws, 1883, p. 244, sec. 2.

There is nothing in the section referred to that indicates an intention to require the jurisdictional averment to be in a prescribed form. The import of the language employed therein, is, that it must affirmatively appear from the complaint that the value of the property in controversy, or the amount involved for which relief is sought, does not exceed the sum of two thousand dollars.

The effect of the ruling in Bamdoller v. Patten, 5 Colo., 46, is that the requirement of the statute was satisfied by averments of the complaint which were equivalent to an allegation that the amount in controversy did not exceed the sum of two thousand dollars.

In Hume v. Duff, *Id.*, 574, an action for possession of a mining claim, together with damages for its detention, in which case there was no allegations of the value of the property involved, we held it to be essential to the jurisdiction of a county court that the complaint contain an allegation that the value of the property does not exceed two thousand dollars, or that it contain an equivalent allegation.

Applying the principle announced in the above cases, to the case at bar, we have no difficulty in holding that the statutory requirement has been substantially complied with. It affirmatively appears from the complaint that the relief demanded is a money judgment, and that the amount involved for which relief is sought, is the sum of two hundred and eighty-three dollars and twenty-nine cents, with interest thereon at the rate of twelve per centum per annum from the fourteenth day of August, 1879. Judgment is demanded for said sum of money, and interest thereon at the rate and for the time stated.

Judgment was rendered for the plaintiff on the thirty-first day of January, 1881, for the sum of three hundred and thirty-five dollars and sixty-five cents, that being the amount of principal and interest then due.

It affirmatively appearing, therefore, from the allegations of the complaint, that the amount involved for which relief was sought was within the jurisdiction of the court, we hold that the error in this behalf was not well assigned.

On account of the error first assigned, the judgment will be reversed and the cause remanded.

Judgment reversed.

SAXONIA MINING AND REDUCTION COMPANY v. COOK.

Filed October 31, 1884.

MASTER AND SERVANT—RIGHTS OF SERVANT DISCHARGED BEFORE END OF TERM.—A servant, who is employed for a definite period and discharged before the expiration thereof, without fault on his part, may either treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach; or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term.

THE SAME—MEASURE OF DAMAGES—WHEN SERVANT MUST SECURE OTHER LABOR.—The measure of damages in the latter class of cases is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. The servant cannot recover the wages accruing for the balance of the term as a matter of course. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere. or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor, must be deducted from the amount of the damage occasioned by the breach of contract of employment. The burden of showing that such other labor was or might have been obtained, is on the defendant.

PRINCIPAL AND AGENT—SECRET INSTRUCTIONS—GENERAL AGENT.—The power of a general agent cannot be restricted by secret instructions of his principal, so as to affect a party dealing with such agent without notice of the secret instructions.

THE SAME—BREACH OF CONTRACT—HOW ALLEGED—WRONGFUL DISCHARGE.—In an action to recover damages for breach of a contract, by the terms of which the defendant agreed to employ the plaintiff for a certain term. and at stipulated wages, an averment that "the defendant neglects and refuses to keep and perform its said agreement, to the damage of the plaintiff," is not a sufficient allegation of the breach of contract. If the breach consisted in a wrongful discharge of the plaintiff before the end of the term of employment, such wrongful discharge, as a breach of the contract, should be averred as the fact constituting the cause of action.

APPEAL from the district court of Arapahoe county. The opinion states the facts.

Decker & Yonley, for the appellant.

Ingersoll & Crater, *Leander H. Long*, and *Sanford C. Hinsdale*, for the appellee.

STONE, J. The only question we need to consider in this case is, whether the complaint is sufficient to support the judgment. The complaint contains two counts, the second of which is wholly insufficient for any purpose, and cuts no figure in the case.

The first count is as follows, viz.:

"The said plaintiff, complaining of the said defendant, complains and alleges:

"That on the 27th day of May, A. D. 1880, the said defendant entered into a certain agreement with the plaintiff, in and by which the said defendant hired and employed the said plaintiff for the term and period of one year, from the fifteenth day of April, 1880, to do and perform certain service and labor, and promised and agreed then and thereby to pay the said plaintiff the sum of one hundred and twenty-five dollars per month for the first three months of said term, and the sum of one hundred and fifty dollars per month for the remaining months of said term; that the said plaintiff then and there, in pursuance thereof, entered into the amployment of said company, and performed the service required, and is still able and willing to comply with the terms of said agreement, upon his part

to be kept and performed; that the said defendant neglects and refuses to keep and perform its said agreement, to the damage of this plaintiff of the sum of one thousand and ninety dollars. That no part thereof has been paid."

The answer of the defendant company below is a specific denial of each and every of the allegations of the complaint as above set forth, and further, "denies that it is indebted to the plaintiff upon any contract whatever, or for work and labor performed by the plaintiff for the defendant; but says that whatever labor has been performed by plaintiff for the defendant, has been paid for by the defendant, and received by the plaintiff in full satisfaction and discharge of said work and labor."

The facts established by the evidence on trial, are, that the plaintiff was engaged by the defendant to perform services of work and labor as a refiner in the smelting works of the defendant company for the term of one year, from April 15, 1880, upon the terms as to wages, the same as alleged in the complaint; that in accordance with this engagement, plaintiff entered upon said work and performed the same in a satisfatory manner up to the seventh of August, 1880; that he was paid for the same from time to time at the rate aforesaid; that on the seventh day of August he was paid in full for services up to that date, when the works were closed by the defendant, and plaintiff with the other employees of the works was discharged, the only reason for such discharge being that the defendant chose to shut down the works on account of alleged dissatisfaction with the superintendent of the company; that thereafter the plaintiff remained at the locality of the defendants' works where he had been employed, until the spring of the next year, 1881, without engaging in other work; that from November 1, 1880, until March 1, 1881, he had the keys of said smelting works, and during that time did some work without being specially re-engaged by defendant, and without having been paid anything therefor; that the keys were given him by the same superintendent who engaged him on behalf of the company in the first place, and that this latter work was done by direction of said superintendent; that he did no work after the twenty-fifth of February, 1881, for the reason that no more work was provided by defendant for him to do.

The only matters set up by defendant on the trial were, *first*, that the said superintendent was not authorized to employ plaintiff or any other employes except on condition that such employe might be discharged at the pleasure of the president of the company (who resided outside the state of Colorado), or upon one day's notice; but, with this condition, said superintendent had "full and complete power from the defendant company to hire, employ and discharge any and all workmen and employes of said company;" and, *second*, that the plaintiff was discharged and paid in full on the 7th of August, 1880, and that, therefore, defendant was not liable to plaintiff for anything after that date.

Plaintiff admitted payment in full to said date for services rendered up to that time, but testified that he did not understand that he was discharged under the contract.

The suit was brought before the expiration of the year for which plaintiff claims he was engaged, to wit: October 22d, 1880. The trial was held in December, 1881. Where one is employed to serve for a definite term, as for a year, and is discharged before the expiration of the term, without fault on his part, he has a right of recovery, either for the balance of wages due, or damages for the loss he may have suffered by reason of the wrongful discharge.

"A person employing another for a definite term is bound to provide him with labor for the whole term, and cannot deduct from the wages of the servant for time he was not at work, when the failure results from his own fault. The fact that the business proves unprofitable is no excuse. If the master chooses to go out of the business, he can do so, but must pay the servant his actual damages for not employing him for the stipulated term": Wood's Law of Master and Servant, sec. 97, and cases cited.

When a servant is discharged without a sufficient legal excuse, before the expiration of his term, he has his choice of two remedies: he may treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages, occasioned by the breach, or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term: Id., sec. 125, and authories cited: Smith's Master and Servant, p. 91; Southerland on Damages, p. 471.

Under the remedy in the latter class of cases the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages, *prima facie*, or in the absence of any other showing. He cannot recover the wages accruing for the balance of the term *as a matter of course*. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received for such labor, is to be deducted from the amount of the damages occasioned by the breach of the contract sued upon: Wood, Master and Servant, sec. 125, and cases cited; Southerland on Damages, p. 473.

But while the defendant in such case is entitled to mitigate the damages to the extent of what the plaintiff might have earned from other parties during the term, the burden of establishing such mitigating facts is upon the defendant: *Id.*, sec. 132; Howard v. Daly, 6 N. Y., 362; Barker v. Knickerbocker Life Ins. Co., 24 Wis., 630.

The instruction to the superintendent by the president of the defendant company, limiting the power of the former to employ only

on condition that the person employed could be discharged at will, was no defense under the facts in this case.

The power of a general agent cannot be restricted by secret instructions of his principal so as to affect a party dealing with such agent without notice of the covert instructions: Scales v. Parrie & Co., 13 Neb., 521.

Tested by the foregoing rules of law, and under the facts of the case presented by the record, the appellee undoubtedly had a right of action against appellant at the time of commencing his suit. But, testing the complaint by the same rules, we cannot pronounce it sufficient to sustain the judgment rendered therein. There is not averred a sufficient cause of action to either inform the defendant of the precise ground upon which recovery was sought, and which the defendant was called upon to defend, or to warrant the rendition of a judgment for either of the two causes of action, to wit: wages due for actual services rendered, or damages for breach of the contract.

Since the facts established by the evidence in the case show that nothing was due plaintiff as wages for services actually rendered prior to the commencement of the suit, on the twenty-second day of October, 1880, it may perhaps be fairly presumed that the object of the suit was to recover damages for breach of the contract. But no breach is sufficiently set out. The averment that "the defendant neglects and refuses to keep and perform its said agreement, to the damage of the plaintiff," etc., is insufficient. Did the pleader intend by this averment to allege a breach of the contract to pay the certain wages stipulated, or the contract to employ for a year? Or, was it intended to cover both?

As we have seen, the servant can have but one action: either for wages due, or for damages; he cannot have both: Howard v. Daly, *supra*.

In the case before us, the cause of action of the plaintiff was clearly not for wages, but damages for breach of the contract. The defect in the complaint is not cured by the mere abolition of *forms* of action under the code practice. The allegation of the very cause of action is wanting. The code requires that the complaint shall contain "a statement of *the facts constituting* the cause of action." The facts constituting the breach should have been alleged, not the evidence of those facts, but simply a clear and concise statement of such facts. Ultimate, not evidential facts, must be pleaded. In other words, if the breach consisted in a wrongful discharge of the plaintiff by the defendant, before the end of the term of employment, such wrongful discharge, as a breach of the contract, should have been averred as the fact constituting the cause of action.

"Clearly, a breach must be stated, or there is no cause of action shown; the essential facts must be stated in unequivocal language, and not left to be inferred:" Moore v. Bresse, 30 Cal., 570.

The case of Van Schaick v. Winne et al., 16 Barb., 90, presents a question which is on all fours with the one we are considering. There the only averrment of a breach was that the defendant "failed

to fulfill his obligations by virtue of said instrument." The court held this wholly insufficient, and that it was a mere conclusion of law, to be derived from the facts, when they are made to appear, and was not an issuable fact.

The court say further: "The plaintiff should have stated such facts as if controverted, he intended to prove, to show a breach of the agreement. * * * To say that he has failed to fulfill his obligations, is no more than saying that he has broken his contract, or that the plaintiff is entitled to judgment. It involves no question of fact. It is merely the plaintiff's inference from a state of facts which he has not thought fit to disclose." The same rule is laid down by Mr. Bliss in his work on code pleading, section 210.

The plaintiff is not at liberty to make out his case by proving facts not alleged in his complaint: Bristol v. R. & S. Ry. Co., 9 Barb., 158.

So in the case at bar; here was no answerable fact pleaded, and the denials of the answer put the case to trial upon an immaterial issue, or rather no issue, as to the cause of action.

Judging from the specific sum claimed in the complaint, to wit.: one thousand and ninety dollars, and the sum for which judgment was rendered, viz.: one thousand and fifty dollars, and also looking to the instructions of the court given on the trial, it would appear that the verdict and judgment were based on some exact computation of wages due under the contract—for both actual and constructive services for a specific time, including the services which the plaintiff testified that he rendered after the commencement of the suit, and hence, such judgment is in violation of the rules of law herein laid down as governing such cases, and cannot be allowed to stand.

Had the case been tried upon proper issues, we do not think the assignments of error which go to the evidence allowed by the court on behalf of the plaintiff would be well taken.

The judgment will be reversed and the cause remanded.

Judgment reversed.

PEOPLE v. OSBORNE.

Filed October 31, 1884.

STATE INDUSTRIAL SCHOOL—BOARD OF CONTROL OF—HOW APPOINTED.—The board of control of the state industrial school, as established by the act of February 12, 1881, are not officers created by the constitution. The legislature has power to provide for the manner of making original appointments to such offices, the terms of office, how all vacancies shall be filled and when the time of an incumbent appointed to fill a vacancy shall expire.

THE SAME—VACANCY IN—POWER OF GOVERNOR TO FILL.—A person who has been appointed to fill a vacancy in the board of control of the state industrial school, caused by the resignation of one of the members thereof, is entitled to hold such office in the same manner and for the same time that his predecessor might have held it, and until his successor shall be elected and qualified. While such incumbent so holds such office there is no vacancy, within the meaning of section 2 of the act of February 12, 1881, which the governor is authorized to fill without the consent of the senate.

ERROR to the district court of Jefferson county. The opinion states the facts.

D. F. Urmy, Attorney-General, Markham, Patterson & Thomas, and *J. H. Brown,* for the plaintiffs in error.

A. J. Sampson and *A. H. De France,* for the defendant in error.

BECK, C. J. The legislature of 1881 passed an act establishing a state institution to be styled the state industrial school. The second section of the act provides that, "Sec. 2. The general supervision and government of said industrial school shall be vested in a board of control, who shall be appointed by the governor, by and with the advice and consent of the senate, the members of which board shall hold their offices for the respective terms of two, four and six years from the first day of March, A. D. 1881, and until their successor is appointed and qualified; and whenever any vacancy shall occur in said board, by death, resignation or otherwise, the governor shall fill the same by appointment, and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill:" Session Laws Col., 1881, p. 132.

The act was approved on the twelfth day of February, 1881, and on the next day the legislature being in session, the governor of the state, by and with the advice and consent of the senate, appointed one A. L. Emrigh a member of the board of control of said industrial school for the term of two years, to hold and occupy said office from the first day of March, 1881.

The appointee qualified, and performed the duties of the office up to the thirteenth day of November, 1882, when he resigned, and the defendant in error, Osborne, was appointed by the governor to fill the vacancy. The term of office to which the said Emrigh had been appointed, expired on the first day of March, 1883, but through oversight, no nomination for a successor to the then incumbent, Osborne, was sent to the senate, which convened in the month of January, 1883; consequently no successor was appointed at that session. After the adjournment of the general assembly, to wit, on the fourteenth day of June, the governor appointed the relator, C. P. Butler, a member of said board of control, in place of said Osborne, on the theory that the term of the latter had expired, and that a vacancy existed by reason of the failure of the governor and senate to appoint a successor.

Butler qualified and demanded the office, but Osborne refused to surrender the possession thereof, and the present action is brought to test the question, who is entitled to exercise the functions of said office.

A demurrer was filed to the complaint, alleging that it did not contain facts sufficient to constitute a cause of action. The district court sustained the demurrer, and dismissed the complaint.

The pleadings present two principal questions for our consideration, viz: 1st. Do the provisions of the constitution, concerning appointments to office and appointments to fill vacancies in office,

control in the present case, or do the provisions of the statute establishing the industrial school control such appointments? 2d. Did a vacancy exist in the office in question at the time of the appointment of the relator, C. P. Butler?

Section 6 of article IV of the constitution is as follows: "The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty or malfeasance in office. If, during the recess of the senate, a vacancy occur in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of auditor of state, state treasurer, secretary of state, attorney-general, or superintendent of public instruction, shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law. The senate, in deliberating upon executive nominations, may sit with closed doors, and the vote shall be taken by ayes and noes, which shall be entered upon the journal."

A comparison of the foregoing provisions of the constitution with those of sec. 2, *supra*, of the statute, shows that, while an officer appointed to fill a vacancy by virtue of the provisions of the statute, holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate.

It is evident, then, that if the offices in question had been created by the constitution, the statutory provision for the filling of vacancies would be in conflict with the constitutional provisions on the same subject, and to the extent of the variance the statute would be void. But these offices were not created by the constitution, but by the statute, nor can it be said that the constitution has provided either for original appointments to fill the offices, or for appointments to fill vacancies in said offices, since both events are "*otherwise provided for*" by the statute. This being so, the fundamental principle obtains, that the legislature has unlimited power in regard to legislation, save only as to restrictions imposed by the constitution: Thorpe v. Rutland & Burlington R. R. Co., 27 Vt., 140, 142; Cooley's Constitutional Limitations, p. 107.

There being no constitutional restrictions imposed in this instance, it was entirely competent for the legislature to provide, as it has done, the manner of making original appointments, the terms of office, how all vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire. This view of the subject is in harmony with the rule announced by this court in the case of People, etc. v. Rucker, 5 Col., 455.

We proceed now to the second inquiry: Did a vacancy exist in the office in question at the time of the appointment of Butler?

This inquiry involves a construction of sec. 2 of the statute establishing the industrial school.

This section provides that the members of the board of control shall be appointed by the governor, by and with the advice and control of the senate during the session of the general assembly, the appointees to hold their offices for the respective terms of *two, four* and *six* years, from the first day of March, 1881, "*and until their successors shall be appointed and qualified.*" This provision covered the case of Emrigh, who was appointed for the term of two years.

The following provision covers the case of Osborne, his successor. "Whenever a vacancy shall occur in said board by death, resignation or otherwise, the governor shall fill the same by appointment, and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill."

What is the meaning of the clause, "and the appointee shall hold only for the unexpired term, etc?"

Counsel for the relator say this is a limitation imposed upon incumbents appointed to fill vacancies, restricting them to the unexpired terms, simply thus denying to this class of incumbents the constitutional extensions vested in original appointees by the words: "and until their successors shall be elected and qualified."

Counsel for defendant in error say this construction is unwarranted, and argues that Osborne, upon his appointment and qualification, became entitled to hold the office in the same manner and to the same extent of term that his predecessor might have held it, including the conditional extension mentioned.

In our judgment the latter view is the correct one. It is sustained both by the words of the statute, taken in their obvious and ordaining signification and import, and by the evident intention of the framers as collected from the context.

It is a fundamental rule of interpretation, that every law is adopted as a whole, and a clause which standing by itself might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law: Cooley's court lim's, p. 70.

The intent and purpose of a law is to be considered in its interpretation, and this intent may be ascertained from the words employed and by viewing and comparing together the whole and every part of the act: 1 Kent, 462.

Viewing the act in the light of these familiar principles, the purpose and meaning of the phrase, "and *shall hold only for the unexpired term of the person whose place he is appointed to fill,*" is plain and unambiguous.

The terms of the first incumbents were made to consist of different periods, so that one term would expire every two years dating from the first day of March, 1881. All terms thereafter were to be six years. This arrangement made it the duty of the governor, by

and with the advice and consult of the senate, to appoint a successor for one member of the board at each session of the general assembly, said body convening in regular sessions on the first Wednesday in January of each alternate year.

In order to carry out this system of biennial appointments and successions, it was necessary in the first place, to provide for filling vacancies; and in the second place to limit the terms of such appointees to the unexpired terms of their predecessors.

If no provision had been made in the statute for filling vacancies, then the constitutional regulation would have been in force, and such appointees would hold only until the next meeting of the senate.

This might operate to nullify the system of appointing one member of the board at each session of the general assembly, and require the appointment of two members at the same session.

Again, if incumbents appointed to fill vacancies were not limited to unexpired terms, the plan of biennial appointments provided by the statute might be defeated by the issuing of commissions to end at different intervals from those specified in the act, or if such appointees were restricted to the balance of a calendar term it would, as suggested by counsel for defendant in error, afford an opportunity to executives to defeat the will of the legislature, by withholding nominatives from the senate when in session, thus creating vacancies which they could afterwards fill without the advice and consent of the senate.

The evident intent of the legislature was to guard against such consequences.

The provisions extending the term of office until a successor shall be appointed and qualified is usual in constitutional and statutory enactments of this character. The object is to prevent any inconvenience that might otherwise arise from a vacancy in an office occurring after the expiration of a term and before the qualification of a successor.

It is to be presumed that the usual object was sought to be attained in the present instance, and if this be so, precisely the same reason exists for extending the provision to unexpired terms as to full terms of service.

Viewing the subject in accordance with the principles announced, and in the light of the context, the clause: "and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill," means simply that an officer appointed to fill a vacancy shall not hold for a full term, but shall retain the office for the same time that his predecessor might have retained it, and no longer.

This view harmonizes the tenure of office with the system of appointments provided by the statute, and renders the whole consistent and effectual.

It follows that Osborne, upon his appointment and qualification as the successor of Emrigh, succeeded to all the duties, rights and

privileges of his predecessor, and thereafter bore the same relation to the office as did his predecessor.

What, then, is the import of the term *vacancy*, employed in the statute? The supreme court of Indiana has said that this word has no technical or peculiar meaning as used in the statute of that state; that it means empty and unoccupied, as applied to an office without an incumbent: Stocking v. The State, 7 Ind., 326. We entertain the same opinion respecting the legal signification of the term as it is used in our statute. Section 2, of the act of 1881, only authorizes an appointment by the governor, *without* the consent or the senate, when necessary to fill a vacancy in the board of control, arising from *resignation, death* or *otherwise.* Whatever the contingency may be, it must occasion a *vacancy* in the office or the power of appointment by the governor alone does not exist.

It was decided in Tappan v. Gray, 9 Paige 506, that an office is not vacant while any person is authorized to act in it and does so act.

In the case of The People ex rel. Parkinson v. Bissell, 49 Col., 407, the statute provided that appointments to the office of inspector of gas meters should be made by the governor with the consent of the senate, except when made to fill vacancies, and that incumbents in office should continue to discharge the duties thereof until their successors were qualified. Upon the theory that Bissell's term of office had expired, the governor, during the recess of the senate, appointed Parkinson to fill the vacancy, although Bissell still continued to discharge the duties thereof. The latter refused to surrender the office, and an information setting out the facts was filed in behalf of Parkinson, charging that Bissell was an usurper and intruder in the of "inspector of gas meters." The court held upon demurrer to the information, that if Bissell's term of office had in fact expired, so long as he continued to discharge the duties there was no vacancy, in any sense which would authorize the governor to fill the office without the consent of the senate. To the same effect is the case of The State ex rel. Clifford v. McMullen, 46 Ind., 307, when the auditor of a county, who was authorized by statute to fill vacancies in the office of township trustee, determined that a vacancy existed in that office by reason of the failure to elect a successor at the general election (the two candidates therefor getting each the same number of votes) and appointed a successor. The incumbent being authorized by statute to held the office until his successor should be elected and qualified, refused to deliver up the books and papers, and continued to perform the duties of the office. The court held there was no vacancy, and that the appointment of the auditor was a nullity.

It is clear to our minds from the language of the statute, that no vacancy existed in the office of member of the board of control of the state industrial school, at the time of the appointment of the relator, and this conviction is confirmed by the reasons assigned and the authorities cited.

It is unnecessary to discuss the remaining proposition of the relator, that his appointment may be justified under the power of removal vested in the governor. No such fact is alleged in the information, and it cannot be supplied on demurrer charging that the complaint does not state facts sufficient to constitute a cause of action.

The judgment is affirmed.

BROOKS v. BATES, ET AL.

Filed October 31, 1884.

STATUTE OF LIMITATIONS—ANTICIPATION OF DEFENSE OF—STRIKING OUT ALLEGATIONS OF.—Averments of a complaint, in anticipation of a defence of the statute of limitations, will be stricken out on motion, if the complaint, without such averments, states a cause of action which is not barred by any existing statute.

STATUTE OF LIMITATIONS—BANKRUPTCY LAW—PROVABLE CLAIM—WHEN ACTION MAY BE MAINTAINED IN STATE COURT—UNREASONABLE DELAY OF BANKRUPT.—The plaintiff brought this action to collect a promissory note. The defendant pleaded the statute of limitations. The replication averred that the defendant had been adjudged a bankrupt by the United States district court for the northern district of Illinois, in proceedings under the the national bankruptcy act then in force; that the note sued on was a claim provable in said proceedings; that the defendant had never been discharged in bankruptcy, and that he had unreasonably delayed taking the necessary steps to procure such discharge. *Held*, that the replication stated facts sufficient to avoid the statute of limitations: that the plaintiff, not having proved his claim in the bankruptcy proceedings, within the meaning of section 5,105 of the revised statutes of the United States, was entitled to bring an action thereon without first obtaining the consent of the bankruptcy court, after the bankrupt had unreasonably delayed his application for a discharge; and that the state court, in which such action was brought, had jurisdiction to determine whether the bankrupt had been guilty of unreasonable delay in applying for his discharge.

ERROR to the district court of Arapahoe county. The opinion states the facts.

Stallcup & Shafroth, for the plaintiff in error.

M. B. Carpenter, for the defendant in error.

HELM, J. The motion to strike certain averments from the complaint was properly sustained. These averments related to the statute of limitations; their purpose was to show that no bar of the action had arisen thereunder. This was anticipating a defense of which advantage might not be taken. Without the rejected matter the complaint stated a cause of action; upon its face no bar was disclosed by virtue of any existing limitation statute. No new promise was relied on; hence by no possible construction would a special demurrer lie thereto under the rule stated in Buckingham v. Orr, 6 Colo., 387. The matters averred were wholly unnecessary, and were appropriately reached by the motion to strike.

The second assignment of error is not so easily disposed of. Defendant—W. L. Bates—in his answer for a second defense, pleads the statute of limitations; he invokes the benefit of the sixteenth section thereof as it existed prior to 1879; this section referred to causes of action upon contracts accruing without the state and operated to prevent a recovery when pleaded, in suits begun upon such causes of action one or two years after the same matured.

Plaintiff, by his amended replication, first pleaded facts which, if true, would have avoided the plea of the statute, viz: that defendant did not become a resident or citizen of Colorado; that he never was in the state even, until after the sixteenth section aforesaid had been repealed. Then, as a second ground of replication, he averred that defendant was duly adjudged a bankrupt by the United States district court for the northern district of Illinois, in proceedings under the national bankruptcy act then in force; that the note upon which plaintiff brought this suit was a claim provable in said proceedings; that defendant had never been discharged in bankruptcy; and that he had unreasonably delayed taking the necessary steps to procure such discharge.

The object of the latter plea was to show that before the unreasonable delay above mentioned, plaintiff could have brought no independent action in Colorado upon the note; and therefore that in any event, being prevented by a superior law from bringing suit, the statute of limitations aforesaid did not run against him; but that by defendant's delay under the bankruptcy law a right to maintain this suit finally, sprung into existence. See Greenwald v. Appell, 3 Colo. L. R., 552.

To the replication a demurrer was filed. The theory maintained in support of this demurrer is, that if plaintiff's claim was actually *proved* in the bankruptcy court, he was thereby estopped from maintaining another action therefor; that whether the claim were so proven or not, that court was the only forum which had jurisdiction to determine the question of unreasonable delay on the part of the bankrupt in procuring his discharge; and that its consent was an essential prerequisite to suit before any other tribunal upon the note here declared on.

Thus three questions are presented by this demurrer. *First*, was it necessary for plaintiff to aver in his replication an omission to prove his claim in the bankruptcy court and if necessary, did he sufficiently do so; *Second*, is that the only tribunal clothed with power to determine whether or not there has been the "unreasonable delay" mentioned by statute, in procuring a release in bankruptcy; and, *Third*, should the replication have contained an averment of consent first obtained from the court of bankruptcy, to bring this action?

We assume of course, that plaintiff was duly served with the usual creditors' notice of the bankruptcy proceeding.

The first of the foregoing questions arises under section 5,105, revised statutes of the United States, which was a part of section 21 of the bankruptcy act of 1867, and reads as follows: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him."

This, like nearly every other provision of that statute, has received judicial construction, though its language is so plain that it hardly seems to admit of conflicting views. Without reviewing or com-

paring cases, we shall simply adopt the conclusion reached in Dinges v. Becher, 9 B. Reg., 508, interpreting this provision in the light of the entire act. "If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion the, the creditor who has proved his debt, *is still incapable of proceeding elsewhere without permission of the court of bankruptcy.*"

The reason for this construction is that under the law, a creditor who proves his claim in the bankruptcy proceeding, thereby voluntarily submits to the jurisdiction of the bankrupt court, and waives any right he might have had to maintain, upon his own volition merely, a suit elsewhere.

It was in our judgment necessary for plaintiff to show in his replication that his claim had not been proved, or to aver consent to sue elsewhere, first obtained from the bankruptcy court. But we think the former fact was sufficiently pleaded.

Provable claims are practically divided by the bankruptcy act according to status before the bankruptcy court, into two classes, viz: those which have been proved, and those which have never been presented therein. The foregoing provision of the statute is confined to the former, the succeeding section applies to the latter. This succeeding section as we presently shall see, uses the term "provable" to distinguish from the class of claims alluded to in the proceeding section, as well as in contradistinction to claims that could not be proved in the court of bankruptcy, and when plaintiff in his replication declares that the note in suit is a provable claim, following such declaration with the averment of unreasonable delay, it is apparent that he intends to place himself within the purview of the latter section, we think the pleading sufficiently accomplishes this purpose; it was hardly necessary to add the negative averment, that the claim had not been proved in the bankruptcy proceedings.

The alleged fact is in issue, and upon the trial, if defendant offers evidence establishing the proof of the note in the court of bankruptcy, this action will be defeated.

The remaining points presented by the demurrer are closely connected, and can not be considered separately. The statutory provision last above mentioned is section 5,106, revised statutes of the United States, which is also the latter part of section 21 aforesaid. It declares that no creditor whose claim is *provable* shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of discharge shall have been determined, and any such suit or proceeding shall, upon application of the bankrupt, be stayed to await his discharge, provided there be no unreasonable delay on the part of the bankrupt, in endeavoring to obtain his discharge.

Counsel differ as to the meaning of the words "to prosecute," cited in the foregoing section. Our view is that these words relate equally to suits brought before the bankruptcy proceeding, and those instituted while it is pending. It would be a narrow con-

struction to limit this expression, and consequently the entire section, to the former class of cases. The legal meaning of the phrase "to prosecute" is, "to proceed against judicially." Had congress intended to confine this provision to suits begun before the proceedings in bankruptcy, the insertion of two words, at the most, would have placed such purpose beyond cavil, but the context and spirit of the whole sustain our interpretation of the words.

It is not clear from the language used, whether the suit mentioned in the statute is to be stayed by a restraining order from the bankruptcy court, or by order of the court in which it is pending. The statute simply says: "such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy;" it fails to designate the forum in which this application of the bankrupt shall be made. Therefore, we are not aided by this expression in determining the question under consideration.

If a state court has power to say, in suits like the one at bar, where the unreasonable delay mentioned by the statute exists, in our judgment no previous consent of the court in bankruptcy is essential to the bringing of a creditor's action in the proper tribunal, so, when we have answered the second question raised by the demurrer, we have answered the third, also.

There is excellent reason for saying that the bankruptcy court is the only proper tribunal to determine whether or not the bankrupt has been guilty of unreasonable delay in procuring his release. For the court is most familiar with all the proceedings in bankruptcy, and best prepared to give intelligent judgment in the premises. Upon this theory, and upon principle also, such courts have taken jurisdiction to temporarily restrain parties from proceeding in actions pending before state courts upon "provable claims," which had not been proved, as well as those which had been: In re Schwartz, 14 Blatchf., 196; see also Phelps v. Selleck, 8 B. Reg., 390; and likewise cases hereinafter referred to.

On the other hand, it is said that "The creditor who has not proved his debt has no status in the court of bankruptcy. He has never submitted to its jurisdiction, and his right to proceed is no further affected than it is affected by the restraining words of the statute. But this restraint is, by the very words of the statute, subject to a condition, and that condition is that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge."

"In the case, therefore, of a creditor who has not proved his debt, there is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay, the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed which he has not surrendered by any act of his, and which the law has not taken away from him. * * * In such a case, therefore, the question of unreasonable delay must necessarily be a question to be determined by the court, in which the

creditor's action is pending:" Dingee v. Becher, *supra*. See, also, adopting a similar interpretation, Calvert v. Peebles, 80 N. C., 334. In the latter case the suit was begun before proceedings in bankruptcy were instituted; but under our view above declared, of the statute, this fact does not affect the question. In National Bank of Clinton v. Taylor, 120 Mass., 124, the action was stayed by application in the state court.

We are disposed to adopt the conclusion reached in the case of Dingee v. Becher, *supra*, to the extent of holding that under circumstances presently stated, the state court may decide the question; though we do not concur in all the reasoning of that decision. We are not prepared to deny the entire jurisdiction of the bankruptcy court over creditors who have received the statutory notice of the proceeding therein, but have not yet presented their claims. We intimate no opinion adverse to the propriety of a temporary restraining order issuing in cases like this, from the bankruptcy court. The authority of that tribunal to restrain *parties litigant* in the state courts, whenever it was necessary to accomplish the purpose designed by the bankruptcy act, seems to have been thoroughly established: See Bump's Law and Practice of Bankruptcy, 10th ed., 227, *et seq.*; 698 *et seq.;* also, 327 and 335. In a majority of the cases mentioned by Mr. Bump the injunction issued to prevent the enforcement of liens against the bankrupt's property; but, in some instances, the writ simply restrained the prosecution to judgment of suits like the one before us.

But if the bankrupt does not see fit, by his application to the court in bankruptcy for an injunction, to there settle the question of unreasonable delay, why should the state court be estopped from considering the question? Why may he not, by his failure to act, waive a right to the statutory stay of proceedings through process issuing from the bankruptcy court? There seems to be no inconsistency in holding that in the absence of such effort by him in that form, the state court in which the action is pending may, under circumstances such as are here presented, take jurisdiction to determine this question.

Bearing upon the subject last discussed, see the case cited in Bump's Practice, p. 702, *et seq.*

From the foregoing views, it follows that in our opinion the demurrer ought not to have been sustained.

The judgment will, therefore, be reversed, and the cause remanded.

SUPREME COURT OF MONTANA.

TERRITORY *v.* YOUNG.

August Term, 1884.

CRIMINAL LAW—MURDER—INDICTMENT—POSSESSION OF WEAPON.—An indictment for murder need not allege that the weapon with which the homicide was committed was had or held by the defendant at the time of the alleged killing.

THE QUESTION WHETHER AN INDICTMENT DOES OR DOES NOT SUPPORT THE JUDGMENT can be raised in the appellate court for the first time.

CRIMINAL LAW—CONCLUSION OF INDICTMENT.—Under the Montana statute, if the substantive averments in an indictment for murder are good and sufficiently describe the crime, the formal concluding words are immaterial.

THE SAME—APPEAL FROM JUDGMENT—REVIEW OF EVIDENCE.—On an appeal from a judgment alone the appellate court will not examine the evidence as to its sufficiency to support the verdict.

OBJECTIONS TO INSTRUCTIONS MUST BE MADE AT TRIAL.—Objections to instructions will not be considered by the appellate court, unless the same were made and saved at the trial in a proper bill of exceptions.

APPEAL from a judgment of the district court of Gallatin county. The opinion states the facts.

R. P. Vivion and *J. B. Sanborn*, for the appellant.

J. A. Johnston, Attorney General, for the respondent.

WADE, C. J. This is an appeal from a final judgment rendered upon a verdict, in which the defendant was found guilty of the crime of murder in the first degree. There was but one exception taken, and saved during the trial, and that has been abandoned by counsel for the defendant, in their briefs and arguments, as unworthy of their consideration. That exception is based upon the proposition that the facts stated in the indictment do not constitute a public offense in this: the indictment does not allege that the defendant had and held a certain gun, or had any weapon in his possession at the time of the alleged killing, and that the said indictment is therefore uncertain.

A reference to the authorities will conclusively show that such an allegation is unnecessary. In the case of the Commonwealth v. Costley, 118 Mass., 1, which was an indictment for murder, the defendant moved to quash the indictment, "because there is no allegation that the pistol named therein as the weapon with which the homicide was committed, was had or held by the defendant at the time of the commission of the offense in his, the defendant's, hand or hands."

The motion was overruled and the defendant excepted. In deciding the question raised by the exception, chief justice Gray said: "The only objection to the form of the indictment is for the omission to allege that the pistol was held in the hand of the defendant. This objection is supported by a statement in 2 Hale P. C., 185, and by a case there cited, decided in the time of Queen Elizabeth. But the materiality of such an allegation has been denied or doubted by the later English writers on criminal law; 2 Hawk C., 23, sect's 76-84; 1 East P. C., 341; 1 Stark Crim. Plds. (2d ed.), 62; 1 Russell on Crimes (3d ed.), 558; Archb. Crim. Pl. (10th ed.), 407.

It is not necessary to a full description of the crime, nor in order to inform the defendant of the particulars of the charge, which he is to meet, and, if inserted, need not be proved.

We are of the opinion that it is of the same character as a description of the size of the wound, the omission of which does not affect the validity of the indictment: Prain & Heard's Crim. Pl., 274.

But though there were no other objections to the indictment at the trial, still the indictment must support the judgment, and the question as to whether it does or not can be, as it has been, raised in this court for the first time in this case. It is admitted by counsel for the defendant, that the indictment is good for murder in the second degree; and that it is a good common law indictment for murder. If this be so, then this case is within the decision of this court in the case of the Territory v. Stears, 2 Mont., 326, which case is affirmed in Territory v. McAndrews, 8 Mont., 158, where it is held that an indictment for murder, good at common law, is good under our statute. More than this, the indictments in the Stears and McAndrews cases, are in every material particular, the same as the indictment in the case we are considering. The only difference is in the conclusion of the indictments. In the Stears case the indictment concludes as follows: "And so the jurors aforesaid upon their oaths aforesaid do further say that the said William H. Stears, the said Franz Warl, in manner and form aforesaid, then and there feloniously, willfully and of his deliberate and premeditated malice and of his malice aforethought did kill and murder contrary, etc."

In this case the indictment, after charging that the defendant, in and upon one Daniel McCarty, feloniously, willfully, unlawfully, deliberately, premeditatedly and of his malice aforethought, did make an assault; and then and there (describing the means used) feloniously, willfully, unlawfully, deliberately, premeditatedly and of his malice aforethought did strike, penetrate and wound the said Daniel McCarty (describing how and where) thereby giving to the said Daniel McCarty one mortal wound of which mortal wound the said McCarty instantly died,—concludes as follows: "And so the grand jurors aforesaid do say, that the said Frank Young, in the manner and by the means aforesaid, feloniously, willfully, unlawfully, deliberately, premeditatedly and of his malice aforethought did kill and murder, contrary, etc.," leaving out the words "him the said McCarty." These words are the mere conclusion drawn from the preceding averments. If the averments are bad the conclusion will not aid them; if they are good and sufficiently describe the crime as the law requires, by proper averments the formal, concluding words are immaterial. At common law the concluding words formally charging the defendant with murder were necessary in order to distinguish an indictment for murder from an indictment for manslaughter. If the term murder were omitted from the conclusion of the indictment the defendant could only be convicted of manslaughter: 3 Chitty Crim. L., 737; Faust v. State, 8 Ohio, S. R., 119–120.

The reason for the technical conclusion of indictments for murder at common law all disappear under statutes defining the degrees of the crime and providing that the jury shall designate the degree in their verdict. And so we are compelled to say that this indictment is clearly within the Stears and McAndrew decisions, and those decisions we cannot disturb. This conclusion seems irresistable when we remember our statute, which provides that no indictment shall be quashed or set aside for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged; or for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant on the merits: Revised Stats., p. 311, sec. 171, subd. 5 and 6.

This is an appeal from the judgment. There was no motion for a new trial. The decisions of this court are uniform and numerous that the testimony cannot be brought here for review, except by statement on motion for a new trial. The testimony is not before us in such a manner that we can examine it as to its sufficiency to support the verdict. Only a motion for a new trial could have brought it here for that purpose. There is no exception to this rule.

The defendant at the trial did not ask for any instructions to the jury in his own behalf, nor did he object to, or take an exception to those given by the court, or to any part or portion of them. He did not suggest an addition to, or a modification of the instructions as given. This being so, we cannot consider the questions raised by counsel for defendant in their briefs and argument, for the first time. Over and over again this court has decided that we cannot consider objections to instructions to the jury unless such objections were made and saved at the trial in a proper bill of exceptions. Under the law of the territory and precedents of this court there is nothing in the record by which the judgment can be disturbed.

The judgment is affirmed.

All concur.

TERRITORY *v.* HANNA.

August Term, 1884.

CRIMINAL LAW—NOTICE OF APPEAL MUST BE SERVED ON CLERK.—An appeal in a criminal case will be dismissed if the appellant fails to serve a notice of appeal upon the clerk of the court in which the judgment was rendered, in the manner required by the statute. A notice directed to and served upon the attorney for the respondent, and filed with the clerk is not sufficient.

THE SAME—TIME FOR FILING TRANSCRIPT.—After an appeal has been properly taken, a failure to file the transcript within the time required by statute, is not fatal to the jurisdiction of the appellate court. Such statutory requirement is directory and not mandatory.

MOTION to dismiss an appeal. The opinion states the facts.

I. D. McCutcheon, for the appellant.

J. A. Johnston, Attorney-General, for the respondent.

WADE, C. J. The plaintiff moves the court to dismiss the appeal herein for the reason that no notice of appeal was served upon the

clerk as the statute requires, and that the transcript was not filed within the time provided by law.

Our statute provides that an appeal in a criminal case is taken by the service of a notice upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. If taken by the defendant a similar notice must be served upon the attorney prosecuting.

Appeals are matters of statutory regulation. There must be a substantial compliance with the statute in order to confer jurisdiction upon the appellate court. The appellant is charged with the duty of perfecting his appeal in the manner provided by law, and error in this regard affects the jurisdiction of the appellate court: Courtwright v. Berkin, 2 Mont., 404.

An appeal can only be taken from the district court to the supreme court by the service of a notice upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. Unless the notice is served there is no appeal. A notice directed to the attorney prosecuting, and served upon him and filed with the clerk, is not the service of notice upon the clerk. The clerk is not presumed to know the contents of papers filed with him, addressed to other persons, and of which he is simply the custodian. The times at which, and the successive order in which, the several steps are to be pursued, to take and perfect an appeal, are distinctly prescribed by statute, and must be observed; otherwise, the appeal must fail: Arm v. Shallenbarger, 42 Cal., 275.

It follows, therefore, that the failure of the appellant to serve a notice of appeal upon the clerk of the court where the judgment was rendered is fatal to the appeal, and the appellate court, in the absence of such notice and service, requires no jurisdiction of the case.

As to the time when the transcript should be filed, if the appeal has been properly taken by a substantial compliance with the statute, and the lower court has thereby lost jurisdiction of the case, and the appellate court has acquired jurisdiction, as in such case it would, then the matter as to the time when the transcript should be filed, is directory and not mandatory. And the case of the Territory v. Flowers, 2 Mont., 292, is affirmed.

The appeal is dismissed.

All the judges concur.

TERRITORY v. HANNA.

August Term, 1884.

DUTY OF PROSECUTION TO CALL WITNESS PRESENT AT KILLING—MURDER.—The prosecution in a trial for murder must call every person who was present and witnessed the alleged homicide, if it is within their power, and a failure so to do is ground for reversal.

APPEAL from a judgment of the district court for Meagher county. The opinion states the facts.

Isaac D. McCutcheon, for the appellant.

J. A. Johnston, Attorney-general, for the respondent.

WADE, C. J. This is an appeal from a judgment against the defendant rendered upon a verdict of murder in the first degree.

The prosecuting attorney, in making his opening statement of the case to the jury on behalf of the territory, said to the jury, in the presence of the court "that at the time of the homicide nobody was there but the deceased, his wife and children." The prosecutor then produced testimony tending to show previous threats by the defendant to kill the deceased, and the confession of the defendant that he had killed deceased, and rested the case on the part of the territory, having produced no testimony as to what took place at the killing. Thereupon, the defendant moved the court that the prosecution be required to call one, Hannah Nelson, wife of the deceased, as a witness, the prosecutor having stated to the jury in his opening statement that she was present and witnessed the homicide. It also appeared in evidence that the wife of the deceased was present at the dwelling house of the deceased and in an adjoining room to that in which the deceased was killed, immediately after the homicide.

The motion of the defendant was overruled and this action of the court is assigned as error. The authorities are clear and conclusive upon the proposition that the prosecution cannot select out part of a transaction and ask a conviction thereon when testimony showing the whole thereof is within its reach. Says Christiancy in Hurd v. People, 25 Mich., 415. "But the prosecution can never, in a criminal case, properly claim a conviction upon evidence which expressly or by implication, shows but part of the *res gestae*, or whole transaction if it appear that the evidence of the rest of the transaction is obtainable. This would be to deprive the defendant of the benefit of the presumption of innocence and to throw upon him the burden of proving his innocence. It is the *res gestae*, or whole transaction, the burden of proving which rests upon the prosecution, so far at least as the evidence is attainable. It is that which constitutes the prosecutor's case, and to which the defendant has the right of cross-examination; it is that which the jury are entitled to have before them, and until this is shown, it is difficult to see how any legitimate inference of guilt, or the degree of the offense can be shown." "The prosecutor in a criminal case is not at liberty like a plaintiff in a civil case to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed, especially if it appears to the court that the evidence of the other part is attainable. The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence."

In Maher v. The People, 10 Mich., 226, the same learned judge says: "And for myself I am inclined to the opinion that all the

facts constituting the *res gestae*, so far as the prosecuting counsel is informed of, and having the means of proving them, should on principle and in fairness to the prisoner be laid before the jury by the prosecution. They naturally constitute the prosecutor's case. And whenever it appear evident to the court, that but part of the facts, or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestae*, or entire transaction, and that the evidence of the others is within the power of the prosecutor, it would, I think, be the duty of the court to require the prosecutor to show the transaction as a whole."

In Roscoe's Criminal Ev. p. 128, it is said: On a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Pattison, judge, directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. The learned judge observed: "Every witness who was present at a transaction of this sort ought to be called; and even if they give different accounts, it is fit that the jury should hear the evidence so as to draw their own conclusions as to the real truth of the matter:" R. v. Holden, 8 C. & P., 609; R. v. Storner, 1 C. & P., 650; R. v. Chapmad, 8 C. & P., 559; R. v. Orchard, id., note 47; Eng. Com. Law, 650.

The statement of the prosecuting attorney in opening the case to the jury in presence of the court, is an official statement made under the solemnity of his official oath. In this statement the prosecuting attorney declared to the jury that Hannah Nelson, the wife of the deceased, was present at this homicide. The testimony on the part of the prosecution also showed that she was in a room adjoining that in which the homicide took place, immediately thereafter. Having stated officially to the court and jury that she was present at the homicide, and the proof showing that she was present immediately thereafter, and in all probability, at the very act itself, the prosecuting attorney ought to have called this witness, or made some satisfactory explanation to the court why he did not, otherwise a suggestion is raised that there was design and purpose in omitting to call the witness. Especially should she have been called as there was no proof of the circumstances attending the killing, in evidence at the time the motion was made.

Says Campbell, judge, in Wellar v. People, 30 Mich., 23: "As explained in Hurd v. People, 25 Mich., 406, and in the English cases here referred to, a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony. The fact that he is compelled to call those witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions."

Judgment reversed and cause remanded for a new trial.

All the judges concur.

TERRITORY *v.* ADOLPHSON.

August Term, 1884.

CRIMINAL LAW—MURDER—EVIDENCE—REASONABLE DOUBT.—The evidence of the only witness who testified to the act of killing or connected the defendant with the homicide, reviewed, and held so contradictory and improbable as not no exclude every reasonable doubt of the defendant's guilt.

THE EVIDENCE IN A CRIMINAL CASE MUST CONVINCE TO A MORAL CERTAINTY before a conviction can be had.

APPEAL. from a judgment of the district court for Gallatin county. The opinion states the facts.

J. J. Davis, for the appellant.

J. A. Johnston, Attorney General, for the respondent.

GALBRAITH, J. The defendant was indicted for and and convicted of the crime of murder in the first degree, for the killing of one Andrew Sjobeirg. The testimony in the case shows that on the night of the fourth of February, 1883, being the night upon which the homicide is alleged to have been committed, the deceased, the defendant and two other persons, Peterson and Johansen, slept in a shanty in Rocky Canon, Gallatin county. The evening previous to the homicide, Johansen and the defendant were quarelling with the deceased. It would appear that the defendant and Johansen were the assailants. Johansen's enmity to the deceased would appear from the testimony, to have arisen on account of a previous trouble which had taken place between the deceased and Johansen's brother, and defendant's cause of quarrel was in relation to a settlement of an indebtedness claimed to be due from deceased to defendant and Peterson. Johansen struck the defendant two or three times with his hand. When the deceased attempted to leave the cabin, the defendant threw him back into the cabin two or three times. During this altercation the defendant remarked that he, the defendant, would make "his pain short before morning."

But the witness who testived to this threat did not know at the time to whom it referred; but supposed afterwards that that it referred to the deceased. Johansen also remarked, on the day previous to the homicide, in a conversation relating to the deceased, "if he comes back again to-night I'll fix him." They went to bed about ten o'clock at night, Johansen and the defendant sleeping in the same bed, and the deceased and Peterson sleeping in separate beds. The only witness who connected the defendant with the homicide was Peterson. He testified that, about two or three o'clock at night the deceased got up and went outside, being gone two or three minutes; that, while he was out, the defendant got up and lit the candle. The deceased, when he returned, blew it out, and went to bed. The defendant went back to his own bed, and, after the deceased laid a little while, he asked the defendant to "come and put the blankets on him," and then the defendant went up and took hold of the blankets and shook them around a little, and then I saw he had a knife in his hand, and cut the deceased in

the neck. He cut him right on the left side of the neck. He only cut him one time. I was laying in bed, and Johansen was in bed, and after he cut him, the defendant went back to his bed. There was was no light in the house, but the deceased was laying right beside the window, and I heard the blood running. In the morning I saw the blood, and told the defendant to come and look, and he reached over and took the knife that was lying inside the mat, between him and the wall, and said, "Now you see this scrub; that the knife belonged to the deceased, and has laid there and cut himself." The witness Peterson also testified that the deceased, a very short time before he died, which was about seven o'clock in the morning, asked for a cup of coffee; that the night upon which the homicide was committed was a moonshiny night, and that at 10 o'clock the moon was about mid-heaven, and was shining brightly, so that he could see plainly in the house, though the door was shut. He also testified that he made no statement to the coroner at the cabin, and was not examined, and did not testify for fear of the defendant. In answer to the question, "Do you know how this man was killed?" he said he thought he was killed, but did not say by whom. He admitted that he told the coroner, the next day after the homicide, that the deceased had committed suicide, and that he so testified before the coroner's jury. He also testified that he did not say before the coroner's jury that he "did not know whose knife it was with the blood on it." The bunk upon which the deceased lay when the homicide was committed was about three feet from the window, which contained four small lights of glass. Two knives were found in the bunk where the deceased slept; one was open, and the big blade and the knife was all bloody. The other knife was not bloody, The surgeon testified that he found a wound in the throat of the deceased about three and a half or four inches in length and two and a half or three inches in depth, severing the wind-pipe, the jugular vein and the carotid artery, and that, in his opinion, he died from hemorrhage from the wound in his neck, and that a person who had received such a wound could not possibly live over thirty minutes; also, that it would be impossible for a man, after laying three or four hours with such a wound, to articulate. The evidence showed that, at 2 o'clock, p. m., the next day after the homicide, it was so dark in the cabin, with the door open, that a candle had to be lighted to remove the corpse.

A witness testified as follows:

"We went into the cabin first, and had to light to see." Another witness testified as follows: "I went into the cabin, and the room was so dark I couldn't see who it was. It might have been a negro, and I wouldn't have known the difference." It was shown by the testimony that the moon would not be visible on the night of the alleged homicide in that locality until nearly 6 o'clock in the morning. The coroner testified that the witness Peterson was asked before the coroner's jury, whose knife it was that had the blade open; and he answered that he did not know; that Peterson said at the

is an officer of the law and in his hands the property is in the custody of the law. He preserves and protects the property for the benefit of the rightful owner. If the complaint does not make a case for the appointment of a receiver the defendant may move to have the order set aside. Appeal is not the remedy authorized by statute.

In this action the defendants, Savage & Sons, made an assignment to Mund and Curry for the benefit of their creditors and took possession of the property assigned to them and entered upon the execution of their trust. Thereafter, at the suit of some one or more of the creditors, Johnson, the sheriff of Custer county, seized the property so assigned and took possession of the same.

Thereupon, the plaintiff, another creditor, brings this action to test the validity of the assignment aforesaid, and asks for the appointment of a receiver to hold the property, and the money received from the sale of that which is perishable and going to waste, until the validity of the assignment and the rights of the creditors shall have been adjudicated and fully determined. It does not seem to be a matter of much consequence whether the property is so held and preserved by the sheriff of Custer county, or by the receiver appointed herein. The creditors and not these officers of the court are the parties interested. Certainly the sheriff, who is the appellant herein, nor the persons in whose behalf he is acting, cannot ask this court to review an order from which there is no appeal.

The appeal is dismissed.

All concur.

FIRST NATIONAL BANK OF HELENA *v.* MCANDREWS.

August Term, 1884.

STATEMENT ON MOTION FOR NEW TRIAL—TRANSCRIPT—WHAT MUST SHOW.—Papers purporting to be a statement on a motion for a new trial will not be considered by the appellate court when the transcript fails to show that either a motion for a new trial was filed in the lower court, or that a notice thereof was served upon the adverse party, as required by section 287 of the code of civil procedure.

MOTION to strike out portions of transcript. The opinion states the facts.

T. L. Napton, for the appellant.

E. W. & J. K. Toole, for the respondent.

WADE, C. J. This is a motion to strike out that portion of the transcript purporting to be a statement on motion for a new trial, for the reason that there is nothing in the record to show that there was either a motion for a new trial filed or a notice thereof served upon the adverse party as required by section 287 of the code of civil procedure. That section provides that the party intending to move for a new trial must, within ten days after the verdict of the

jury or decision of the court, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions or a statement of the case.

These provisions of the statute must be substantially complied with before this court can be called on to review the action of the lower court in overruling or sustaining a motion for a new trial. Unless there is a notice or motion designating the errors complained of, upon which the lower court has passed, there is nothing for this court to review. This is an appellate court and has jurisdiction to review the decisions of the lower court. Certain questions may be raised in the supreme court for the first time, but questions concerning new trials do not belong to this class. Unless the errors were assigned in the court below in the notice or motion, we have no means of knowing what questions were decided by such courts, and upon such a motion the court will only review the questions determined in the lower court.

We cannot establish a precedent declaring that a decision upon a motion for a new trial may be reviewed in this court when the record does not show that any motion for a new trial was filed in the lower court, nor that any notice of motion designating the errors complained of was filed or served upon the opposite party.

There is nothing in the record before us to indicate upon what questions the court passed in overruling the motion for a new trial. We are informed that the motion for a new trial was overruled, but the record is silent as to the grounds of the motion, and as to whether there was a notice or motion filed. The recital in the statement, which was made up after the notice of motion was, or should have been filed, that the appellant relies upon certain errors assigned, cannot take the place of a notice designating the grounds of motion for a new trial, served as the statute provides. There is nothing in the record showing that the errors recited in the statement, were the errors designated in the notice, or that they raise the questions upon which the court passed in overruling the motion for a new trial..

The motion is granted.

All the judges concur.

OWEN, A LUNATIC, BY HIS COMMITTEE, v. MCCORMICK.

August Term, 1884.

STRIKING COMPLAINT FROM FILES—AMENDMENT—APPEAL.—An order striking a complaint from the files, and overruling a motion to allow it to be amended, is not a final judgment. Such order is not appealable.

MOTION to dismiss an appeal. The opinion states the facts.

Robinson & Stapleton, for the appellant.

E. W. & J. K. Tbole and *W. W. Dixon*, for the respondent.

GALBRAITH, J. This is a motion to dismiss the appeal, from an order striking the complaint from the files and overruling a motion to allow it to be amended. It is claimed that this is an appealable order under the provisions of the code of civil procedure: Rev. Stats., 79, sec. 408. That "an appeal may be taken from a final judgment in an action on special proceeding commenced in the court in which the same is rendered," and that the order striking the complaint from the files is a final judgment within the meaning of this provision. But it was necessary that something more should be done before it can be said that a final judgment was rendered in the action. For aught that appears in the transcript, this action is still pending in the district court. The plaintiff might still, upon a proper showing, move to amend his complaint by adding the verification. He might have leave to file another complaint. The striking of the complaint from the files does not terminate the action. In Larab v. McConnel, 14 Minn., 513, and, afterwards, affirmed in Searles v. Thompson Bros., 18 Minn., 316, it was held that "an appeal will not lie from an order made on the trial of an action dismissing the action." This is a step nearer the rendition of a final judgment in the action than the order made by the court in this case. In the case of Lamb v. McCanna, *supra*, the court, by Gilfillan, C. J., says: "That the appeal must be from the judgment, or from the order on a motion for a new trial." "An order which does not determine the controversy, but leaves it to proceed, is not appealable:" 3 Estee Pl., 406. In our opinion the appeal does not lie from an order refusing to allow an amendment to the complaint, or striking the complaint from the files.

The appeal is dismissed.

All the judges concur.

SUPREME COURT OF NEVADA.

STRAIT ET AL *v.* WILLIAMS.

Filed November 20, 1884.

CONTEMPT—AFFIDAVIT FOR—VERIFICATION OF BY THIRD PERSON.—The affidavit charging a person with a contempt for refusing to obey an injunction decree, need not be verified by a party beneficially interested in the injunction proceedings; and, although the court should refuse to act, unless satisfied that the party making the affidavit was authorized to do so by the party beneficially interested, the presumption is that such party, by his attorney, presented the affidavit, and that fact is sufficient to show that the party making the affidavit was authorized.

THE SAME—WHAT THE AFFIDAVIT MUST SHOW.—Such affidavit is sufficient to give the court jurisdiction of the contempt proceedings, if it states, in substance, the rendition of the judgment, that the same is in full force and effect and unreversed, and shows the violation thereof by the defendant.

APPLICATION for a writ of *certiorari*. The opinion states the facts.

Henry K. Mitchell, for the petitioner.

HAWLEY, C. J. John Williams, the above named defendant, petitions this court for a writ of *certiorari* to review the action of the district court of the fifth judicial district in adjudging him guilty of contempt for diverting the waters of Duckwater creek, in violation of the judgment and decree of said court in the suit of Strait v. Williams.

It is claimed by petitioner that the affidavit presented to the court was insufficient, to give the court jurisdiction, in two essential particulars:

1. The affidavit was verified by D. S. Truman. It was not, therein, alleged that Truman was a party beneficially interested, or that he was the attorney or agent for the plaintiffs.

The statute does not require that the affidavit shall be made by a party beneficially interested in the proceedings. It reads as follows: "When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt:" 1 Comp. L., 1,522.

Undoubtedly, a court would refuse to act unless satisfied that the party making the affidavit was authorized to do so by the party beneficially interested in the proceedings. The presumption, however, is that the plaintiffs, by their attorney, presented the affidavit, and that fact would be sufficient to satisfy the court that the party making the affidavit was authorized to do so.

2. It is claimed that the affidavit is insufficient, in this: That it does not allege that the decree was duly made and entered, and that it only sets forth conclusions of law, instead of a statement of facts.

The affidavit is loosely drawn, and its form is subject to criticism. It might have been, and ought to have been, more specific in many respects. But we are of the opinion that sufficient facts are stated to set the power of the court in motion.

It alleges, among other things, that at a certain date "a decree and judgment was made and entered in the above-entitled cause in favor of the plaintiffs * * * and against the defendant, whereby he was enjoined and restrained from diverting the waters of Duckwater creek, or of the waters of Hot Springs thereof, to the injury of the plaintiffs, or either of them * * * whenever the same was necessary for the use of said plaintiffs;" that the decree is in full force and effect and unreversed; that the defendant, in disobedience of the decree, in diverting the water and depriving the plaintiffs of a large portion of the water necessary for plaintiffs' use and threatens to continue the diversion thereof to the injury of plaintiffs.

These facts might have been stated in clearer terms, and the district judge might have required a more definite statement of the facts before issuing an order for the defendant to appear and show cause, if he could, why he should not be punished for contempt. But the objections urged are more to the form than to the substance of the affidavit.

It appearing that sufficient substantive facts were stated to give the court jurisdiction, the application of petitioner for a writ of *certiorari* must be denied: Phillips v. Welch, 12 Nev., 158.

It is so ordered.

STATE *v.* ANGELO.

Filed November 17, 1884.

OVERT ATTEMPT TO ESCAPE FROM STATE PRISON—EVIDENCE OF PUNISHMENT AFTER CAPTURE—INDICTMENT.—An indictment for an overt attempt to escape from the state prison is sufficient, if it alleges that the defendant, while lawfully confined in state prison under a judgment of a competent court, for the crime of burglary, did make an overt attempt to escape therefrom; that he did unlawfully, forcibly and feloniously break out of the cell in said prison, in which he was confined, and out of the building in which said cell was and is. It is unnecessary to aver that a certified copy of the judgment against the defendand, for burglary, had been delivered to the warden of the state prison. At the trial of such indictment evidence of the punishment received by the defendant at the hands of the prison authorities after his recapture, is immaterial.

TRIAL JURORS—SUMMONING UNDER OPEN VENIRE—DISCRETION OF COURT.—The necessity of selecting additional trial jurors under an open venire is a matter within the discretion of the lower court.

JUROR'S OATH—FORM OF—WHEN SUFFICIENT.—An oath administered to trial jurors as follows: "You, and each of you, do solemnly swear that you will well and truly try this cause, and a true verdict render according to the law and the evidence. So help you God," is substantially sufficient.

APPEAL from a judgment of the second judicial court of Ormsby county, entered upon a verdict convicting the defendant of an overt attempt to escape from the state prison, and from an order denying him a new trial. The opinion states the facts:

A. Soderberg, for the appellant.

Attorney-General, for the respondent.

HAWLEY, C. J. Appellant having been convicted of an overt attempt to escape from the state prision, seeks the intervention of this court for a new trial.

1. He claims that this demurrer to the indictment should have been sustained upon the ground that the indictment did not allege the existence of any warrant, or commitment, authorizing his incarceration in the state prison, and, also, upon the ground that the facts alleged in the indictment constitute the crime of an escape from the prison instead of an overt attempt to escape therefrom. Neither of these positions are well taken.

The indictment tested by the requirements of the law in this state, (1 Comp. L., 1858,) is sufficient. It shows that appellant, while lawfully confined in the state prison under a judgment of a competent court, for the crime of burglary, did make an overt attempt to escape therefrom; that he did unlawfully, forcibly and feloniously break out of the cell in said prison, in which he was confined, and out of the building in which said cell was and is." This is a sufficient statement of facts to show the commission of the crime charged: Comp. L., 2466. It was unnecessary to aver in the indictment that a certified copy of the judgment against the appellant, for

burglary, had been delivered to the warden of the state prison. The statute does not make that an essential fact to be proved. It does require that the prisoner making the attempt to escape "shall be lawfully confined * * * under the judgment of imprisonment in said prison," and these facts are fully set forth in the indictment. It was the judgment against appellant for burglary that authorized his imprisonment in the state prison and made his confinement therein lawful: Ex parte Smith, 2 Nev., 340. The statute requires a certified copy of this judgment to be given to the warden as evidence of his authority to receive the prisoner and to keep him confined in the prison: 1. Comp. L., 2076.

That portion of the indictment which designates the crime as an overt act to escape is merely formal and might have been omitted. It is the recital of the facts in the body of the indictment that constitutes the crime of which appellant is charged: State v. Anderson, 3 Nev., 256; State v. Johnson, 9 Nev., 178: State v. Rigg, 10 Nev., 288. Hence, if the facts alleged constituted the crime of an escape from the prison, appellant could have been tried for that offense, and the "verdict of guilty as charged in the indictment" would warrant the sentence imposed. The statute makes no difference in the grade of these offenses. It provides the same punishment for each. But we are of opinion that the formal part of the indictment correctly designated the offense as an overt attempt to escape. The breaking out of the cell in which the prisoner was confined, and out of the building in which the cell was situate, did not necessarily constitute an escape from the state prison; for if he was captured within the prison walls he did not succeed in his attempt to escape from the prison.

2. Appellant challenged the panel of trial jurors on the ground that the jurors were not ordered drawn, or summoned, according to law, in this, that they "were summoned under an open venire and without any necessity existing for not drawing, or summoning, the jury herein in the regular way," and claims that the court erred in not allowing him to prove the truth of his objections.

The statute provides for the issuance of an open venire in certain cases, and leaves the question as to the mode of selecting the jurors by open venire, or otherwise, to the discretion of the court: Stat. 1881, 23.

The order of the court recites the statutory facts "that the regular panel of trial jurors * * * has been exhausted," which justified the court in issuing an open venire, and it, also, recites the fact that it appeared to the court "that it was necessary to summon additional jurors."

The offer as made was too general. It was not to prove any specific fact, as, for instance, that the regular panel was not exhausted, or to give the number of the jurors, on the regular panel, if any.

The law leaves the question of necessity to the discretion of the court instead of the judgment of the prisoner. There is nothing in the record which tends, in the slightest degree, to show that the court abused its discretion.

The offer, as made, was properly overruled.

3. The objection that the jurors were not lawfully sworn is without any substantial merit. The oath administered was as follows: "You, and each of you, do solemnly swear that you will well and truly try *this cause*, and a true verdict *render* according to *the law and* the evidence. So help you God."

The principle of the common law is that oaths are to be administered to all persons according to their opinions, and as it most affects their consciences. The criminal practice act of this state does not provide any particular form of oath to be administered except in justice courts: 1 Comp. L., 2,229, and this form is the one generally used in the district courts, and is substantially the oath as usually administered at the common law. It is as follows: "You do swear (or affirm, as the case may be) that you will well and truly try *this issue between the state of Nevada and A. B., the defendant*, and a true verdict *give* according to the evidence." The only objection to the form of the oath as administered in this case, worthy of notice, is in the use of the words "this cause," instead of "this issue between the state of Nevada and Charles Angelo, the defendant." The latter words are preferable, and it would always be best not to depart from the language of the statute in this respect. We do not, however, think that the change as made vitiates the solemnity of the oath, or is such a departure from the regular form as to entitle appellant to a new trial.

The form of the oath as prescribed by statute should always be followed. The substance of the oath cannot be dispensed with: State v. Rollins, 2 N. H., 532; Harriman v. State, 2 G. Greene, 285; Maher v. State, 3 Min., 447; Bawcom v. State, 41 Tex., 191; Sutton v. State, 41 Tex., 515; Bray v. State, 41 Tex., 561; Morgan v. State, 42 Tex., 224; Edwards v. State, 49 Ala., 336; State v. Owen, 72 N. C., 611.

The oath to well and truly try "the cause" was the same in substance as an oath to well and truly try "this issue between the state of Nevada and Charles Angelo, the defendant." From an examination of the Texas cases, above cited, it will be seen that the courts of that state have been very strict in requiring the substance of the oath given.

In Faith v. State, 32 Tex., 374, the precise point here presented was held insufficient to justify a reversal. The court said: "The jury were sworn 'well and truly to try *the cause* and a true verdict render according to law and evidence.' This, though not in the precise language of the statute, is a substantial compliance."

4. Appellant offered to prove "the punishment he had received at the hands of the prison authorities, after his recapture, for the alleged offense." This was wholly immaterial. It had nothing whatever to do with the question of the guilt or innocence of the defendant, and was very properly refused.

We have specifically noticed all the objections relied upon by appellant, which are presented by the record.

The judgment of the district court is affirmed.

SUPREME COURT OF OREGON.

WEBB v. NICKERSON.

Filed October 23, 1884.

PARTIAL DEFENSES AT COMMON LAW AND UNDER CODE, HOW PLEADED.—At common law every plea must go to the whole cause of action, and be an entire answer thereto on the record. The same rule prevails under the code, except that matter may be set up by way of answer which constitutes only a partial defense; but in such case it must be pleaded as a partial defense and not assume to answer the entire cause of action.

INTRODUCTION OF LIQUORS INTO INDIAN RESERVATION—SEIZURE OF PROPERTY USED FOR. Property in the possession of a person other than the owner, who is using it for the purpose of introducing spirituous liquors upon an Indian reservation, may be seized by the government agent in charge of such reservation, and delivered over to the proper officer, to be proceeded against for forfeiture. If such agent surrenders the property to the owner, upon demand, he does not thereby admit the illegality of the seizure.

THE SAME—JUSTIFICATION OF SEIZURE, HOW ALLEGED.—In an action brought in a state court against the government agent, for a wrongful taking of such property, the agent may justify his seizure under section 2,140 of the United States revised statutes, although the state court had no jurisdiction of the offense for which the seizure was made. Such justification, however, to be available as a defense, must allege that the person introducing the spirituous liquors was either a white person or an Indian.

APPEAL from a judgment of the circuit court for Klamath county. The opinion states the facts.

E. B. Watson, for the appellant.

Bonham & Ramsey, for the respondent.

THAYER, J. This is an appeal from a judgment recovered by the respondent against the appellant, for the sum of two hundred dollars damages for an alleged forcible taking and detention by the appellant of a certain span of horses and their harness, belonging to the respondent, claimed in respondent's complaint to be of the value of two hundred and fifty dollars. It is alleged in the complaint that said taking of the team and horses occurred on the fourth day of April, 1881, at what was then known as Lake county, now Klamath; that the detention continued for a period of fifty days; that the use of the team during that time was worth four dollars a day; that respondent, in order to recover it, was compelled to travel from his residence in Jackson county to Klamath agency, a distance of one hundred and ninety miles, and back, occupying a period of twenty-five days, during which time he was prevented from pursuing his business; that his time so employed was worth two dollars a day. That he has necessarily expended in so traveling, and in his maintenance, the sum of eighty dollars, and was compelled to employ an attorney to assist him in his recovery of the team, for which he paid ten dollars.

The appellant interposed an answer to the complaint, which contained a denial of all the material allegations therein contained, and the following matter as a separate defense, viz: "The defendant, for a further and separate answer and defense to said amended complaint, alleges, that, on the fourth day of April, 1881, and ever since, this defendant was, and is, and has been, an Indian agent of the government of the United States for the Klamath Indian agency and reservation in the state of Oregon, duly appointed and

qualified and acting as such, and that he was at all times mentioned and described in the complaint, as such agent, in charge of said Klamath Indian agency and reservation; that said Klamath Indian reservation was at all times mentioned in the complaint, and now is, the Indian country; that, on the eighth day of April, 1881, W. S. Webb, Jr., the son of the plaintiff, did wrongfully, without any order from the war department of the United States, or any order of any officer duly authorized thereunto by the war department of the United States, introduce into and upon said Klamath Indian reservation, being then and there under the charge of this defendant, as aforesaid, spirituous liquors, to wit: ten gallons of whiskey; and that the team and horses described in the complaint were then and there in the possession of the said W. S. Webb, Jr., in and upon said Klamath Indian reservation, and were then and there actually used and being used by the said W. S. Webb, Jr., in carrying said spirituous liquors into and upon said Klamath Indian reservation, as aforesaid; that, on the said 8th day of April, 1881, this defendant being then and there the Indian agent of the United States, in charge of said Klamath Indian reservation, as aforesaid, had reason to suspect, and did suspect, and was informed, that the said W. S. Webb, Jr., had introduced said ten gallons of whiskey into said Indian reservation, as hereinbefore stated, in violation of the statutes of the United States in such case made and provided, and so having to suspect, and being so informed, in pursuance of his duty as such Indian agent, did then and there, as he lawfully might, cause the wagon of the said W. S. Webb, Jr., then and there being drawn by the team described in the complaint, in and upon the Klamath Indian reservation aforesaid, to be searched; that, in and by reason of said search, the said ten gallons of whiskey were then and there found concealed in said wagon; that this defendant then and there, as Indian agent, as aforesaid, as he lawfully might, did seize the said whiskey and the said team, in order that he might deliver the same to the proper officer of the United States, to be disposed of as provided by the laws of the United States, and did then and there destroy said whiskey; that this defendant did, for the purpose aforesaid, retain the possession of the team and harness aforesaid, until the first day of May, 1881, at which time the plaintiff having duly demanded the possession of the said property, and having filed his affidavit in due form of law, to the effect that said horses and harness were the property of the plaintiff, and that he had no knowledge of the said wrongful acts of the said W. S. Webb, Jr., immediately delivered the said horses and harness into the possession of the plaintiff."

The respondent demurred to this matter of defense for the reason that it did not set forth facts sufficient to constitute a cause of defense, which demurrer the court below sustained, and that ruling is the only assignment of error to be considered in the case.

The respondent's counsel maintains that the demurrer was properly sustained, for the reason (1) that the matter plead as a defense

did not authorize the appellant to seize the team and property, under section 2,140 of the United States revised statutes, as it did not show that W. S. Webb, Jr., was either a white person or an Indian; (2) that it was not a sufficient justification for seizing the property of W. S. Webb, Sr., for the misconduct of W. S. Webb, Jr.; and (3) that appellant, by surrendering the property to the respondent, admitted that his seizure of it was illegal.

At common law, every plea must go to the whole cause of action, and be an entire answer thereto on the record. This was a fundamental principle, and it prevails under the code except that matter may be set up by way of answer which constitutes a partial defense; but in the latter case it must be pleaded as a partial defense, and not assume to answer the entire cause of action: Fitzsimmons v. Fire Ins. Co., 18 Wis. 246. The second and third reasons claimed by respondent's counsel for sustaining the demurrer here, are, in our opinion, entirely untenable. As an abstract proposition, the appellant would not be justified in seizing the property of S. W. Webb, Sr. for the misconduct of S. W. Webb, Jr., but when the latter is found in possession of the property of the former, and using it to introduce spirituous liquors upon an Indian reservation, of which the appellant is Indian agent, the appellant would not only have the right, but it would be his duty to seize it and deliver it over to the proper officer to be proceeded against for forfeiture. The appellant could not be expected to stop in such a case and inquire as to whether W. S. Webb, Jr. was the owner of the team he was using to haul the contraband article onto the reservation. Nor did the appellant admit the illegality of the seizure of the team by surrendering it in the manner set out in the separate defense. The section of the revised statutes referred to makes it his duty, when he has reason to suspect or is informed, that any white person or Indian is about to introduce or has introduced any spirituous liquors or wine into the Indian country, in violation of law, to cause the boats, stores, packages, wagons, sleds and places of deposit of such person, to be searched, and if any such liquor is found therein to seize it, and the boats, trains etc. used in conveying the same. It is true the law also requires him to deliver over the property seized to the proper officer, to be proceeded against by libel in the proper courts for forfeiture; but if he neglected his duty in that respect by delivering the team to the respondent upon his demand, and, after he had filed his affidavit referred to in the said defense, the latter cannot certainly take any advantage of it. The action was for a wrongful taking of the property, and the appellant had the right to plead that he had committed no wrong by showing a state of facts authorizing him to seize it.

The respondent's counsel contends that the state courts have no right to inquire into an alleged forfeiture in such cases. This is undoubtedly true, but they are not thereby precluded from inquiring into an alleged wrong charged against a party. A United States marshal could justify his arrest of a party in an action against him

therefor in a state court, although the state court had no jurisdiction of the offense upon which the arrest was made. The right to justify for an arrest or seizure in an action therefor, cannot possibly depend upon the question of the jurisdiction of the court in which the action is brought over the subject matter of the arrest or seizure. The counsel for the respondent relies upon Gelston et al v. Hoyt, 3 Wheat., 246, as establishing his third ground for sustaining the demurrer. We have examined that case with some care but have been unable to discover its applicability to the one at bar. The defense there could not be sustained as there had been an adjudication of acquittal, and no certificate of reasonable cause for the seizure had been given, and it was held that the action for the seizure could not be maintained during the pending of the proceeding for condemnation. In the case at bar there has been no adjudication upon the seizure. The proceeding was arrested as much by the act of the respondent as of the appellant, and he is as much affected by the result as the appellant is.

The other reason for sustaining the demurrer is purely technical. It is very apparent that W. S. Webb, Jr., is a white person. That fact was doubtless so well understood that appellant's attorney overlooked the necessity of alleging it in the separate answer. The facts which are therein alleged, and admitted by the demurrer to be true, show that the said W. S. Webb, Jr., was guilty of a grave offense, and if they had included the allegation referred to, that he was a white person, would have constituted a complete defense to the action. In viewing the affair from the record standpoint of the case, the court can arrive at no other conclusion than that the appellant has been unjustly dealt by, and it would gladly have laid hold of any point that would legally have authorized it to reverse the judgment against, but the said section of the United States revised statutes only authorizes in terms, a seizure in such cases as against a white person or an Indian; and as it is a penal statute the court does not feel warranted in extending it beyond the language employed. It is most extraordinary that congress intended to confine the right of seizure in such a case to the two classes of persons mentioned, yet it is difficult to understand why it used the words "white person or Indian" if it had intended to include other classes as well. At all events, the court does not consider that it is authorized to look beyond the language of the act to ascertain the intention of the body that framed and enacted it in a case of the seizure of a person's property for forfeiture.

The court regards these views as decisive of the question last considered, and as determining the case. The new matter was insufficient as a complete defense to the action, and while it might have been used as a partial defense or in mitigation of damages, yet it cannot be, as it professes, to answer the entire cause of action. It has been suggested by appellant's counsel that the demurrer should have pointed out this defect, but the court is of opinion that the practice which governs in that particular is

analogous to that which obtains in case of a demurrer to a complaint where it is claimed that it does not contain facts sufficient to constitute a cause of action.

The judgment of the circuit court is therefore affirmed.

COGSWELL v. WILSON.

Filed November 10, 1884.

PARTNERSHIP HOW CREATED—ESSENTIAL ELEMENTS OF.—A partnership is a contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions.

THE SAME—AGREEMENT TO SHARE PROFITS AND LOSS.—To constitute a partnership *inter se* mere community of interest is not sufficient; there must be an agreement to share in the profits and loss. Such agreement must provide for an interest in the profits as profits, and not for a mere division of the gross earnings, and such profits must be shared as the result of the adventure or enterprise, and not simply as a measure of compensation.

THE SAME—BREACH OF PARTNERSHIP AGREEMENT—DISSOLUTION OF PARTNERSHIP.—The existence of a partnership does not depend upon the fact that each of the partners has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, the partnership continues until legally dissolved.

THE EVIDENCE REVIEWED, and held that a partnership existed between the defendant and the plaintiff's vendor.

APPEAL from a judgment of the circuit court for Lake county. The opinion states the facts.

John Kelsay and N. B. Knight, for the appellant.

Stratton & Fullerton, for the respondent.

LORD J. This is a suit for the dissolution of a copartnership alleged to exist between one D. R. Jones and the defendant, H. C. Wilson, for an accounting, and the appointment of a receiver. The plaintiff is a purchaser at an execution sale of all the right, title and interest of the said Jones in such alleged copartnership, and by reason thereof, alleges he is now the owner of all of such right, title and interest of the said Jones in the property of said copartnership, and not desirous himself of continuing such copartnership, he prays the appointment of a receiver and for an accounting, to the end that the liabilities of such copartnership may be paid and discharged and his rights and interests as such purchaser may be ascertained and determined. Upon issue being joined, the evidence in the case was taken and submitted, and the court below finding that no partnership existed between the parties as alleged, dismissed the bill for want of equity. From this decree the plaintiff appeals, and brings his suit to this court. The matter out of which the contention principally arises, is in reference to a certain contract made and executed between the said Jones and the defendant, Wilson, for the purpose of forming a copartnership in the business of sheep raising, the terms and conditions of which, the plaintiff claims, have been substantially performed and carried into effect, whereby the partnership in question was established. The contract was as follows:

"Articles of agreement are concluded, this nineteenth day of June, A. D. one thousand eight hundred and seventy-five, between H. C. Wilson, Tehama county, California, party of the first part, and D. R. Jones of Grant county, state of Oregon, party of the second part, witnesseth: That the said parties above named agree to and with each other, that they will enter into co-partnership at Warner lake, Grant county, Oregon, for the purpose of sheep raising, which occupation is to be our specialty; H. C. Wilson, of the first part, agrees to furnish two thousand head of sheep (or more as may be agreed upon), for the use of the co-partnership, at the rate of three dollars and fifty cents per head, and D. R. Jones of the second part, agrees that after fifteen hundred dollars is taken from the half value, that he is to give his note to H. C. Wilson, of the first part, for the remainder of the one-half of the sheep at the same valuation, said note to draw interest at the rate of one per cent. per month from the date until paid. That said H. C. Wilson, of the first part, agrees to make such payments on the lands that said co-partnership may purchase from the state of Oregon, as university lands, or from the Oregon central military company (if such lands are purchased), which purchases may be at the discretion of both parties hereto; and the said H. C. Wilson agrees to make such payments on such lands as may be required for the year 1875, which will be the first payment, and the said D. R. Jones agrees to make the second payment, H. C. Wilson the third payment, and D. R. Jones the fourth payment. Each party hereto agreeing to pay one-half of the purchase price and all the expenses that may be incurred in the purchase of any or all of said lands that may be purchased from said parties above named, and also each party agreeing to pay one-half of all expenses incurred in the purchase and care of said sheep.

"And it is further agreed by both parties hereto that said sheep and their increase is to be under the care and control of said H. C. Wilson, and that both of said parties are to put up such quantities of hay each season for said sheep as the said H. C. Wilson may think proper to be done, at the equal expense of both parties hereto. This agreement to go into effect as soon as M. Tipton relinquishes his right to the lands hereinbefore mentioned.

"In witness whereof we have hereunto set our hands this nineteenth day of June, A. D. 1875.

"(Signed) H. C. WILSON.
"(Signed) D. R. JONES.

"Done in the presence of KASPAR KUBLE."

The defendant Wilson admits the execution of this contract, but denies that its terms or conditions have ever been performed, or that any co-partnership was ever formed or established in pursuance of its provisions; and claims that owing to the inability and failure of the said Jones to comply with his part of the agreement, it was mutually abrogated and abandoned by them; that another and different arrangement was made, and a contract entered into between

them in which it was expressly stipulated in writing that when Jones paid him a certain sum—the purchase price of the sheep—then only was he to deliver to Jones one-half of the band of sheep and their increase. The first question for us to decide is: Was there a partnership? If there was, then it is not denied that an accounting is necessary for a proper settlement of the partnership affairs. A partnership has been defined to be a contract of two or more competent persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions: 3 Kent's Com., 23; Story on Partn., sec. 2. Mere community of interests is not sufficient, but there must be an agreement to share in the profits and loss: Holmes v. U. In. Co., John.'s Cases, 329; Post v. Kimbosly, 9 John., 470. Nor will an agreement to divide the gross earnings constitute individuals partners, but there must be an interest in the profits as profits: Patterson v. Blanchard, 5 N. Y., 186; Hunsbrit v. Howland, 5 Denio, 68; and such profits must be shared as the result of the adventure or enterprise in which both are interested, and not simply as a measure of compensation: Ogden v. Astor, 4 Sandf., 311.

These references are sufficient to show that a communion of profits and loss is essential in order to constitute a partnership, and this, it would seem, is the true test to determine whether persons are partners or not. It will be observed by the terms of the agreement that it is to go into effect as soon as Mr. Tipton relinquishes his right to land mentioned in the agreement. The evidence discloses that Jones, in pursuance of that agreement, went to Linkville, about the first of July, 1875, and saw Mr. Tipton, who relinquished all right he had to the lands referred to, and that he wrote to Wilson of this result, requesting him to send the money to Salem to pay for the land, and that subsequently the deed was sent to him. Jones also testifies that about the tenth of September, 1875, he went to Susan river for the purpose of securing the sheep and bucks; that Wilson and another man drove them out of the corral, and that a man by the name of Johnson counted them as they came out of the shoot; that a man with him by the name of Moore drove the sheep, and he drove the team; that the sheep were delivered to him by Wilson for the purposes of the co-partnership, in pursuance of their agreement made at Jacksonville, and then driven to Warner valley, and the business of sheep-raising thus commenced as provided in such agreement. Upon the question of the delivery of the sheep at this time, and as thus sworn to by Jones, the defendant, Wilson, testifies in substance that he did not deliver the sheep to Jones, but to Moore, who held the possession for him; that his reasons for so doing were that it had come to his knowledge that Jones was involved in debt, and to secure himself against loss, and to avoid all possibility of difficulty and annoyance, he put Moore in possession of the sheep; and that subsequently a written obligation was given by Jones to him, in which it was expressly stipulated that the delivery of the

sheep should be postponed until full payment was made therefor. This obligation is as follows:

"$2,624.20. One day after date I promise and bind myself and heirs to pay to H. C. Wilson, or order, the just and full sum of two thousand six hundred and twenty-four dollars and thirty cents, in gold coin, with interest at the rate of one per cent., in like gold coin, for a half interest in twenty-one hundred and twenty-six head of sheep. The consideration of the above obligation is such, that when the said D. R. Jones, or his heirs, pay to H. C. Wilson the above named sum, with interest, then the said Wilson is to deliver to the said D. R. Jones one-half of the above band of sheep and their increase.

"(Signed) "D. R. JONES.

"Warner Valley, Grant Co., September 16, 1876."

To preserve the order of time, we shall defer reference to the endorsements on the back of this note or obligation at present. It will be noticed in the transaction as thus far detailed that there is no conflict in the evidence except as to whom the possession and delivery was given, at Susan river, Jones testifying that the possession and delivery of the sheep was made to him by Wilson for the copartnership, and in pursuance of the original agreement, and Wilson testifying that the possession and delivery of the sheep was not made to Jones, but to Moore, to be held for him, and in further confirmation of which and to more particularly define their rights and interests in the premises, the note and obligation of September 16, 1876, was given. The contention of the defendant, Wilson, therefore, is that the original agreement, which contemplated his furnishing the band of sheep for the copartnership, and the giving by Jones his note to Wilson, after deducting the one thousand five hundred dollars from the half value, according to the terms thereof, was abandoned, because, as he claims, there was no sheep delivered to Jones for the copartnership at Susan river, as the express stipulation in the writing of September, 1876, is in contradiction of such delivery for the purposes of a copartnership in the sheep as provided in the original agreement. It will be observed that more than a year intervenes between the original agreement and the note and obligation upon which the defendant relies to establish there was no delivery of the sheep to Jones at Susan river for the use of the alleged copartnership, and about a year from the time of the transaction at Susan river to the execution of the note. What was done prior to the Susan river transaction and in furtherance of the conplated copartnership, stands uncontradicted. To ascertain, then, whether the sheep were delivered to Jones and for the use of the copartnership or otherwise, becomes the important inquiry, and can only be determined in the light of all the surrounding facts and circumstances as disclosed by the evidence. It was about the tenth of September, 1875, that the sheep were counted out at Susan river, and then driven to Warner Valley, the place designated

by the original agreement for the copartnership to engage in the business of sheep raising.

In a letter written by Wilson and mailed to Jones, dated November 17, 1875, he says: "As soon as you get the sheep all right, you can send me your note dated from the day you got the sheep, with interest as understood by us. As life is uncertain, and it saves misunderstanding hereafter, keep all the accounts pertaining to the sheep strict, so that there will be no misunderstanding." And again: "When we want to sell or divide, if the sheep do not do well, I will not want to keep them then. Have the note sent also for half of the sheep, as I have nothing to show for what you owe me," etc. By this letter, written right on the heels of the Susan river transaction, it is quite clear that Wilson understood that Jones "got" his sheep, and owed him for one-half of them, for which he was to give him his note, and this is in accordance with the original agreement and the testimony of Jones in respect to this matter. And more, it not only recognizes in effect the possession of Jones of the whole band of sheep, but that he has a half interest in the ownership of them, and which in the event the "sheep do not do well," he is willing to "sell or divide," as may be deemed best under the circumstances. If Jones had no possession, or ownership in the band of sheep, what has he got to "sell or divide," or for which he "owes" him, and for which the note is requested to be sent "to show that you owe me?" In the light of what had preceded, and what had been done, the import of this letter is plain and unmistakable. It shows that Wilson understood that the possession was in Jones for the partnership, and that Jones owed him for one-half of the sheep as specified in the agreement, a construction and meaning which excludes and shuts out his suggestion that the delivery was to Moore to hold possession for him. And this is made still more evident by the fact that in the settlement of their accounts, the correctness of which is not disputed, the sheep are not only treated as partnership property, but the services of Moore as herder are charged to the firm of Jones & Wilson, and paid for out of the funds of the firm.

In another letter written by Wilson to Jones, dated December 27, 1875, he says: "I hear that Diggers attached you. Now, if there is any danger of your being attached, don't you claim any part of the sheep; tell them that they are all mine, and we have that all understood in our contract between us. I will do exactly as I agreed." Now, there is no other contract in existence at this time except the agreement made at Jacksonville, in June, 1875, and in pursuance of the terms of which, as we have seen, the sheep had been delivered to Jones for the partnership and driven to Warner valley, where the partnership was to carry on the business of sheep-raising. The reference, therefore, to the contract "understood between us," could not have alluded to the note and obligation, for that had not come into existence, but must, of necessity, have referred to the one already existing, and under which the partnership was formed, but,

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In another letter written by Wilson to Jones, dated December 27, 1875, he says: "I hear that Diggers attached you. Now, if there is any danger of your being attached, don't you claim any part of the sheep; tell them that they are all mine, and we have that all understood in our contract between us. I will do exactly as I agreed." Now, there is no other contract in existence at this time except the agreement made at Jacksonville, in June, 1875, and in pursuance of the terms of which, as we have seen, the sheep had been delivered to Jones for the partnership and driven to Warner valley, where the partnership was to carry on the business of sheep-raising. The reference, therefore, to the contract "understood between us," could not have alluded to the note and obligation, for that had not come into existence, but must, of necessity, have referred to the one already existing, and under which the partnership was formed, but,

according to the terms of which, at this time, Jones had become indebted to him for one-half of the sheep, less the amount specified, which Wilson probably felt would be endangered by the attachment. Hence the suggestion not to "claim any part of the sheep; tell them they are all mine," although contrary to the fact, and might place Jones in an embarrassing position, is followed by the assurance, "we have that all understood in our agreement between us," and "I will do exactly as I agreed."

We now come to the note and obligation. Jones testifies that the reason he did not send his note was, on account of a misunderstanding in respect to the $1,500 to be deducted from the note to be given for his half-interest in the band of sheep (a controversy which does not seem to be settled yet), and that when this note of September 16th, 1876, was given, the latter clause of which postpones the delivery of the sheep until full payment is made therefor, it was inserted on account of his indebtedness to other parties, and to prevent any interference with their business, and at the suggestion of Mr. Wilson, who said to him: "you may put your property into my hands, and I will protect you until you can pay your debts;" and he further testifies that it was put into Wilson's hands, not to avoid the payment of his debts, or to defraud his creditors, but so that Mr. Wilson could protect him until such time as he could pay. In another letter, written in 1879, Wilson says: "You say you have placed your property into my hands. Now, if you are afraid to trust me with your property, I will give you back your papers when we meet and settle, if you want them. It was only through a suggestion of your own that you turned your property to me, and I thought I was accommodating you." In explanation of this, Wilson testifies, it only refers to a wagon and team, which Jones, fearing would be attached, turned it over to him by a bill of sale, and that subsequently he paid him for them. Now, turning to the settlement of their accounts, we find that all property furnished by Jones, and including the team, valued at $500, was charged to the copartnership. The same is true, of the property furnished by Wilson. The sheep and bucks first delivered by Wilson, as also the bucks subsequently purchased, were charged to the copartnership. These accounts show, too, that Jones became equally liable with Wilson for supples furnished by agent Lowell for the use of the copartnership, and that one-half of the money arising from the sale of wool clipped from the sheep, after deducting expenses, was placed to the credit of Jones. He receives credit, too, for one-half of the proceeds of the sale of wethers, sold out of these sheep. The twenty per cent. paid to the state for the land used in the sheep business, the expense of Wilson going to Salem in respect to it, and the taxes thereon, are charged to the copartnership. Now, is the allegation in the complaint, that Jones paid for one-half of the sheep, denied in the answer? The code provides that every material allegation not specifically controverted in the answer, shall, for the purpose of the action, be taken as true: Code, sec. 92. This,

however, may have been an oversight, but the payments admitted to have been made by Jones, and endorsed by Wilson on the back of the note, inclusive of the $1,500, for which Jones claims he is entitled to be credited, as provided by their articles of copartnership, would pay the note, or liquidate the amount Jones owed for the sheep. The evidence in respect to the land is not clear and definite—in fact, it is difficult to determine by the record before us just what relation it bore to the partnership. That it was used by the partnership for the purposes of its business seems incontestable. There are, however, some facts disclosed by the evidence of Wilson, which would indicate that it did not constitute a part of the partnership property, or, at least, not the whole of it. Just what the truth is in this regard, we are not able, nor is it necessary, now, for us to determine. But, looking at all the facts and circumstances which surround this transaction from its inception in 1875, to 1881, when proceedings were instituted which have resulted in the present suit, we are satisfied that a partnership existed between Jones and the defendant Wilson. All things may not have been done precisely as agreed and contemplated by the agreement for a copartnership. Nor, in all cases, is this absolutely necessary. In Hartman v. Woehr, 18 N. J. Eq., 383, it is held that the existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, there is a partnership until legally dissolved. Having reached the conclusion there was a partnership, how much interest Jones had in such partnership can be determined on the accounting. The decree must, therefore, be reversed, and the suit remanded for an accounting.

SUPREME COURT OF WYOMING.

IN RE BROWN.

Filed November 1, 1884.

ATTORNEY AT LAW—SUSPENSION AND REMOVAL FROM THE BAR—UNPROFESSIONAL CONDUCT.—An attorney at law who publicly, and without cause, charges a court with bribery is guilty of such a violation of his professional duties as to justify his suspension and removal from the bar, both by the common law and under the statutes of this territory.

PROCEEDINGS for the disbarment of an attorney. The opinion states the facts.

J. C. Baird, for the prosecution.

Downey & Blake, for the respondent.

LACEY, C. J. This is an accusation against Mellville C. Brown, an attorney and counsellor at law of this court, prosecuted by direction of the court, under the act of December 9, 1869: Compiled Laws, page 16.

The accusation avers *inter alia*, that the respondent, in the presence of divers witnesses, in the city of Cheyenne, in this territory, utterred of and concerning this court and its decision of a certain cause, the following language: "It is a son-of-a-bitch of a court; one bribed and the other I don't know what." It is further alleged that said words were so spoken with intent to scandalize, traduce and bring into contempt and disgrace, the court.

There is also a further allegation charging the utterance of similar words at Laramie city, but, as to these words, we do not find the accusation sustained.

The respondent answered under oath. In his answer he admits the use of the language at Cheyenne, except that he claims he used the expression "son of a gun" instead of "son of a bitch." Mr. Corlett and Mr. Riner both swear, positively, that the latter expression was the one used, and they are contradicted by the respondent alone.

The court finds, therefore, that the words used in the accusation were the words used.

Were the words used in relation to this court and a cause by it decided, with intent to charge the court with bribery in the decision of that cause?

If the above question be decided in the affirmative, do all the facts show, on the part of respondent, such a violation of his duties as an officer of this court, as would demand a suspension or severance of the official relation.

The evidence shows that on the day the words were uttered this court had decided a cause in which Edward Ivinson was appellant, and Charles Hutton and Judge Carey and brother were appellees.

The decision was by a majority of the court, the members of that majority being judges Blair and Parks. The then chief justice Sener dissented. The respondent was solicitor for the appellant in that cause, and the decision was adverse to his client.

Immediately after the decision the respondent and several others walked from the court room towards the *Sun* office. While in the *Sun* office some one remarked to respondent, "Brown, you got beaten," or words to that effect, to which respondent replied, "Yes, that's a son-of-a-bitch of a court, one bribed and the other I don't know what." The respondent was himself sworn as a witness on his own behalf at the trial, and in his evidence made the following answers:

"Question.—To recur to the conversation in the *Sun* office, you say the name of no court was mentioned?

"Answer.—No, sir; it was not.

"Q.—What court did you refer to as the 'son-of-a-gun' of a court?

"A.—I don't know that I referred to any; it was one of those remarks we lawyers sometimes make. It really has little or no meaning.

"Q.—Some one asked you if you were beaten?

"A.—Yes, sir.

"Q.—In your reply 'yes,' where did you mean you were beaten?

"A.—Well, if I meant anything, or if my conversation referred to any matter, it probably referred to the case decided here in court.

"Q.—You would say that your conversation referred to something?

"A.—Well, it referred to just this, if your honor please: it was a remark made in anger, and what it meant or what one would mean by it, would be pretty hard to say.

"Q.—In your answer you certainly referred to the Ivinson case?

"A.—I certainly had the Ivinson case in my mind.

Mr. Corlett in his evidence, after stating what occurred in the *Sun* office, and that he and the respondent were afterwards on the same day in his (Corlett's) office, states the following as having occurred at the latter place:

"I broached the subject to him about his remark. He said to me finally that he didn't mean to say that I had done anything or had anything to do in respect to this case that was improper, or that judge Cary had either."

"Q.—What cause had that reference to?

"A.—What we call the Ivinson and Hutton case.

"Q.— * * * Now you might state whether in that conversation the respondent did not state that he meant not to be understood that the court was bribed?

"A.—I don't remember of his saying that.

"Q.—You might state whether the respondent did not wish to be understood as charging any judge with bribery?

"A.—No, sir; the statement was that he did not mean to say that he had any evidence that judge Blair" (one of the judges of this court) "had been bribed, but that his position in the supreme court was different from what it was in the district court; that may have been it, or that he did not have any evidence."

As to what drew out respondent's remark, above stated, Mr. Corlett testified:

"I don't know, but for some reason or other, I presumed he had reference to judge Blair, and I asked him what reason he had for thinking judge Blair had been bribed or if he had any evidence of it."

Of the above testimony, and the conversation mentioned in it, the respondent in his testimony, says:

"I think if it occurred at all, and probably it did as he states it, it occurred in the afternoon of that day,—or substantially as he states it. If I was to repeat the conversation I would not vary it very much."

We think the evidence shows conclusively that the language spoken by the respondent at the *Sun* office was spoken of this court and concerning its decision in the Ivinson-Hutton case, and being so used the only meaning which can reasonably be given the words

is one which charges the court with bribery in the decision of that cause.

By his words spoken publicly, the respondent, with vile epithets, charged the court with the commission of the highest crime which a court can possibly commit, and yet it is not claimed that there was even the slightest ground for that charge.

The claim is that the words were spoken in anger. The plain duty of respondent was then to right the wrong as far as possible, and when confronted here with the groundless charge made by him to retract it with as much alacrity as was uttered. He owed it to himself as well as to the court to be entirely frank, candid and truthful in the matter.

But there is no retraction in the respondent's answer, nor is there anything showing the slightest regret upon his part on account of his offense. Indeed the answer closes with this self-sufficient language:

"That if at any time he has criticised the action of courts unkindly it was the result of disappointment in the failure of justice and the inability of courts to administer the law with that uniformity and precision that he believed requisite in so high and noble a profession, and not from any disposition or intention to hinder or prevent the due administration of justice."

Respondent testifies that he retracted the charge of bribery in a private conversation with Mr. Corlett which respondent says took place before noon of the day of the utterance, and within a few minutes after the utterance. Mr. Corlett's recollection is not in accord with that of respondent upon this point, and in this the former is strongly corroborated by the conversation which took place several hours afterward in his office—a conversation in which respondent reiterated in effect the charge of bribery, though, admitting he had no evidence of it.

It is at least singular that this conversation should have taken place as it did if the retraction had been made as claimed.

It will be seen that the testimony of respondent, to state it mildly, was quite evasive. We have, also, had the task of trying to reconcile that testimony with his sworn answer. For example, that answer contains the following:

"But respondent denies that he used said language, or spoke said words of or concerning said cause of Ivinson against Hutton or any other case that had been decided by said supreme court." This denial we failed to reconcile with portions of respondent's testimony.

Our statute provides that this court "may revoke or suspend the license of any attorney or counsellor at law to practice therein. * * * Fifth. For the willful violation of any of the duties of attorney or counsellor."

The statute does not define the duties of an attorney or counsellor.

We have also, a general statute adopting the "common law of England as modified by judicial decisions," and expressly providing that, that common law "shall be considered as of full force

until repealed by legislative authority." Compiled Laws, page 193, sec. 1.

The duties of an attorney in this territory, are, therefore, the same as under the common law, his first duty being to the court of which he is an officer.

"The obligation which attorneys impliedly assume, if they do not by express declaration, take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers.

"This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges, personally, for their judicial acts:" Bradley v. Fisher, 13 Wall., 333–355.

The fountain of the power of the courts to remove attorneys, as exercised at common law, is the statute of 4 H. IV, ch. 18, which is as follows.

"And if any such attorney be hereafter found notoriously in any default, of record or otherwise, he shall forswear the court and never after be received to make any suit in any court of the king. That they be good and virtuous, and of good fame, shall be received and sworn at the discretion of the justices, and, if they are notoriously in default, at discretion, may be removed upon evidence, either of record or not of record."

It seems to us that the power to remove under our statute, and the causes sufficient for removal, are as broad and comprehensive as at common law. Further: So far as questions now arising in this case are concerned, there is nothing in our statute, either expressly or by implication, repealing the common law.

The court finds that the accusation, so far as it relates to the conversation in Cheyenne, is, in all things, sustained, and that the subsequent conduct of the respondent, in relation to the matters involved, including his answer and testimony here in this action, has, in no way, lessened or atoned for his offense.

The court further finds that the defanlt of the respondent, the willful violation of his duty to the court as an attorney and counsellor, has been such, when viewed from the stand point, either of the common law or of our statute, as to demand a suspension of his official relation to this court: Bradley v. Fisher, 13 Wall., 333, *supra*; Beene v. State, 22 Ark., 149; People *ex rel* Elliott v. Greene, 2 West Coast Rep., 311, 521; *Ex parte* Wall, 107 U. S., 265.

It is, therefore, considered by the court that the license of the respondent, as an attorney and counsellor at law to practice in this court, be, and the same is, hereby, suspended until the further order of this court.

It is further considered by the court that the respondent pay the costs of this proceeding, taxed at eighty-three dollars.

All the judges concurring.

SUPREME COURT OF CALIFORNIA.

No. 7,790.

PELLIER *v.* GILLESPIE ET AL.

Department Two. Filed November 22, 1884.

AFFIDAVIT OF SERVICE OF SUMMONS—RESIDENCE OF DEFENDANT.—Where the affidavit of service of summons states that the defendant was served in a certain county, it will be presumed that he was a resident of such county.

FORECLOSURE OF MORTGAGE—PERSONAL JUDGMENT AGAINST GRANTEE OF MORTGAGOR—PLEADINGS.—In a complaint to foreclose a mortgage an allegation that the grantee of the mortgagor covenanted and agreed to pay the mortgage debt and discharge the mortgage lien, is sufficient to sustain a personal judgment against him, although such allegation is made upon information and belief.

APPEAL from a judgment of the superior court for Santa Clara county. This was an action to foreclose a mortgage against an original mortgagor and his grantee. Judgment was rendered upon the default of the defendants. The record showed that a copy of the summons only was served upon the appellant. The affidavit of service of summons did not state that the defendant, served with a copy of the complaint and summons, and the appellant, were residents of the same county. The complaint alleged, on information and belief, that the mortgagor, Gillespie, sold and conveyed the mortgaged premises to the appellant, subject to the mortgage lien of the plaintiff, and that at the time of such sale the appellant covenanted and agreed to pay said mortgage debt and discharge said mortgage lien. The decree adjudged the appellant personally liable for the payment of the debt secured by the mortgage. The further facts appear in the opinion.

Houghton & Reynolds, for the appellant.

Jas. R. Lowe, for the respondent.

THE COURT. The objection that the affidavit of service of summons, is fatally defective, because it does not state that the appellant on whom the summons alone was served, and the defendant on whom a copy of the complaint was served with the summons, were residents of the same county, is overruled, on the authority of Calderwood v. Brooks, 28 Cal., 153.

The allegation that appellant covenanted and agreed to pay the mortgage debt and discharge the mortgage lien, is sufficient to sustain the judgment.

There is a sufficient description of the premises.

Judgment affirmed.

No. 9,601.

GARLICK v. BOWERS.

Department Two. Filed November 22, 1884.

STATEMENTS OF A VENDOR OF PERSONAL PROPERTY MADE AFTER A SALE thereof, are not part of the *res gestae*, and are inadmissible in an action against a vendee.

INSTRUCTIONS PARTLY CORRECT AND PARTLY INCORRECT.—A refusal to give instructions partly correct and partly incorrect is not ground for a reversal of the judgment.

APPEAL from a judgment of the superior court of Kern county, entered in favor of the defendant, and from an order denying the plaintiff a new trial, in an action to recover possession of certain wheat. The further facts appear in the opinion.

S. Solon Holl and *Zue G. Peck*, for the appellant.

Freeman & Arick, for the respondent.

THE COURT. Evidence of statements made by the vendor after he had sold the property was clearly inadmissible: Paige v. O'Neil, 12 Cal., 496; Fisher v. Webster, 13 *Id.*, 58; Cohn v. Mulford, 15 *Id.*, 50; Jones v. Morse, 36 *Id.*, 205; Whitney v. Durkin, 48 *Id.*, 462; Hutchins v. Castle, *Id.*, 153. The plaintiff had introduced evidence, which, if true, showed that the property had been sold and delivered to her before her vendor made the statements which were testified to by defendant's witnesses, against the objection of the plaintiff. Under such circumstances the statements of the vendor could not be regarded as a part of the *res gestae*. Evidence of what he said after the sale and delivery of the property to the plaintiff was simply hearsay. For this error the plaintiff is entitled to a new trial.

The plaintiff requested the court to give several instructions which were not given. We think none of them should have been given without modification, and that of itself constituted sufficient ground for the refusal.

We think there is no error in the instructions given by the court.

In Williams v. Lerch, 56 Cal., 334, the question of what would constitute an immediate delivery, and an actual and continued change of possession, is quite fully considered, and we do not deem it necessary to add anything to what is there said on the subject.

Judgment and order reversed.

No. 9,510.

HILL v. WALL.

In Bank. Filed November 24, 1884.

GUARDIAN AND WARD—SALE OF MINOR'S REAL ESTATE—ORDER FOR—DESCRIPTION OF LAND IN.—An order of the probate court for the sale of real estate belonging to a minor, must describe the land to be sold with sufficient definiteness and certainty as to admit of its identification without reference to any extraneous matter; otherwise a sale based thereon is void. A description of such lands as "twenty and one-half acres of the rancho Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff and said minors were defendants," is insufficient.

APPEAL from a judgment of the superior court for Santa Barbara county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

B. F. Thomas, for the appellant.

W. C. Stratton, for the respondent.

MORRISON, C. J. Plaintiff brought ejectment in the superior court of Santa Barbara county, for the recovery of a portion of the rancho La Patera y La Golita, particularly described in the complaint. Defendant had judgment; plaintiff moved for a new trial, which was denied, and the appeal is from the judgment as well as from the order of the court denying a new trial.

On the hearing of the motion for a new trial it was stipulated "that the land sold to defendant's grantor at the guardian's sale was the land of the plaintiff and his brother, Thomas Hill." This was the land in controversy. It was further agreed that the stipulation might be incorporated in plaintiff's statement on motion for a new trial, and on appeal to the supreme court. By the foregoing stipulation it was admitted, that plaintiff and his brother were the owners of the land in controversy at some time anterior to the making of the stipulation, and plaintiff's right of recovery was a consequence of such stipulation, unless defendant proved title out of the plaintiff at the time the action was brought. This he attempted to do by the introduction in evidence of certain proceedings in the probate court. These proceedings consisted of an order of the probate court of Ventura county, bearing date February 5, 1875, appointing Maria Los Angeles Burke de Hill, guardian of Juan B. Hill (the plaintiff) and his infant brother, Thomas M. Hill. The petition for letters of guardianship was filed in the probate court of Santa Barbara county —the place of residence of the minors, and was transferred from that county to the county of Ventura, for the reason, as the order states, that the judge of the former county was disqualified to act in the matter. Plaintiff objected to the introduction in evidence of the letters of guardianship, on the ground that the probate court had no jurisdiction to make the order, and on the further ground that it was not shown that the notice required by law had been given.

The next step in the order of defendant's proof was a petition by said guardian for the sale of the land of the two wards, to raise money for their support and education.

On the fourteenth day of June, 1875, the probate court of Ventura county, by its order, authorized the guardian of the wards to sell all the right, title and interest of her wards in and to the following real estate: "Twenty and one-half acres of the rancho La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county in a suit in partition, wherein the guardian herein and the mother of said minors was plaintiff, and said minors were defendants."

The defendant then offered in evidence an order of the probate court of Ventura county, dated January 31, 1876, reciting a sale of

said lands to one G. H. Lillard, confirming the sale, and ordering the execution to him of the proper legal conveyance to pass the title to the land sold. Defendants then offered in evidence a deed from said guardian to G. H. Lillard, dated the eleventh day of February, 1876, conveying to him all the right, title and interest, of said minor children to the land in controversy, and also a deed from said Lillard to defendant for the same property, bearing date October 26, 1876.

In rebuttal, the plaintiff offered in evidence a petition and subsequent order of the probate court of Santa Barbara county, dated the eleventh day of December, 1876, appointing Rabaela Hill, the grandmother of said children, their guardian. Plaintiff also offered in evidence the order of the probate court of Ventura county, fixing a time for the hearing of the petition of the guardian for the sale of said lands and ordering that a notice of such application be given for three successive weeks next before the hearing of said application, in the *Santa Barbara Index*, a newspaper published in the county. Defendant objected to the evidence and the objection was sustained. The plaintiff then offered in evidence the affidavit of the printer of the newspaper, to prove that the required notice was not published for three successive weeks next before the hearing of the application. To the introduction of this affidavit in evidence objection was made on the ground "that the recital in the order of the court authorizing the sale, that due publication of such notice had been given was conclusive of the fact of publication," and thereupon objection was sustained to all inquiry in regard to the fact of publication.

The appellant assigns numerous grounds of error, but it will be sufficient for the purposes of this appeal to notice one of them, as it is decisive of the case.

This point relates to the sufficiency of the order of sale, and that point, we think, is well taken. The order does not describe the land to be sold with sufficient certainty. The description found in the order of sale is of "twenty and one-half acres of the Rancho La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff, and said minors were defendants."

The order of sale must be in itself sufficient; and to make it so, the description of the land to be sold must be sufficiently definite and certain, without reference to any extraneous matter. Section 1,544, C. C. P., provides that the order of sale must describe the lands to be sold, and the record cannot be helped out by reference to a document not found in it. This question was fully considered by this court in the case of Crosby v. Dowd, 61 Cal., 557, and the reasoning in that case appeals to the one now in hand.

Judgment and order reversed and cause remanded for a new trial.

SHARPSTEIN, J., MCKINSTRY, J., MYRICK, J., ROSS, J., and THORNTON, J., concurred.

McKEE, J. I dissent. The controlling question in the case relates to the jurisdiction of the probate court of Ventura county to order a sale of the land in controversy as the estate of Juan R. and Thomas W. Hill, who were minors and wards of the court.

Assuming that the guardian of the minors had been properly appointed, that she filed a petition according to law for the sale of the estate of the wards, and that the court of Ventura county had jurisdiction to hear the same, it was objected that the action of the court in ordering a sale was void, because neither the petition nor order of sale contained a sufficient description of the land. The objection was overruled and the ruling is assigned as error.

In fact, the petition contained the following description of the land, viz:

"Said real estate is all situated on the rancho La Golita, in the county of Santa Barbara, in this state, and is described as follows, to wit: The first piece or parcel, and the same which guardian, your petitioner, desires an order to sell, contains twenty and one-half acres allotted to said minors in a partition suit had in the district court of the county of Santa Barbara, wherein your petitioner was plaintiff and said minors defendants; for a further and more particular description, for which see inventory and appraisement on file herein."

Reference to the inventory and appraisement shows the land described as follows, viz:

"A certain piece or parcel of land situate, lying and being on rancho La Golita, in the county of Santa Barbara, in this state, containing twenty and a half acres, being a share of a tract of thirty-one acres, allotted to said minors by a decree of the district conrt of Santa Barbara county, wherein the guardian herein and mother of said minors was plaintiff, and said minors defendants, and bounded and described as follows:

"Commencing at Post No. 41, thence running N. 7.56 chains to Post No. 42; thence N. 85° W., 41 chains to Post No. 33; thence S. 7.56 chains to Post No. 32; thence S. 85° E., 41 chains to place of beginning, containing thirty-one (31) acres, and marked on said map as heirs of J. J. Hill, '5.'"

The order of sale recites that "said minors have no other property than the real estate described in said petition * * * that it is necessary and beneficial that a portion of said real estate be sold, for the reason that the proceeds of such a sale is necessary for the maintenance and education of said wards; and as no good reason exists why the order of sale should not be granted, as prayed in said petition, * * * therefore the guardian is authorized to sell all the right, title and interest of her said wards in the following real estate situated in the county of Santa Barbara, and bounded and described as twenty and one-half acres in rancho La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county in a suit of

partition, wherein the guardian herein and mother of said minors was plaintiff, and said minors defendants. Dated June 14, 1875."

Under these proceedings the property was sold, the purchase money paid to the guardian; confirmation of the sale was duly made, and a deed executed and delivered to the purchaser under which he entered upon the land and has had possession since. But his title thus acquired is assailed, because it is said that the probate court that ordered the sale of the land and confirmed the same, acquired no jurisdiction to make the order or confirmation because of the defective description of the land in the proceedings.

Unquestionably, the probate court must have had jurisdiction of the land affected by the order of sale, otherwise the order would be a nullity. But the record sufficiently discloses that the court acquired jurisdiction over the cause, over the parties and over the land, and that was all that was necessary to give validity to its order: Section 1,917, C. C. P. Admit that the description of the land in the record was defective or inaccurate as a matter of pleading, and that the defect or inaccuracy was carried into the order of sale, the order was not thereby rendered void in the sense that it was assailable in a collateral attack. Having been rendered in a court of competent and exclusive jurisdiction, in a proceeding of which it had jurisdiction, the order is not assailable collaterally for a merely defective or inaccurate description of the subject-matter of the order.

Certum est quod certum reddi potest is a rule of logic as well as of law for solving any incertitude in expressions of time or descriptions of land. Is is, says Brown on legal maxims, p. 600, peculiarly applicable to written instruments, such as feoffments, grants, wills, leases, contracts, etc. Hence the general rule that any description of land in a deed by which the land may be identified by a county surveyor, or with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient: Smiley v. Fries, 104 Ill., 416.

The rule is not limited in its application to deeds. Says the supreme court of Alabama: "The same rule should be applied when a decree is assailed because of an inaccurate or imperfect description of the lands. If inaccuracy or imperfection of description of the lands could be held to vitiate the proceedings, then the inquiry would at once arise, What degree of inaccuracy will subject them to condemnation? How gross must it be, or what imperfections are so slight that they may be disregarded? When will validity or invalidity be imputed? Vagueness of description or mistakes, so that lands are entirely misdescribed, do not avoid a deed or grant. * * * Parol evidence is received to identify the lands intended to be described. Indefiniteness and discrepancies in the description of lands in the petition, order of sale, report of sale and conveyance of titie, it has been expressly decided do not invalidate the sale and parol evidence is admissible to fix the boundaries of the lands ordered to be sold:" Wright's Heirs v. Ware, 50 Alabama, 559.

And the same court in the case of Smith v. Flournoy, 47 Ala., 360, says: "The application in the case avers all the facts required by the code and the description of the land, if not perfectly accurate, is accurate as far as it goes. It would be sufficient in a deed and in a will. * * * Such a description is sufficient to bring the subject within the jurisdiction of the court. * * * It entitled the court to proceed. This was all that was needed to give validity to its judgment:" Commissioners v. Crawford, 3 Wall, 396.

So in Alexander v. Knox, 6 Sawyer, 54, which was an action of ejectment, by one who derived title from a purchaser at a foreclosure sale, to recover possession of a half-section of land known as claim number seventy, lying in sections thirty-five and thirty-six, in township twenty south, or range three west, of the Wallamet meridian. The degree of foreclosure described the land as "claim number seventy, in T. twenty S., R. three W., of the Wallamet meridian." The court, by the aid of extrinsic evidence in taking judicial notice of public surveys under an act of congress, held that the description was just as certain as a description by reference to the sections in the township and range: See, also, Wright's Heirs v. Ware, *supra*.

In Crosby v. Dowd, this court held that a description of mortgage premises was absolutely void; but in this case I think the description of the land in the petition and order of sale was sufficient to sustain the sale when collaterally attacked.

No. 20,002.

PEOPLE *v.* CUNNINGHAM.

Department Two. Filed November 25, 1884.

LARCENY—EVIDENCE OF SIMILAR OFFENSE NOT ADMISSIBLE.—On a trial for larceny, evidence tending to show that the defendant had in his possession property taken by other thefts at the same time is inadmissible.

SHORT-HAND REPORTER'S NOTES OF TESTIMONY TAKEN ON PRELIMINARY EXAMINATION.—On such trial the reporter's notes in short-hand of the testimony of a witness taken on the preliminary examination of the defendant are not admissible, although the witness may have died before the trial, and the correctness of such notes are proved by the reporter.

APPEAL from a judgment of the superior court of Santa Clara county, entered upon a verdict convicting the defendant of larceny, and from an order denying him a new trial. The opinion states the facts.

T. H. Laine, for the appellant.

Attorney-General, for the respondent.

THORNTON, J. The defendant was accused, tried and convicted of the crime of grand larceny in stealing on the eighteenth of May, 1883, five head of cattle, the property of one John Trimble.

It is urged that several errors were committed on the trial, on account of which the conviction ought not to be permitted to stand.

1. When the defendant was arrested there was found in his possession a steer belonging to Charles Wade, which was not referred to in the information.

In relation to this steer the following occurred on the trial: Charles Wade was called as a witness in rebuttal for the people, and testified that on the twentieth or twenty-first of May, 1883, he got from Trimble's pasture a red and white steer.

The district attorney, at the instance of the court, stated his reasons for offering the testimony which he was about to introduce, as follows:

"The defense in this case is that the defendant purchased the cattle which have Mr. Trimble's brand from the man who had charge of them, Carmel. This testimony is offered as tending to show that the story is improbable, because he took not only the cattle which had Mr. Trimble's brand, but another animal which did not belong to Mr. Trimble whose brand the defendant from his own testimony, is well acquainted with, and that of another owner at the same time. I understand that the taking of different articles at the same time is always admissible as tending to show the intent with which the animals were taken."

The defendant objected:

"First—If this testimony is offered for the purpose indicated, it was a part of the state's original case, and should have been then offered, and not in rebuttal. It rebuts nothing offered by us.

"Second—It is not within the charge. The defendant is not charged with taking any but the Trimble cattle. It is, therefore, incompetent and inadmissible."

These objections were overruled by the court, and an exception was reserved.

The witness Wade then proceeded to testify as follows:

"This red steer was mine, branded with my brand, and had my ear-marks. I never sold that steer nor authorized any one else to sell him. He was sent out there in that range the first of March, 1883, and I saw him between Dougherty's and Carmel's about the first of May; was between the fifteenth of April and the first of May."

The court, in its directions to the jury, stated the reasons which induced it to admit the testimony as follows:

"This evidence was not admitted as tending to prove that he" (referring to defendant) "had stolen Wade's steer, as charging him with the guilt of that offense, or as seeking any conviction of him here on that ground, but simply as making it more or less probable or improbable that his explanation, that he acquired honestly the other animals, was founded in truth, by showing that at the same time he had in his possession property taken by other thefts at the same time." Then, after giving an illustration as tending to show the relevancy and bearing of the evidence, this further was said as the reason why the testimony was let in, that, "stated plainly and simply, that if he took the Wade steer and drove it off, it was more probable that he was stealing the Trimble cattle and taking them off,

and that the explanation that he bought them from Carmel, supposing that he had a right to sell them, was not a truthful explanation." By the foregoing, in our judgment, the jury were informed that the evidence as to the Wade steer was let in for their consideration, that they might find whether defendant stole this steer or not, and if they did so find, such conclusion would render it more likely to be true, that he had stolen the Trimble cattle; in other words, that if they found that he had stolen the Wade steer, of which he was not accused in the information, it was a circumstance from which they might infer a larceny of the Trimble cattle with which he was charged in the information.

In admitting the evidence objected to, we are of the opinion that the court below fell into an error. A person cannot be accused of one offense and tried for another. The indictment or information must charge but one offense: penal code, section 954; and it must contain a statement of the facts constituting the offense in ordinary and precise language, in such manner as to enable a person of common understanding to know what is intended: Penal Code, section 950.

The object of these provisions is to present a distinct issue for trial, and clearly inform a defendant of that with which he is charged, that he may prepare to meet it. The evidence should, therefore, be confined to the offense charged, otherwise the party on trial might be taken by surprise.

It was well said by the general court of Virginia, speaking by Brockenburgh, J., on this point: "As he" (the defendant) "is charged with a particular offense, he has notice to prepare to defend himself against that charge, and that alone; he cannot be prepared to defend himself against other charges not exhibited against him, or to maintain the integrity of his whole life when that is not in issue": Walker's case, 1 Leigh, 574. The principles just above referred to were violated in the ruling in this case. The evidence as to the Wade steer should have been excluded from the jury. The conclusion here reached is supported by the decisions of this court, in People v. Hartman, 62 Cal., 562, and People v. Wood, 12 Pac. C. L. J., 146.

The prosecution offered in evidence the reporter's notes in shorthand of the testimony of Ernest L. Fischer, taken on the preliminary examination of the defendant, offering at the same time to prove the correctness of the notes by the reporter, who was present. Fischer had died intermediate the preliminary examination and the trial, which was admitted by defendant's counsel; and it was further admitted that defendant was present with his counsel at such examination, and that his counsel then and there cross-examined Fischer in defendant's presence, and that the reporter would testify that his notes correctly represented Fischer's testimony on that occasion.

To the introduction of this testimony the defendant objected on the grounds that it was incompetent and inadmissible, that in a

criminal prosecution the defendant must be confronted with the witness, and that depositions cannot be read except in certain specified cases, of which this is not one; that the testimony of a deceased witness, taken or given on a preliminary examination, cannot be taken in a criminal case; that such examination is not a former action within the meaning of the statute. The court ruled against these objections, and admitted the evidence, to which an exception was reserved by defendant.

If the testimony of Fischer, given on the preliminary examination, had been taken, written out, certified and filed by the reporter, as provided by section 869 of the penal code, it would have been admissible as a deposition in the case of the death of the witness before the trial, as provided in section 680 of the same code. We recently held such a deposition admissible in the People v. Oiler, 4 West Coast Reporter, p. 383, where the witness had left the state after his testimony was taken, and prior to the trial. But we are of opinion that the written deposition is alone admissible, unless in case of its loss or destruction, when secondary evidence of its contents may be given. The object of the provisions of the penal code above cited (686 and 869) was to have the testimony on preliminary examinations so taken that it might be preserved as given, for use or reference at a time subsequent to that at which it was taken, and that if it became necessary to use such testimony on a trial, the written deposition, taken and certified as required by law, should alone be used for such purpose, and that resort should not be had to the memory of those who heard it. We are, therefore, of opinion that the court fell into an error in allowing the above mentioned evidence of Fischer's testimony to go to the jury.

We find no other error in the record, but for those above mentioned, the judgment and order denying defendant's motion for a new trial are reversed, and the cause remanded for a new trial.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 9,604.

KIMPLE v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

Department Two. Filed November 25, 1884.

CERTIORARI—ORDER MADE AFTER JUDGMENT—DELAY IN APPLYING FOR WRIT—A writ of *certiorari* will not lie to review an order made after final judgment, when the right of appeal therefrom is barred, unless extraordinary circumstances are made to appear justifying the delay in applying for the writ.

APPLICATION for a writ of review. The opinion states the facts.

D. L. Smoot and *A. M. Heslip*, for the petitioner.

W. R. Daingerfield, for the respondent.

THORNTON, J. In the case of Conway v. Conway, which was an action for a divorce, a decree was entered on the twenty-first of September, 1878, granting one of the parties a divorce and ordering a sale of the community property. Under this decree the community property was sold by the sheriff and the petitioner became the purchaser. The purchase money was paid to the sheriff by the petitioner and after the lapse of a proper period the sheriff executed a deed of the property to the purchaser. The possession of the property was withheld by Margaret Conway, the plaintiff in the action above mentioned, from the purchaser, and on motion of the purchaser a writ of assistance was on the twenty-eighth of February, 1880, ordered by the court, under which she was put in possession.

This writ was granted by the superior court of the city and county of San Francisco. After the writ was executed it was duly returned and filed with the papers it the cause. Afterwards, on the twenty-eighth of July, 1882, the above mentioned Margaret Conway procured from the said superior court an order vacating the writ of assistance formerly granted, and ordering said Margaret to be restored to the possession of the property above referred to.

The application before us in this case is for a writ of *certioruri* to to review and annul the last mentioned order of the twenty-eighth of July, 1882. The application for this writ was made on the fifth day of June, 1884, nearly two years after the entry of the order sought to be annulled.

It is contended on behalf of the respondent that the application comes too late. It was so held under a like state of facts in Keys v. Marin County, 42 Cal., 252. In that case as in this, nearly two years had elapsed after the entry of the order complained of, before an application was made for the writ. The court, in relation to this, said: "An appeal to the court from a final judgment of a district court, is barred by the lapse of one year; and we are of opinion that unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of *certiorari* should be held to be barred by the lapse of a like period of time:" 42 Cal., 256.

In the case before us, the order sought to be annulled might have been appealed from in sixty days after it was entered (C. C. P., sec. 939), and an appeal from a final judgment in the court granting the order, might have been taken within one year after said judgment was entered. No circumstances of any kind are made to appear in this case justifying the delay in applying for the writ of review. The like reasons for denying the writ exist in this case as in Keys v. Marin County; and approving the ruling in that case, we hold here that on the facts stated in the petition, the writ must be denied.

SHARPSTEIN, J. and MYRICK, J., concurred.

No. 8,996.

PEOPLE v. GOLD RUN DITCH AND MINING COMPANY.

In Bank. Filed November 25, 1884.

HYDRAULIC MINING—PUBLIC NUISANCE TO NAVIGABLE STREAM—RIGHT OF PUBLIC TO ENJOIN.—The record of the case shows that the Gold Run Ditch and Mining Company has been since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the North Fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty millions cubic yards of material composed mostly of sand, gravel, small stones, cobbles and bowlders, mixed with small particles of gold,—is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses and will continue to use, under a vertical pressure of several hundred feet, discharging water through 'little giants' and 'monitors,' and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to wit., of bowlders, cobbles, gravel and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land. Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluents, but mostly in the American, and upon lands adjacent to both rivers. The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from six to twelve feet. In consequence, the beds of the two rivers have shallowed and their channels widened so that the depths of the rivers have greatly lessened and their liability to overflow has been materially increased, causing the frequent floods to extend their area and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining debris. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier debris, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land—probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And from the same cause the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to wit., by boats drawing nine or ten feet of water, has been, since the year 1862, unnavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits, that said rivers will be turned from their channels, cutting new waterways, injuring or destroying immense tracts of land and probably will result in greatly impairing the navigation of the Sacramento river. *Held*, that such acts of the defendant constituted a public nuisance, which might be enjoined in an action in the name of the people of the state, although other mining companies, acting separately and independently of each other, contributed in producing such nuisance.

COURTS WILL TAKE JUDICIAL NOTICE OF THE NAVIGABILITY OF THE SACRAMENTO RIVER.

THE SAME—NUISANCE UPON NAVIGABLE STREAM.—Navigable streams are public highways, in which the people of the state have controlling and paramount rights, and all unauthorized intrusions upon the same for purposes unconnected with the rights of navigation or passage are nuisances.

THE SAME—JOINDER OF PARTIES CONTRIBUTING TO NUISANCE.—In an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance, may be enjoined jointly or severally.

PUBLIC NUISANCE—RIGHT TO CONTINUE CANNOT BE ACQUIRED BY CUSTOM.—The right of private individuals or corporations to make use of the waters of navigable streams as a place of deposit for their mining debris, so as to destroy the navigability of such streams cannot be acquired by custom.

THE SAME—CANNOT BE ACQUIRED BY PRESCRIPTION.—The right to continue a public nuisance cannot be acquired by prescription. Against such nuisance, however long continued, the state is bound to protect the people; and for that purpose the attorney-general has the power to institute a proceeding in equity in the name of the people to compel the discontinuance of the acts which constitute the nuisance.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

J. K. Byrne, W. C. Belcher, S. M. Wilson, W. T. Wallace and *Stewart & Herrin*, for the appellant.

A. L. Hart, Attorney General, George Cadwalader, A. L. Rhodes, I. S. Belcher and *Richard Bayne*, for the respondent.

MCKEE, J. This appeal is from an order denying a motion for a new trial, and from a judgment, which perpetually restrains the commission and compels the discontinuance of certain acts as wrongful and injurious to public rights.

The record of the case shows that "The Gold Run Ditch and Mining Company has been, since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the North Fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty millions cubic yards of material, composed mostly of sand, gravel, small stones, cobbles and bowlders, mixed with small particles of gold, is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process, the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses and will continue to use, under a vertical pressure of several hundred feet, discharging water through 'little giants' and 'monitors,' and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to wit., of bowlders, cobbles, gravel and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land."

Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, "commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluents, but mostly in the American, and upon lands adjacent to both rivers." The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from six to twelve feet. In consequence, the beds of the two rivers have shallowed and their channels widened so that the depths of the rivers have greatly lessened and their liability to overflow has been materially increased, causing the frequent floods to extend their area and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining debris. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier debris, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land—probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And from the same cause "the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to wit., by boats drawing nine or ten feet of water, has been, since the year of 1862, unnavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits, that said rivers will be turned from their channels, cutting new waterways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigability of the Sacramento river."

Vast as may be the interests bound up in the litigation, yet the questions for the consideration of this court, arising out of the facts as found by the court below, lie within a comparatively narrow compass. All of them flow into one as the main question at issue, and that is, whether the defendant as owner of its hydraulic mines situate on the banks of the American river—an unnavigable stream

which empties its waters into the Sacramento river, the principal navigable river within the state—has the right to dump its hydraulic debris into the river to the endangerment of habitation and cultivation of large tracts of country, upon which are cities, towns and villages, and to the impairment of the navigation of the Sacramento river; and if there exists no such right in the defendant do the acts committed by it and which it threatens to continue to commit, involving such consequences, constitute a public nuisance which may be enjoined in an action in the name of the people of the state?

Courts take judicial notice of the navigability of the Sacramento river. In addition to which, the court below has found that the river has been declared by law navigable to the mouth of Middle creek, which is above the confluence of the American and Sacramento rivers; "and has been continually navigated by steamers, barges, schooners and smaller craft; and, up to 1862, was navigated as far as the city of Sacramento, without difficulty, by steamers of deep draught, to-wit: by boats drawing nine or ten feet of water." Navigability, in law and in fact, has therefore been established. As a navigable river the Sacramento is a great public highway, in which the people of the state have paramount and controlling rights. These rights consist chiefly of a right of property in the soil and a right to the use of the water flowing over it, for the purposes of transportation and commercial intercourse. The soil of a navigable river is the *alveus* or bed of the river; the river itself is the water flowing in its channel. An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known in law as a purpresture. Purpresture is also a particular kind of nuisance. The word is derived from the French word *pourpris*, which signifies an inclosure: "That is," says Coke, "when one encroacheth and makes that serviceable to himself which belongs to many. And because it is properly, when there is an inclosure made of any part of the King's demesne, or of a highway, or a common street, or public water, or such like things:" 2 Coke's Insts., 271.

Great water highways belong to the same class of public rights and are governed by the same general rules applicable to highways upon land. Any contracting or narrowing of a public highway on land is a nuisance: Russell on Crimes, 349; and all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage are nuisances: Comm. v. Caldwell, 1 Dall., 150; Comm. v. King, 13 Met., 115; sections 3,479, 3,480, C. C. To make use of the banks of a river for dumping places, from which to cast into the river annually, six hundred thousand cubic yards of mining debris, consisting of bowlders, sand, earth and waste materials, to be carried by the velocity of the stream down its course and into and along a navigable river, is an encroachment upon the soil of the latter, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire com-

munity, or neighborhood, or any considerable number of persons, to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance.

In Veazie v. Dwinell, 50 Maine, 479, certain mill occupants on the Penobscot river were accustomed to throw slabs, edgings and other waste materials from their mills into the river to float or sink and obstruct navigation. The supreme court compelled the discontinuance of the practice. "Highways," said the court, "whether on land or water, are designed for the accommodation of the public for travel or transportation; * * * they cannot be made the receptacles of waste materials, filth or trash, nor the depositories of even valuable property, so as to obstruct their use as public highways. * * * If, therefore, any person obstruct a stream which is by law a public highway, by casting therein waste material, or filth or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, he does it at his peril—it is a public nuisance." And in Garrish v. Brown, 51 Maine, 262, the court reiterates the same doctrine: "A person who casts at random filth, or trash, or waste materials into a public river to float or sink as it may, without guidance or direction, can in no sense be said to be in the use of such river for lawful purposes."

But it is contended that as the nuisance complained of and found by the court, was the result of the aggregate of mining debris dumped into the stream by the defendant and other mining companies, acting separately and independently of each other, the acts of the defendant cannot be joined with the acts of other mining companies to create a cause of action against the defendant. The contention is made upon a finding by the court as follows:

"On the American river and its tributaries a vast amount of mining was done in early times, and up to this time a great deal is being done, besides that by the defendant. No other mine contributes annually more detritus to the river than the defendant, still I am unable to say that defendant's mine alone, without reference to the debris from other mines, materially contributes to the evils mentioned; or, in other words, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of debris from all the mines which produces the injuries mentioned in these findings."

And it is attempted to sustain the contention by the cases of Chapman v. Palmer, 77 N. Y., 51; Schuylkill Navigation Company v. Richards, 57 Penn., 142; Sellick v. Hale, 47 Conn., 260, and Keyes v. Little York, 53 Cal., 724.

The first three of those cases were actions on the case for damages; the first, for polluting the water of a stream by the discharge of sewage therein; the second, for the filling up of the basin of a dam and water-power with coal-dirt and waste material cast into a stream by separate collieries working their mines on the stream in-

dependently of each other; and the third, for the overflow of a brook obstructed by the defendant and other persons who were not parties to the action. Each of those cases was decided upon the principle that where several persons, acting independently of each other, engage in the commission of wrongful acts, the torts are distinct and not joint; and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right. But in the case of Keyes v. Little York, the late supreme court of this state applied the principle to an action in equity by which the plaintiff sought to enjoin a number of persons, who, without privity or concert of action, contributed to the washing down from their mining claims, mining debris into a stream which carried it down and spread it over the plaintiff's land, rendering it valueless. To the complaint in the action, the court sustained a demurrer upon the ground of misjoinder, because all, who contributed to the injury complained of, could not be joined as defendants, without an averment that they acted in concert in the commission of the wrongful acts charged against them.

That case, however, was practically overruled by this court in Hillman v. Newington, 57 Cal., 62. That also was a case in which the plaintiff sued a number of persons to recover damages for the wrongful diversion of the water of a stream, and to perpetually enjoin them from diverting the same. The defendants answered, as in Keyes v. Little York, that they were improperly joined in the action, because they acted severally and not jointly. But this court said: "Each of the defendants diverts some of the water, and the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. * * * All who act must therefore be held to act jointly," and the damages and costs may be apportioned by the court sitting as a court of equity. This case clearly recognizes the equitable principle that in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance, may be enjoined jointly or severally. It is the nuisance itself which, if destructive of public or private rights of property, may be enjoined.

The King v. Trafford, 1 Barn. and A., 874, was a criminal action for a public nuisance to a public canal navigation established by act of parliament. The jury found that the acts creating the nuisance were done by the defendants separately; but it was held, nevertheless, that as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to be several.

Whenever an indictable nuisance exists there is a co-ordinate remedy in equity to abate it by injunction. In an equitable action for that purpose, there is generally raised no question of damages.

Until the adoption of the codes, such a question could not be raised in an action in equity for the abatement of a nuisance. The only question was, whether the nuisance compained of and sought to be redressed had been committed; and it was no answer, in such an action, where there was no question as to a separate or joint liability for damages in the case, to say that other persons were committing the same sort of nuisance: Crossley & Sons v. Lightowler, 8 L. R. Eq. Cas., 729; Chipman v. Palmer, 77 N. Y., 51. So in Woodyear v. Schaeffer, 57 Md., 9, it is said: "It is no answer to a complaint of nuisance, that a great many others are committing similar acts of nuisance. Each and every one is liable to a separate action, and to be restrained. * * * The extent to which the appellee has contributed to the nuisance may be slight and scarcely appreciable. Standing alone it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be as to each of the other numerous persons contributing to the nuisance. Each standing alone might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in producing the mischief complained of. And it may only be after from year to year, the number of contributors to the injury has greatly increased, that sufficient disturbance of rights has been caused to justify a complaint. * * * In that state of facts * * * each element of contributive injury is a part of the common whole, and to stop the mischief of the whole, each part in detail must be arrested and removed."

But it is also claimed that the defendant has acquired the right from custom, and by prescription, and the statute of limitations, to use the American and Sacramento rivers as outlets for its mining debris; and that in the exercise of this right it cannot be restrained in its business of hydraulic mining, notwithstanding the consequent injuries to those rivers.

Undoubtedly, the fact must be recognized that in the mining regions of the state, the custom of making use of the waters of streams, as outlets for mining debris, has prevailed for many years; and, as a custom, it may be conceded to have been founded in necessity, for without it hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and upon the strength of it, mining operations, involving the investment and expenditure of large capital, have grown into a legitimate business, entitled, equally with all other business pursuits in the state, to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner. Every business has its laws, and these require of those

engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is a corresponding duty to so use it that it shall not abuse the rights of other recognized owners: Sections 3,479, 3,514, C. C.; 731, C. C. P.

Upon that underlying principle, neither state nor federal legislatures could, by silent acquiescence, or by attempted legislation, take private property for a private use, nor divest the people of the state of their rights in the navigable waters of the state for the use of a private business, however extensive or long continued.

As we have already said, the rights of the people in the navigable rivers of the state are paramount and controlling. The state holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general government: Martin v. Wade, 13 Peters, 410. The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable. Any grant of the soil, therefore, would be subject to the paramount rights of the people to the use of the highway. And such was the doctrine of the common law. "The *jus privatum*" says Lord Hale, in *De Jure Maris*, p. 22, "must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected to public use." It is, therefore, beyond the power of legislatures to destroy or abridge such rights, or to authorize their impairment.

As to the claim of right derived from prescription and the statute of limitations, it is sufficient to say that a right to continue a public nuisance cannot be acquired by prescription: Rettis v. Johnson, 56 Ind., 139; Boston Rolling Mills v. Cambridge, 117 Mass., 396; Wright & Rice v. Moore, 38 Ala., 593; People v. Cunningham & Harris, 1 Denio, 524; Mills v. Hall & Richards, 9 Wend, 315. Nor can it be legalized by lapse of time: Sec. 3,490, C. C. Against it, however long continued, the state is bound to protect the people; and for that purpose, the attorney-general, as the law officer of the state, has the power to institute a proceeding in equity, in the name of the people, to compel the discontinuance of the acts which constitute the nuisance: County of Sacramento v. The Central P. R. R. Co., X Pac. C. L. J., 27; 61 Cal., 250; People v. Stratton, 25 Id., 242: Yolo county v. Sacramento, 36 Id., 193. As was said in People v. Booth, 32 N. Y., 397.: "The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river, is by injunction at the suit of the people by their attorney-general. For all the people of the state are interested in the question, and have the right to use all bays and navigable rivers within the state; and I think the attorney-general may maintain an action in the name of the people of the state, to prevent the obstruction of a public highway, which all the people have a right to travel, because all of them have an interest in such highways."

There is no prejudicial error in the record. Judgment for a perpetual injunction and order affirmed.

MYRICK, J., and MORRISON, C. J., concurred.

MCKINSTRY, J., concurring. I concur in the conclusions reached by Mr. Justice McKee with reference to the questions by him considered and discussed. But in my opinion the case of Keyes v. Little York Company, 53 Cal., 724, has no direct bearing upon any question presented in the case now here. That was an action by an individual proprietor, his claim to an injunction being based upon alleged facts showing that he had suffered, by reason of a public nuisance, special injuries, differing in kind and degree from those sustained by other members of the public; either so, or an action to restrain a private nuisance. There many persons whose acts had been several, and not even concurrent, were made defendants. The complaint in the action now here is in the nature of an information by the attorney-general on behalf of the people of the state; and the Gold Run Ditch and Mining Company is the sole defendant.

Among other matters the court below found: "Said defendant has been mining its said tracts of land for about eight years last past in the mode and process aforesaid; and up to the time of commencing this action, and during about five months of each year of said period has been daily discharging into the said North Fork between four and five thousand cubic yards of solid material from its said mine, to wit: of bowlders, cobbles, gravel and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually, if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land.

"That a large portion of the material so dumped by the defendant into the North Fork of the American river has been washed down said river by the water and commingled with tailings from other hydraulic mines, and still other material, which is the product of natural erosion, has been deposited in the beds and channels of the Sacramento and American rivers, but mostly in the American river and upon the lands adjacent to said rivers, and that by said mining of the defendant and other mines the filling up, raising and shallowing of said rivers has been materially increased, to the impairment of the navigation of the Sacramento river, and to the excessive overflow of the lands adjacent to said rivers, to the great injury of said land, and damage, discomfort and annoyance of a great number of citizens of the state, owners of said land, and residents of said valley."

The court found that a public nuisance had been created when this action was commenced. And the court also found that defendant was adding to, and, unless restrained, would continue to add to the obstructions which constituted the nuisance, and thus to aid in increasing and perpetuating it. This made a proper case for an injunction.

Appellant attaches grave consequences to a further finding, which is supposed to qualify those which precede it.

"On the American river and its tributaries a vast amount of mining was done in early times, and up to this time a great deal is being done beside that by the defendant. No other mine contributes annually more detritus to the river than the defendant; still I am unable to say that defendant's mine alone without reference to the debris from other mines, materially contributes to the evils mentioned; or, in other words, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of debris from all the mines which produces the injuries mentioned in these findings."

It is urged that while the complaint alleges the defendant has materially contributed and will materially contribute to the nuisance, the judge below has declared "he is unable to say" that defendant's mine alone materially contributes to the evil; which (it is claimed) is either a finding that defendant's mine does not materially contribute; or the court has failed to find on the *material* issue. But the meaning of the language which immediately procedes it, is rendered very clear by the clause in the finding last quoted: "Or, *in other words*, if there were no mining operations save those of the defendant, I am not prepared to say, that it would materially injure the valley lands, or the navigation of the river."

But the contributions of defendant may have been material—substantial, real, and appreciably capable of rendering more durable and more injurious an existing nuisance—although of themselves they would not in their aggregate have produced the mischief mentioned in the findings. There is no contradiction therefore between the finding last referred to and those which determine that a large portion of the material dumped by defendant into the North Fork has been washed down and deposited in the beds and channels of the Sacramento and American rivers, etc. None of the findings can be construed as deciding that the deposits made by defendant have contributed or will contribute to the shoaling of the waters in so slight a degree as not substantially to affect the building up or continuation of the obstructions to their flow, in the natural channels of the rivers.

THORNTON, J., concurring. Whether Keyes v. Little York Company, 53 Cal., 724, is or not overruled by Hillman v. Newington, 57 Cal., 62, I express no opinion. No question of that kind, in my judgment, is involved in this case or necessary to its decision, and therefore I forbear to give any opinion upon it. As to the other points discussed in the opinion of justice McKee, I agree with what is said, and the conclusion reached by him.

SHARPSTEIN, J. and ROSS, J., concurring. We think the decree in its entirety should be affirmed.

No. 8,834.

PEOPLE v. GOLD RUN DITCH AND MINING COMPANY.

In Bank. Filed November 25, 1884.

HYDRAULIC MINING—INJUNCTION SUBJECT TO CONDITIONS.—The plaintiff being entitled upon the facts found, to a perpetual injunction to compel the discontinuance of the acts complained of, as stated in the preceding opinion, the court cannot make the injunction subject to the condition that "the defendant may at any time, as it may be advised, apply to the court to have the decree and restraining order modified, or vacated, and set aside. And whenever, upon such showing, it shall appear that efficient means have been provided to impound, detain and hold back such tailings at any point on said American river above Alder creek, and that such means are sufficient to detain all bowlders, cobble-stones, gravel and the heavier sand, then said defendant shall be entitled to have said decree vacated and set aside."

APPEAL from part of a judgment of the superior court for Sacramento county. The opinion states the fact.

A. L. Hart, Attorney General, George Cadwalader, A. L. Rhodes, Richard Bayne and *I. S. Belcher* for the appellant.

J. K. Byrne, W. C. Belcher, S. M. Wilson, W. T. Wallace and *Stewart & Herrin*, for the respondent.

MCKEE, J. This is a counter-appeal from the last clause in the judgment entered in this case.

As we held on the appeal of the defendant, the plaintiff was entitled, upon the finding of facts, to a perpetual injunction to compel the discontinuance of the acts complained of; the law gave it, and the court awarded it; but it made the judgment by which it awarded the perpetual injunction subject to this condition, viz.: "The said defendant may, at any time, as it may be advised, apply to this court to have this decree and restraining order modified, or vacated, and set aside. And whenever, upon such showing, it shall appear that efficient means have been provided to impound, detain and hold back such tailings at any point on said American river above Alder creek, and that such means are sufficient to detain all bowlders, cobble-stones, gravel and the heavier sand, then said defendant shall be entitled to have said decree vacated and set aside."

We think this was erroneous; for the plaintiff was entitled to a final judgment absolutely or it was not. The court adjudged that it was entitled to a perpetual injunction, and that adjudication definitely settled the rights and relations of the parties to the controversy, as to the matters in litigation between them. By the judgment it was finally determined that certain acts as performed by the defendant, and threatened to be continued at the commencement of the action, amounted to a public nuisance, which must be forever enjoined. The rights thus finally determined could not be sujected to be disturbed or changed, annulled or set aside upon the performance by the defendant of new and independent acts, at some near or remote period in the future.

It is not the duty of a court to make provision in its final judgment for a reopening or renewal of a controversy which it closes by its judgment. *Reipublicae ut sit finis litum.* As is said in Joyce on

ant, as a corporation, the court denied the motion to dissolve, and that ruling is assigned as error.

The injunction was issued to restrain the defendant from continuing to dump its mining debris, tailings, and other refuse matter from its mines, into certain water-courses which washed the debris and materials down upon and spread them over the plaintiff's land, rendering it valueless for agricultural or other purposes.

1. It is no part of the general and ordinary business of a corporation to do unlawful acts. Acts which are of a continuous nature and threaten to destroy or irreparably injure the property of another, are unlawful, and enjoinable, at the suit of the person injured, not upon the ground of interfering with a lawful business, but upon the ground that every person is entitled to the protection of the law in the use and enjoyment of his property. But it is claimed that the doing of the acts, restrained by the injunction, are necessary to the successful carrying out of the business in which the defendant is engaged; and that, if the defendant be enjoined from carrying on its business in that way, hydraulic mining cannot be carried on at all. Yet the acts restrained are none the less unlawful, if they are injurious to the private rights of others; and the defendant is bound by law to so conduct its business as that it shall not be derogatory to the private rights of other property owners.

In mining pursuits, as was said in Logan v. Driscoll, 19 Cal. 623, "defendant is entitled to use his mining claim in a lawful manner; but no manner can be considered lawful which precludes the plaintiff from the enjoyment of his rights." No person, natural or artificial, has a right directly or indirectly to cover his neighbor's land with mining debris, sand and gravel, or other material so as to render it valueless: Robinson v. Black Diamond Coal Mining Co., 57 Cal., 412; Potter v. Fremont, 47 Id., 465; Richardson v. Kier, 34 Id., 63; Courtright v. Bear River Ditch Co., 30 Id., 57.

2. The law does not require notice of an application for a temporary injunction to restrain a corporation from committing unlawful acts injurious to the applicant. Section 531, C. C. P., has reference only to lawful acts performed in the course of its general and ordinary business. A preliminary injunction granted against a corporation to restrain it from conducting its business in an unlawful manner, is therefore not void though granted without notice. Golden Gate Con., M., Co., v. Superior Court, 2 W. C. R., 736.

3. The court that grants a preliminary injunction may, in the exercise of its judicial discretion, modify the same at any time before the case terminates in a final judgment; and the order of modification will not be disturbed, unless there has been an abuse of discretion. Nothing of that character appears in the record before us.

The orders appealed from are affirmed.

ROSS, J., MCKINSTRY, J., SHARPSTEIN, J., MYRICK, J., and MORRISON, C. J., concurred.

No. 8,513.

HOOPER v. POWERS.

Department One. Filed November 28, 1884.

APPEAL HELD WITHOUT MERIT, AND JUDGMENT AND ORDER AFFIRMED with damages.

APPEAL from the superior court of the city and county of San Francisco.

Carson Bros., for the appellant.

H. C. Firebaugh, for the respondent.

THE COURT. There is no merit whatever in this appeal. Judgment and order affirmed, with twenty per cent. damages against the appellant.

No. 8,408.

SCHWEGERLE & CO. v. MUNDELL.

Department One. Filed November 28, 1884.

JUDGMENT AFFIRMED AND FINDINGS HELD TO HAVE BEEN WAIVED by consent in open court.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs and from an order denying the defendant a new trial.

Cobb & Moore, for the appellant.

J. D. Sullivan, for the respondents.

THE COURT. The judgment was for the amount admittedly due the plaintiffs when the action was commenced. The alleged subsequent payment on account was not proved.

No error appears in the judgment roll. It appears from the order for judgment made in open court and in the presence of the attorney for defendant that findings were waived.

Judgment and order affirmed.

No. 8,486.

SWIM v. BERNHARD.

Department One. Filed November 28, 1884.

PURCHASE OF STOLEN STOCK CERTIFICATES—RIGHTS OF BONA FIDE PURCHASER.—Judgment and order reversed on authority of Barstow v. Savage Mining Company, 1 West Coast Rep., 116.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant and from an order denying the plaintiff a new trial- The facts were similar to those in Barstow v. Savage Mining Company, 1 West Coast Rep., 116.

H. J. Tilden, for the appellant.

Jarboe & Harrison, for the respondent.

THE COURT. On the authority of Barstow v. Savage Mining Co., 1 West Coast Rep., 116, judgment and order reversed and cause remanded, with directions to the court below to enter judgment for plaintiff on the findings for possession of the property, or, in the event its delivery cannot be had, for its value and costs.

No. 7.067.

DUNPHY *v.* POTRERO COMPANY ET AL.

Department One. Filed November 28, 1884.

APPEAL FROM JUDGMENT BY PERSON NOT A PARTY.—A person who is not a party nor privy to, nor aggrieved by a judgment, cannot appeal therefrom.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The opinion states the facts.

T. J. Crowley and *Alex. Campbell, Jr.*, for the appellant.

John A. Stanly, for the respondent.

THE COURT. This appeal is by Laura A. Mowrie from a judgment rendered in favor of the plaintiff against the following named defendants, viz: The Potrero Company, L. A. Lowrie, John Edwards, Ah Wing, Ah Wun and Henry F. Williams. The appellant was not a party nor privy to, nor a person aggrieved by, the judgment; therefore the appeal must be dismissed.

It is so ordered.

No. 7.808.

ESTATE OF MERRIFIELD.

In Bank. Filed November 28, 1884.

ADMINISTRATOR USING ASSETS OF ESTATE MUST PAY INTEREST.—An administrator who uses the assets of the estate in his own business and for his own profit, may be charged interest thereon at the rate of seven per cent. per annum, with annual rests.

EXECUTORS AND ADMINISTRATORS—APPEAL FROM DECREE OF DISTRIBUTION.—A decree of distribution of an estate will not be reviewed on an appeal by an executor or administrator, where he, *as such*, has no interest in the matter sought to be reviewed.

APPEAL from a decree of the superior court for Solano county. The opinion states the facts.

Wendell & Kelly, for the appellant.

O. R. Coghlan, for the respondents.

MYRICK, J. The court below made a decree settling the account of the administrator and distributing the estate. From this decree the administrator, *as administrator*, appealed to this court.

1. In settling the account the court found that the sum of five thousand five hundred and forty dollars and sixty-one cents, assets

of the estate, had been used by the administrator in his own business and for his own profit, and charged him with interest at the rate of seven per cent. per annum, with annual rests. This finding is attacked for want of evidence to sustain it. We think the court was clearly justified in charging the administrator with the interest. Merrifield (administrator here) was the purchaser of real estate from the administrator of one Longmire, deceased, (the former husband of this intestate), and in making payment therefor receipted to the administrator of Longmire for five thousand six hundred and thirty-one dollars as received by him as administrator of the estate of this intestate, and returned in his inventory that amount as money in hand belonging to his intestate (Susannah Merrifield). He thus had his purchase, and had also the purchase money, which he, as administrator, did not set apart from his individual funds as money of the estate.

2. The appellant may have been interested as an individual, in the distribution of the estate, claiming, as he did, to be the assignee of some of the heirs; but, *as administrator*, he had no interest. It is now well settled in this state that a decree of distribution will not be reviewed on an appeal by an executor or administrator, where he, *as such*, has no interest in the matters sought to be reviewed: Bates v. Ryberg, 40 Cal., 463; Estate of Marrey, 3 W. C. Rep., 49.

The decree is affirmed.

SHARPSTEIN, J., ROSS, J., MCKINSTRY, J., MCKEE, J., and MORRISON, C. J., concurred.

No. 8,084.

BULL v. FORD.

Department One. Filed November 28, 1884.

CONVEYANCE TO HINDER, DELAY AND DEFRAUD CREDITORS—PURCHASER WITH NOTICE—ATTACHMENT OF PROPERTY FRAUDULENTLY CONVEYED.—A conveyance of property made with intent to hinder, delay and defraud the creditors of the grantor is void, both as against the grantee and a subsequent purchaser with notice, although the latter may have paid a valuable consideration. The property so conveyed may be levied upon and sold at the instance of the creditors of the fraudulent grantor as if no conveyance had ever been made.

ALLEGATION OF FRAUDULENT INTENT—SPECIAL DEMURRER.—An allegation that a conveyance was made "with intent to hinder, delay and defraud" the creditors of the grantor is a sufficient averment of fraudulent intent to sustain a judgment. Whether the same would be sufficient if objected to by special demurrer, *quaere*.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the plaintiff and from an order denying the defendant a new trial.

Kittredge & Halstead, for the appellant.

D. M. Delmas, for the respondent.

ROSS, J. That the conveyance of Felipe Alvarado of all his interest in the Rancho San Bernarbe to Ascension Mendilla, was without consideration, and made by Alvarado solely for the purpose of

hindering, delaying and defrauding his creditors, was distinctly found by the trial court, whose finding in that regard is not assailed.

The asserted interest of the defendant in the property is derived from a conveyance from Mendilla made at the instance and request of Alvarado. And, with respect to that conveyance, the finding is, that at the time defendant took it, he "well knew that the aforesaid conveyance from Alvarado to Mendilla was without any consideration and a sham, and had been made with intent to hinder, delay and defraud the creditors of Alvarado." It is urged that this finding is contrary to the evidence. But it is clear, under the rule prevailing here, that we cannot so hold.

The testimony of Alvarado and Mendilla, if true, was to the effect stated in the finding, and the credibility of the witness was for the court below to determine, and is not a matter for us to consider. Besides, the instructions given by the defendant to Mendilla not to answer the inquiry by the attorney of one of Alvarado's creditors in respect to the conveyance from Alvarado to Mendilla, strongly tended to show knowledge on the part of defendant of the real nature of the transaction. We must, therefore, accept the finding as stating the truth of the matter. And with that fact established, the legal conclusion is the same, whether the further fact be, as testified by defendant, that the conveyance to him, although absolute in form, was in reality as security only for certain advances made by him, or the firm of which he was a member, to and on account of Alvarado, or, as testified by Alvarado, that defendant took the title, without consideration, to hold for Alvarado, to the end that the creditors of the latter be hindered, delayed and defrauded: Bump on Fraud. Conv.; pp. 483–4, 594–5; Goodwin v. Hammond, 13 Cal., 168; Swinford v. Rogers, 23 Cal., 236. The conveyance to defendant being void as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property, as if no conveyance had ever been made by their debtor: Freeman on Executions, sec. 136 and authorities there cited. This the creditor under whom the plaintiff claims did; and by virtue of that sale the interest of Alvarado in the property became vested in the plaintiff.

But one other point need be noticed, and that is, the claim that the allegation of the complaint, that the conveyance was made "with intent to hinder, delay and defraud" the creditors of Alvarado, is an insufficient allegation of fraudulent intent. Whatever might be held, if the point had been made by special demurrer, we think the allegation certainly sufficient after judgment and in the absence of such demurrer. The case of Hagar v. Shindler, 29 Cal., 60, would, however, seem to sustain the averment in question, even in the face of a special demurrer

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,191.

TUEBNER ET AL. v. CALIFORNIA STREET RAILROAD COMPANY.

Department Two. Filed November 28, 1884.

RIGHTS OF PERSONS TO USE AND ENJOYMENT OF PROPERTY.—Any person may use his own property in such lawful manner as to him may seem fit, having reference always to the right of others to use their property. But a person cannot use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his property.

THE SAME—NUISANCE—STREET RAILROAD—LICENSE WHEN NOT A JUSTIFICATION.—The defendant corporation operated a street railroad along a street in that portion of San Francisco usually devoted to dwelling purposes, and, for the purpose of using steam as a motive power in propelling its cars by means of a cable, constructed a building on a lot adjoining the plaintiff's premises, for use in connection with its street railroad, as a car and engine house. Such use produced a loud and continuous noise; caused the plaintiff's house to be constantly shaken and jarred; cracked the plastering in his rooms, and covered his premises and furniture with soot. *Held*, that such acts of the defendant constituted a nuisance for which it was liable, although the municipality of San Francisco had granted it a franchise to operate its road, and all its structures and machinery were necessary to that end, and were properly constructed.

NUISANCE—ABATEMENT OF PENDING ACTION—DAMAGES.—In an action to recover damages for injuries caused by such nuisance, the fact that the defendant has, since the commencement of the action, remedied the evil complained of, does not interfere with plaintiff's right to recover for injuries sustained before the commencement of the action.

NUISANCE—MEASURE OF DAMAGES—VALUE OF INJURY.—In such action the plaintiff need not prove his injury by value; it is for the jury to determine a reasonable sum as proper compensation.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

H. S. Brown and *J. E. Foulds*, for the appellant.

E. F. Preston, for the respondents.

MYRICK, J. The action was brought to abate an alleged nuisance and to recover damages. The jury gave a verdict for the plaintiffs for one thousand dollars damages, and from the judgment rendered therefor and an order denying a new trial the defendant appealed.

The case is, in substance, as follows: The plaintiffs, owners of a lot of land near the corner of Larkin and California streets, in the city and county of San Francisco, had thereon two dwelling-houses, (one occupied by the family of one of the plaintiffs, the other by the family of the other plaintiff,) and on the rear of the lot a two story building, in the lower story of which the plaintiffs carried on the manufacture of show cases, the upper story being occupied by a tenant. The defendant constructed a street railroad along California street, and, for the purpose of using steam as a motive power in propelling the cars, by means of a cable, constructed a building on the corner of the streets above named, which building adjoined the property of plaintiffs. This building was used, in connection with the street railroad, as a car house, and had an engine and furnace with a smoke stack extending to a point twenty feet higher than plaintiffs' houses. Cars were elevated from one story to another by the aid of machinery. We quote substantially from the testimony of plaintiffs for the purpose of showing the case as presented by them

hindering, delaying and defrauding his creditors, was distinctly found by the trial court, whose finding in that regard is not assailed.

The asserted interest of the defendant in the property is derived from a conveyance from Mendilla made at the instance and request of Alvarado. And, with respect to that conveyance, the finding is, that at the time defendant took it, he "well knew that the aforesaid conveyance from Alvarado to Mendilla was without any consideration and a sham, and had been made with intent to hinder, delay and defraud the creditors of Alvarado." It is urged that this finding is contrary to the evidence. But it is clear, under the rule prevailing here, that we cannot so hold.

The testimony of Alvarado and Mendilla, if true, was to the effect stated in the finding, and the credibility of the witness was for the court below to determine, and is not a matter for us to consider. Besides, the instructions given by the defendant to Mendilla not to answer the inquiry by the attorney of one of Alvarado's creditors in respect to the conveyance from Alvarado to Mendilla, strongly tended to show knowledge on the part of defendant of the real nature of the transaction. We must, therefore, accept the finding as stating the truth of the matter. And with that fact established, the legal conclusion is the same, whether the further fact be, as testified by defendant, that the conveyance to him, although absolute in form, was in reality as security only for certain advances made by him, or the firm of which he was a member, to and on account of Alvarado, or, as testified by Alvarado, that defendant took the title, without consideration, to hold for Alvarado, to the end that the creditors of the latter be hindered, delayed and defrauded: Bump on Fraud. Conv.; pp. 483–4, 594–5; Goodwin v. Hammond, 13 Cal., 168; Swinford v. Rogers, 23 Cal., 236. The conveyance to defendant being void as against Alvarado's creditors, the creditors were authorized to levy upon and sell the preperty, as if no conveyance had ever been made by their debtor: Freeman on Executions, sec. 136 and authorities there cited. This the creditor under whom the plaintiff claims did; and by virtue of that sale the interest of Alvarado in the property became vested in the plaintiff.

But one other point need be noticed, and that is, the claim that the allegation of the complaint, that the conveyance was made "with intent to hinder, delay and defraud" the creditors of Alvarado, is an insufficient allegation of fraudulent intent. Whatever might be held, if the point had been made by special demurrer, we think the allegation certainly sufficient after judgment and in the absence of such demurrer. The case of Hagar v. Shindler, 29 Cal., 60, would, however, seem to sustain the averment in question, even in the face of a special demurrer

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,191.

TUEBNER ET AL. v. CALIFORNIA STREET RAILROAD COMPANY.

Department Two. Filed November 28, 1884.

RIGHTS OF PERSONS TO USE AND ENJOYMENT OF PROPERTY.—Any person may use his own property in such lawful manner as to him may seem fit, having reference always to the right of others to use their property. But a person cannot use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his property.

THE SAME—NUISANCE—STREET RAILROAD—LICENSE WHEN NOT A JUSTIFICATION.—The defendant corporation operated a street railroad along a street in that portion of San Francisco usually devoted to dwelling purposes, and, for the purpose of using steam as a motive power in propelling its cars by means of a cable, constructed a building on a lot adjoining the plaintiff's premises, for use in connection with its street railroad, as a car and engine house. Such use produced a loud and continuous noise; caused the plaintiff's house to be constantly shaken and jarred; cracked the plastering in his rooms, and covered his premises and furniture with soot. *Held*, that such acts of the defendant constituted a nuisance for which it was liable, although the municipality of San Francisco had granted it a franchise to operate its road, and all its structures and machinery were necessary to that end, and were properly constructed.

NUISANCE—ABATEMENT OF PENDING ACTION—DAMAGES.—In an action to recover damages for injuries caused by such nuisance, the fact that the defendant has, since the commencement of the action, remedied the evil complained of, does not interfere with plaintiff's right to recover for injuries sustained before the commencement of the action.

NUISANCE—MEASURE OF DAMAGES—VALUE OF INJURY.—In such action the plaintiff need not prove his injury by value; it is for the jury to determine a reasonable sum as proper compensation.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

H. S. Brown and *J. E. Foulds*, for the appellant.

E. F. Preston, for the respondents.

MYRICK, J. The action was brought to abate an alleged nuisance and to recover damages. The jury gave a verdict for the plaintiffs for one thousand dollars damages, and from the judgment rendered therefor and an order denying a new trial the defendant appealed.

The case is, in substance, as follows: The plaintiffs, owners of a lot of land near the corner of Larkin and California streets, in the city and county of San Francisco, had thereon two dwelling-houses, (one occupied by the family of one of the plaintiffs, the other by the family of the other plaintiff,) and on the rear of the lot a two story building, in the lower story of which the plaintiffs carried on the manufacture of show cases, the upper story being occupied by a tenant. The defendant constructed a street railroad along California street, and, for the purpose of using steam as a motive power in propelling the cars, by means of a cable, constructed a building on the corner of the streets above named, which building adjoined the property of plaintiffs. This building was used, in connection with the street railroad, as a car house, and had an engine and furnace with a smoke stack extending to a point twenty feet higher than plaintiffs' houses. Cars were elevated from one story to another by the aid of machinery. We quote substantially from the testimony of plaintiffs for the purpose of showing the case as presented by them

hindering, delaying and defrauding his creditors, was distinctly found by the trial court, whose finding in that regard is not assailed.

The asserted interest of the defendant in the property is derived from a conveyance from Mendilla made at the instance and request of Alvarado. And, with respect to that conveyance, the finding is, that at the time defendant took it, he "well knew that the aforesaid conveyance from Alvarado to Mendilla was without any consideration and a sham, and had been made with intent to hinder, delay and defraud the creditors of Alvarado." It is urged that this finding is contrary to the evidence. But it is clear, under the rule prevailing here, that we cannot so hold.

The testimony of Alvarado and Mendilla, if true, was to the effect stated in the finding, and the credibility of the witness was for the court below to determine, and is not a matter for us to consider. Besides, the instructions given by the defendant to Mendilla not to answer the inquiry by the attorney of one of Alvarado's creditors in respect to the conveyance from Alvarado to Mendilla, strongly tended to show knowledge on the part of defendant of the real nature of the transaction. We must, therefore, accept the finding as stating the truth of the matter. And with that fact established, the legal conclusion is the same, whether the further fact be, as testified by defendant, that the conveyance to him, although absolute in form, was in reality as security only for certain advances made by him, or the firm of which he was a member, to and on account of Alvarado, or, as testified by Alvarado, that defendant took the title, without consideration, to hold for Alvarado, to the end that the creditors of the latter be hindered, delayed and defrauded: Bump on Fraud. Conv.; pp. 483–4, 594–5; Goodwin v. Hammond, 13 Cal., 168; Swinford v. Rogers, 23 Cal., 236. The conveyance to defendant being void as against Alvarado's creditors, the creditors were authorized to levy upon and sell the preperty, as if no conveyance had ever been made by their debtor: Freeman on Executions, sec. 136 and authorities there cited. This the creditor under whom the plaintiff claims did; and by virtue of that sale the interest of Alvarado in the property became vested in the plaintiff.

But one other point need be noticed, and that is, the claim that the allegation of the complaint, that the conveyance was made "with intent to hinder, delay and defraud" the creditors of Alvarado, is an insufficient allegation of fraudulent intent. Whatever might be held, if the point had been made by special demurrer, we think the allegation certainly sufficient after judgment and in the absence of such demurrer. The case of Hagar v. Shindler, 29 Cal., 60, would, however, seem to sustain the averment in question, even in the face of a special demurrer

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,191.

TUEBNER ET AL. v. CALIFORNIA STREET RAILROAD COMPANY.

Department Two. Filed November 28, 1884.

RIGHTS OF PERSONS TO USE AND ENJOYMENT OF PROPERTY.—Any person may use his own property in such lawful manner as to him may seem fit, having reference always to the right of others to use their property But a person cannot use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his property.

THE SAME—NUISANCE—STREET RAILROAD—LICENSE WHEN NOT A JUSTIFICATION.—The defendant corporation operated a street railroad along a street in that portion of San Francisco usually devoted to dwelling purposes, and, for the purpose of using steam as a motive power in propelling its cars by means of a cable, constructed a building on a lot adjoining the plaintiff 's premises, for use in connection with its street railroad, as a car and engine house. Such use produced a loud and continuous noise; caused the plaintiff 's house to be constantly shaken and jarred; cracked the plastering in his rooms, and covered his premises and furniture with soot. *Held*, that such acts of the defendant constituted a nuisance for which it was liable, although the municipality of San Francisco had granted it a franchise to operate its road, and all its structures and machinery were necessary to that end, and were properly constructed.

NUISANCE—ABATEMENT OF PENDING ACTION—DAMAGES.—In an action to recover damages for injuries caused by such nuisance, the fact that the defendant has, since the commencement of the action, remedied the evil complained of, does not interfere with plaintiff 's right to recover for injuries sustained before the commencement of the action.

NUISANCE—MEASURE OF DAMAGES—VALUE OF INJURY.—In such action the plaintiff need not prove his injury by value; it is for the jury to determine a reasonable sum as proper compensation.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

H. S. Brown and *J. E. Foulds*, for the appellant.

E. F. Preston, for the respondents.

MYRICK, J. The action was brought to abate an alleged nuisance and to recover damages. The jury gave a verdict for the plaintiffs for one thousand dollars damages, and from the judgment rendered therefor and an order denying a new trial the defendant appealed.

The case is, in substance, as follows: The plaintiffs, owners of a lot of land near the corner of Larkin and California streets, in the city and county of San Francisco, had thereon two dwelling-houses, (one occupied by the family of one of the plaintiffs, the other by the family of the other plaintiff,) and on the rear of the lot a two story building, in the lower story of which the plaintiffs carried on the manufacture of show cases, the upper story being occupied by a tenant. The defendant constructed a street railroad along California street, and, for the purpose of using steam as a motive power in propelling the cars, by means of a cable, constructed a building on the corner of the streets above named, which building adjoined the property of plaintiffs. This building was used, in connection with the street railroad, as a car house, and had an engine and furnace with a smoke stack extending to a point twenty feet higher than plaintiffs' houses. Cars were elevated from one story to another by the aid of machinery. We quote substantially from the testimony of plaintiffs for the purpose of showing the case as presented by them

free use of their property, so as to interfere with their comfortable enjoyment of it. It may have been that a smoke stack but twenty feet high would foul the plaintiffs' premises, and that one forty feet high would not. It may have been convenient for the defendant to hoist its cars from one story to another, and yet not absolutely necessary; or, it may be that the hoisting could have been done without causing a jarring producing actual discomfort or injury.

As said above, the municipality could grant a franchise for running cars along the street, but it could not grant a franchise to materially injure the plaintiffs in their property rights. The franchise which the defendant claimed to hold did not even assume to be for that end.

We are aware of the decisions that where a franchise has been granted for the running of steam cars along a street, property owners along the line must abide the natural results of a reasonable and proper exercise of the franchise; but we are of opinion that the reason of those decisions has no application here.

The fact that the defendant had since the commencement of the suit (if such be the fact) remedied the evil complained of, would not interfere with the plaintiffs' right to recover damages for injuries sustained before the commencement of the suit.

It was not incumbent on the plaintiffs to prove their injury by value; it may have been of trivial cost to sweep up a pail full of soot, and yet the soot may have caused serious injury; it may also have been quite out of the question to prove the loss in value sustained by the jarring. If was for the jury to determine a reasonable sum to be proper compensation.

We have examined the points presented by appellant, and are of opinion that they are substantially covered by the foregoing.

Judgment and order affirmed.

SHARPSTEIN, J., concurred.

THORNTON, J. I concur in the judgment. The evidence as to the amount in money of the damages accrued was very slight, yet as the damages found for the injury suffered are not excessive, I do not think the judgment should be disturbed for that reason. That the acts committed by the defendant constituted a nuisance, is clear. Nor were such acts either directly or indirectly permitted to be done by the express authority of a statute.

No 8,514.

ODD FELLOWS' SAVINGS BANK v. DEUPREY.

Department One. Filed November 28, 1884.

MOTION FOR NEW TRIAL—JURISDICTION OF COURT OVER.—The jurisdiction of a court to hear and determine a motion for a new trial lies dormant until it is called into exercise by the final submission of the motion, in a legal manner, upon a bill of exceptions, statement of the case, or other papers designated in the notice of motion. And it may be called into exercise by the submission of the motion itself, or by a motion to deny or dismiss the motion for want of prosecution, upon the ground that the party moving for the new trial has failed, or neglected, to serve or file, within legal time, the statement, or other paper upon which he proposed to move; and when thus called into exercise, and the court, in the exercise of its jurisdiction, has heard and decided the motion, its order is final and conclusive; and it is not erroneous to dismiss or deny a motion afterwards made to set it aside. Such order is reviewable only on appeal. But it is otherwise if such order has been inadvertently or prematurely made.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from orders denying the defendant a new trial. The opinion states the facts.

Columbus Bartlett, for the appellant.

McClure, Dwinelle & Plaisance, for the respondent.

MCKEE, J. In this case there are three appeals: The first is from the judgment rendered the twenty-ninth of November, 1881; the second, from an order denying a motion for a new trial; and the third from an order denying a motion to vacate the order refusing a new trial.

After the decision of the case, defendant served upon the plaintiff's attorney notice that he would move for a new trial, upon a proposed statement of the case, and upon affidavits, and the minutes of the court. There was no extension of tho statutory time for him to serve and file his proposed statement and affidavits; and, in fact, he neither served nor filed any affidavits or proposed statement within the time required by law for that purpose. Upon a conclusive showing being made of that fact, the court, after argument of counsel of the respective parties, denied the motion for a new trial, "so far as the same was made upon the minutes of the court," and dismissed it for want of prosecution so far as it purported to have been made upon a statement of the case, or on affidavits. The order was entered January 6, 1882. Ten days after the entry of the order defendant moved, on notice to the plaintiff's attorney, to vacate the same. The motion was made upon affidavits which showed, that the proposed statement was not within legal time, because of a mistake by the clerks of the attorney of record for defendant, as to the date of the service of notice of the motion. But this mistake did not, and could not, change the record upon which the motion had been heard and determined. The fact still remained, that the proposed statement had not been served or filed in time; and, assuming that the court erred in denying the motion for a new trial, which had been regularly argued and submitted for a decision, and that the subsequent order, denying the motion to vacate its former order, was a

special order made after final judgment and appealable, as seems to have been held in Calderwood v. Peyser, 42 Cal., 110, we see in it nothing erroneous.

The jurisdiction of a court to hear and determine a motion for a new trial lies dormant, until it is called into exercise by the final submission of the motion, in a legal manner, upon the bill of exceptions, statement of the case, or other papers designated in the notice of motion. But it may be called into exercise by the submission of the motion itself, or by a motion to deny or dismiss the motion for want of prosecution, upon the ground that the party moving for the new trial has failed, or neglected, to serve or file within legal time, the statement or other papers upon which he proposed to move; and when thus called into exercise, and the court, in the exercise of its jurisdiction, has heard and decided the motion, its order is final and conclusive, and it is not erroneous to dismiss or deny a motion afterwards made to set it aside.

An order granting or refusing a new trial, made after the regular submission of a motion for that purpose is reviewable only on appeal: Coombs v. Hibberd, 43 Cal.,453; Waggenheim v. Hook. 35 Id., 216; Nichols v. Dunphy, 10 P. C. L. J., 193. But it is otherwise where such an order has been inadvertantly or prematurely made. If made, for instance, before the statement of the case, or bill of exceptions, upon which it was to be made, has been settled, engrossed and certified, and before the motion has been regularly submitted, the jurisdiction to hear and decide the motion was not called into exercise, the order would not be made in the regular exercise of the jurisdiction of the court, and being improvidently made it would be the duty of the court to set it aside: Morris v. DeCelis, 41 Cal., 331; Hall v. Polack, 42 Id., 218; Coombs v. Hibberd, *supra*; and Nichols v. Dunphy, *supra*.

Here, however, the power of the court to hear and decide the motion for a new trial was regularly put in motion, and the order of the court in the decision of the motion exhausted its power over it. The court became *functus officio*.

There was no error in overruling the motion for a new trial.

There is no error apparent on the judgment roll.

Judgment and orders affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,384.

SAVINGS AND LOAN SOCIETY *v.* DURKIN ET AL.

Department One. Filed November 28, 1884.

JUDGMENT AND ORDER AFFIRMED upon authority of Savings and Loan Society v. Bateman, 10 Pac. C. L. J., 795.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

M. Mullany, for the appellant.

A. N. Drown, for the respondent.

ROSS, J. In principle, this case is not distinguishable from Savings and Loan Society v. Bateman, No. 7,654, decided January 30, 1883, 10 Pac. C. L. J., 795, or the cases upon the authority of which that case was determined. In so far, however, as the judgment appealed from affects Edward Durkin and Patrick Durkin, it must be modified. As to them a non-suit was granted. On the authority of the cases hereinbefore referred to:

It is ordered, that the order denying the motion for a new trial be and hereby is affirmed, and that the cause be and hereby is remanded with directions to the court below to modify the judgment as here indicated, and as so modified it stand affirmed.

W. C. KINSTRY and G, J. MCKEE concuraed.

No. 8,473

TISCHLER v. CALIFORNIA FARMERS' MUTUAL INSURANCE COMPANY.

Department Two. Filed November 28, 1884.

POLICY OF INSURANCE—APPLICATION FOR INSURANCE—PLEADING.—In an action to enforce a policy of insurance, the complaint need not allege the terms of the application for insurance, when such application was merely verbal.

FIRE INSURANCE—STIPULATION AGAINST GUNPOWDER—FIREWORKS.—The keeping of fireworks without the written consent of the insurer will not invalidate a policy of fire insurance, although the same provides that if gunpowder is kept on the premises without such written consent, the policy shall be void.

FIRE INSURANCE—INCREASE OF RISK—ANSWER.—In an action on a policy of fire insurance, facts showing an increase of the risk, if relied on as a defense, must be set up in the answer.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

A. W. Thompson, for the appellant.

Winans, *Belknap* and *Godoy*, for the respondent.

ROSS, J. 1. Appellant claims that, upon the authority of Gilmore v. The Lycoming F. I. Co., 55 Cal., 123, defendant's motion for judgment on the pleadings should have been granted. Even if the policy involved in this case was similar to that involved in that, the decision there would not be authority for sustaining the motion here in question. But in Gilmore v. The Lycoming Company the application of the insured was expressly made a part of the policy and therefore constituted a part of the contract; and it having affirmatively appeared from the complaint in that case that all of the terms of the contract were not stated, but that a portion, which might prove material, had been omitted, the complaint, on demurrer, was held insufficient, and the demurrer sustained, with leave given the plaintiff to amend the complaint. In the present case, the ap-

plication, as shown by the evidence, was a mere verbal one, which was authorized by the terms of the policy.

The policy sued on provides that it shall be void "if the risk be increased by any means, or * * * if gunpowder, phosphorus, camphene, spirit, gas or chemical oils are kept or used on the premises without written consent." The property insured was the plaintiff's "stock of stationery, books, toys and similar merchandise," contained in a certain described building. The defendant, by answer, set up that at the time the fire in question occurred, the plaintiff had in his store, wherein was the property insured, "gunpowder; to wit: a certain lot of fireworks and like combustible merchandise made of gunpowder," without the written consent of defendant, and that the fire that destroyed the property insured "originated in and occurred by the combustion of said gunpowder in the said fireworks contained, and not otherwise." At the trial it was admitted that the fire "was caused by the explosion of a bomb, thrown from the street, among a lot of fireworks in plaintiff's store." The clause providing that the policy should be void "if the risk be increased by any means," may be laid out of consideration, inasmuch as that defense was not set up in the answer: Cassacia v. Phœnix Insurance Co., 28 Cal., 620; Kentucky L. M. Ins. Co., v. Southard, 8 B. Monroe, 634 *et seq.*; Ferris v. N. A. F. Ins. Co., 1 Hill, 71.

It remains to be considered whether the fireworks kept by the plaintiff rendered void the policy under that provision of it prohibiting the keeping or use on the premises of "gunpowder." Defendant introduced no testimony tending to show of what the fireworks were composed. They may be composed of various combustible materials—usually, we believe, of preparations of gunpowder, sulphur and some other inflammable material or materials. But, although gunpowder may be, and usually is, one of the constituents of fireworks, it by no means follows that "fireworks" are "gunpowder." The latter is "a mixture of saltpeter, sulphur and charcoal, separately pulverized, then granulated and dried." It was the mixture, called gunpowder, which, along with phosphorus, camphene, gas and chemical oils, the plaintiff was, by the policy in question, prohibited from keeping or using on his premises, without the written consent of defendant, under penalty of rendering the policy void. If defendant wished to provide that the policy should be void in the event the insured should keep fireworks, it ought to have said so, as other companies do, as shown by the record in this case.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,509.

TOMPKINS v. CLAY STREET HILL RAILROAD COMPANY ET AL.

Department One. Filed November 28, 1884.

CARRIERS OF PASSENGERS—NEGLIGENCE—COLLISION—PARTIES.—When a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another vehicle, the party injured may recover from the proprietors of either or of both. Where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turn out that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other.

THE SAME—PROOF OF NEGLIGENCE—INSTRUCTIONS.—A passenger by one carrier, in an action against a different carrier to recover for an injury occasioned by a collision between such carriers, must prove negligence on the part of the defendant. As against such latter carrier there is no presumption of negligence arising from the fact of the injury. The defendant is entitled to an instruction in conformity with this rule; and a general instruction to the effect that the plaintiff must make out his case by a preponderance of evidence is not equivalent thereto.

THE SAME—RELEASE OF ONE CARRIER—ESTOPPEL.—Such passenger, if he receives compensation from one carrier, in consideration of which he discharges and releases it from all liability on account of the injury, is estopped from denying the liability of such carrier, and he cannot afterwards maintain an action against the other carrier for the same injury.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Estee & Boalt, for the appellants.

Garber & Thornton and *F. A. Berlin*, for the respondent.

MCKINSTRY, J. A car of the Clay-street Hill company collided with a car of the Sutter-street railroad company at the crossing of Clay and Polk streets, San Francisco. Plaintiff, a passenger in the car of the latter company was thrown from her seat and injured. The complaint charges neglect on the part of both companies. Plaintiff recovered damages of the Clay-street company and the appeal is by that company.

In Pennsylvania it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury: Lockhart v. Lichtenthaler, 10 Wright, 151; Phila. and R. Railroad Co. v. Boyer, 97 Pa. St., 100. But the weight of authority is otherwise, and is to the effect, that, if the negligence of the managers of both vehicles contributes to the injury, the party injured may recover from the proprietors of either or of both: Wharton, Law of Negligence, 395, and cases cited. Where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other.

The court below charged the jury: "In civil cases (and this is a civil case) the affirmative of the issue must be proved, and when the evidence is contradictory, your decision must be made according to the preponderance of the evidence." But the court refused to charge —at the request of defendant, the Clay-street Hill railroad company

But the other party ought not to be allowed to deny that he had any right to the money, the payment of which he had induced under pain of the prosecution of an action already commenced. He should not be permitted to say, with any beneficial result to himself, "I pursued the defendant *falso clamore*, and I took his money by way of settlement of a pending action in which I never could have recovered." Shall it be said that plaintiff has not received compensation for the injuries she sustained, because she did not choose affirmatively to prove that the negligence of the party, from whom she received the money, contributed to the injuries?

The plaintiff must be held to have received from the Sutter-street company satisfaction for the very same injuries for which she obtained a judgment against the appellant.

In Turner v. Hitchcock, 20 Iowa, 314, the notice by the plaintiff to one of the defendants was not a technical release, and there was no evidence that it was given upon or for a consideration. It was at most a mere promise, without consideration, not to prosecute the action against the particular defendant, so that if he had been admittedly a co-trespasser with the other defendants, the notice would not have released the others. It had been well settled that a covenant not to sue is not such a *release* as will discharge the co-trespasser.

The remark of the learned Judge, "nor do we think, as argued by appellee, that plaintiff, having sued Johnson as a joint trespasser, was estopped, etc.," was not necessary to the decision; and while the suggestion may have been made by counsel for appellee in oral argument, the whole question as to a discharge of defendants by reason of the notice, seems not to have been considered worthy of a place in their *points*, as printed in the report of the case. Under the circumstances we think the remark referred to is not to be accounted the weight of a deliberate judgment upon a question involved in a legal controversy.

Judgment and order reversed and cause remanded for a new trial.

McKEE, J., and ROSS, J., concurred.

WEST COAST REPORTER.

WHOLE No. 50. DECEMBER 11, 1884. VOL. IV. No. 11.

COMMUNITY PROPERTY.

[CONCLUDED.]

2. In certain other instances of acquiring community property, a title or a chain of title apparently perfect and valid on the record must necessarily be entirely nugatory and void, or else its actual validity must be established by facts completely outside of the record and resting upon the memory and verbal evidence of witnesses. Community property consisting of land is acquired by and conveyed to a wife during the marriage; she afterwards conveys the same parcel of land, and subsequently by successive deeds it is conveyed to A. All these deeds put on record make a perfect chain of title to the wife, and a perfect chain of record title from her to A., who on the records appears to be clothed with a perfectly valid legal title as the present owner. The records would not necessarily disclose the fact that the land was community property, and ordinarily this fact would not affirmatively appear on the records. So far as they are concerned, they show an unbroken chain of conveyances vesting a perfect title in A. And yet, because the property is community, the deed from the wife is void, and the whole chain of title from her down to A. is simply nugatory. The fact that the land is community property may be, and ordinarily must be, established by extrinsic evidence; and thus a chain of title appearing to be perfect and valid on the records, is entirely defeated and overthrown by facts outside of the record, which may be, and generally must be, proved by verbal testimony. A person intending to purchase the land from A., upon making a search of the records would find a title seeming to be without a flaw; but if, relying upon the record title, he should purchase, he might discover that he had been misled and that the title was completely worthless.

But this is not all. Even if in a case similar to the last, the land acquired by and conveyed to the wife was in reality her separate estate;—if, for example, it was paid for by money which came to her as a legacy, or a distributive share, or as the proceeds of other separate property of hers sold, or in other like manner, but the deed to her, as is ordinarily the case, failed to show such fact, but merely showed a conveyance to her for a certain purchase price or pecuniary consideration; then, as has

been previously shown, a strong presumption arises that the land is community property. If under such circumstances the wife conveys the land, and the title comes through successive deeds to A., this chain of title from her to A. would be presumptively void. Although on the record the deraignment of title is complete and unbroken, apparently vesting a perfect ownership in A., yet the validity of his title would really depend upon facts wholly dehors the record,—facts resting perhaps upon the memory of witnesses,—namely the fact that the land was conveyed to the wife during her marriage, and the fact that the purchase price paid by her was money belonging to her separate estate. An intended purchaser from A., although a search of the records disclosed no flaw in the title, could not safely rely upon the apparently perfect record title alone; a knowledge of the extrinsic facts not shown by the record would be essential to his complete security.

The same conclusions are equally true, if, under like circumstances, a wife should give a mortgage upon land conveyed to her which was community property, either actually or presumptively. Even though the mortgage so given had been regularly foreclosed, and the land sold at the foreclosure sale, and the purchaser's deed thereof had been executed, delivered, and recorded; the title so acquired, and appearing on the records to be perfect, might be entirely nugatory.

3. There is still a third case. In certain other instances of acquiring community property, there may be two conflicting chains of title to the same parcel of land on the record, one unbroken and appearing to be perfect, and the other interrupted and broken, and appearing to be imperfect, and yet the latter, by the aid of extrinsic facts outside the record, may be shown to be the true, valid and perfect title. A parcel of land being community property is acquired by and conveyed to a wife during the marriage. She afterwards gives a deed of the same parcel, and by successive deeds it is finally conveyed to A. The records of these deeds, not disclosing the fact that the land was community property, would show an apparently unbroken and perfect chain of title through the wife and ending in A., and vesting a valid title in him. On the other hand, the husband, after the conveyance to the wife, gives a deed of the same parcel, and through successive deeds from his grantee, it is finally conveyed to B. This second chain of title appears on the record to be broken and imperfect. The deraignment of the title on the record from the original source down through the wife to B., is interrupted and incomplete, since nothing appears on the record by which the husband's title is connected with that of the wife, nothing showing how the title apparently vested in the wife has passed to the husband. So far as the record discloses, the husband and wife are mere strangers, and the chain of title on the record commencing with him is separate from and uncon-

nected with the original source of title. Looking alone at the record, the chain of title from the original source through the wife to A., is complete and perfect, and that from the husband to B. is imperfect and invalid. And yet from the facts outside of the record it is plain that the conveyances from the husband form the only true chain of title, connected with the original source, and vesting the real ownership in B., while the conveyances from the wife are nugatory and A.'s title is wholly invalid.

A similar uncertainty or imperfection might arise from the records even though the land conveyed to the wife was her own separate property. Land is conveyed to a wife during her marriage which is really her separate property, but as in the case supposed under the preceding head, the deed to her fails to show this fact in any manner by any of its recitals, but is merely a conveyance expressed to be for a pecuniary consideration paid by her. She afterwards conveys it, and by subsequent successive deeds it comes to A. The husband also assumes to convey it, and by subsequent successive deeds from his grantee it comes to B. Although the chain of title on the record from the original source through the wife to A. is apparently complete and perfect, yet the validity of A.'s title might depend entirely upon facts outside of the record, resting in the memory of witnesses, and to be established by their verbal testimony. The fact that the conveyance was made to the wife during her marriage would raise a presumption that the land was community property; and this presumption could only be overcome, and B.'s title derived from the husband could only be defeated, by proof of extrinsic facts showing that the land was the wife's separate property,—such as that the purchase price was money coming to her by bequest or gift, or otherwise belonging to the separate estate. These facts, being entirely outside of the record, would generally rest in the recollection of witnesses and be proved by their parol testimony.

The same results would also follow if the conflicting titles in such a case from the husband and the wife were derived through mortgages given by either or both of them, instead of deeds.

It must not be supposed that the illustrations which I have given are impossible or improbable cases The facts of actual cases which have been decided by the court and reported, furnish ample precedent and authority for every circumstance and every disposition of property described in the foregoing illustrations. That husbands can, and must, convey the community property held in the name of their wives, is a well established truth, and not a mere supposition. Nothing is more likely than that a wife should sometimes, and not infrequently, give deeds or mortgages of community property which had been acquired by or conveyed to her, and of which she appeared to hold the title. Even though

this might not be done secretly and with the intention of violating her husband's rights, or of defrauding her grantee or mortgagee, it might well be done through a mistaken notion on her part that she had the power to convey, or that the land itself was her separate property. Although the wife had thus attempted to convey or mortgage the land, still the husband would retain his full and sole power of disposition over it, and nothing could prevent or hinder his giving a deed or mortgage of it, notwithstanding the prior and really nugatory transfer by his wife. In this manner the apparently valid, but actually void, chains of title on the record from the wife, and the two conflicting chains of title from the husband and the wife, which I have described, are not only possible but probable; indeed it may be said that they are certain to occur. Nor is the other uncertainty which I described, resulting from a conveyance of the wife's own separate property, at all improbable. When land which is really her separate property is conveyed to a wife during her marriage, but the deed to her fails to disclose the facts showing it to be her separate estate, so that the legal presumption of its being community property arises, the husband will sometimes take advantage of this presumplion, will treat it as community property, and will assume the sole power of disposition over it by conveyance or mortgage. This will even be done though the husband knows that he is violating the rights of his wife, and defrauding his grantee or mortgagee. The reports contain too many similar cases to warrant any one in denying the probability of such a transaction. We have seen that a mistaken claim that land, really the wife's separate property, was community property, may arise and be maintained in good faith after the death of both the spouses.

It has thus been shown,—and, it would seem, beyond the possibility of doubt,—that from the peculiar doctrines concerning the acquisition, disposition, and transfer of community property, uncertainties, discrepancies, and contradictions may, and must, appear on the records of titles; chains of title apparently good on the record may be defeated by extrinsic facts; and titles appearing to be perfect on the record may require to be sustained by extrinsic facts. In short, that reliance cannot always be placed upon a seeming perfect record, but resort must sometimes be had to facts outside the record—facts resting in the memory of persons, and to be established by their parol testimony. It must naturally follow that the inconvenience resulting from these imperfections of record titles will be felt to a greater degree after a lapse of time, when death has removed the witnesses upon whose personal knowledge and evidence the facts involving the validity of such titles must rest.

5th. It is natural to enquire, in this connection, whether there are any means or methods by which these uncertainties and other imper-

fections may be wholly or partly prevented or removed? There are, as it seems to me, certain very simple and practicable methods, which if generally adopted would go far to obviate, even if they did not entirely remove and overcome, the various uncertainties, discrepancies and contradictions among record titles hereinbefore described. Undoubtedly, these methods have already occurred to and been practised by various members of the bar, but the suggestion, now made, that they should be adopted, recommended and followed on every occasion by all lawyers, may perhaps be deemed important and worthy of careful consideration. The settled rules are, as we have seen, that property, for example land, conveyed to the wife during the marriage by a deed expressing the conveyance to be for a valuable consideration, – that is, reciting or stating a purchase price,—is presumed to be community property; but if the property so conveyed *is* her separate estate, this fact may be shown and the presumption rebutted, by proof that the purchase price paid was itself her separate property, as, that it was a legacy, distributive share, gift, proceeds of the sale of other separate property, and the like. I would therefore suggest as a universal rule of great practical benefit, that whenever land is conveyed by a third person to a wife which *is* her separate property, recitals should always be inserted in the deed describing fully and in detail the nature and source of the consideration or purchase price and thus clearly showing that the consideration or price was itself also her separate property. Thus, the recital should state that the purchase price was money received by her as a legacy, or as a distributive share of her father's estate, or as a gift from her husband, or as proceeds of the sale of other separate property specified, or that it was other separate property of hers given in exchange, or whatever the real fact might be. Recitals of material facts in a deed or other instrument are expressly made by the code of civil procedure to be conclusive upon the parties and their successors in interest.[1] These recitals would of course bind the wife and her grantees and heirs claiming the land as separate property; and as the husband and his grantees claiming it to be community property, must derive their title *through and from this deed to the wife*, they would also be bound. The presumption that the land was community property arising from the mere fact of the purchase during the marriage, would thus be completely overcome and destroyed by matter appearing on the face of the deed itself. By this simple expedient all doubt as to the land being the wife's separate property would be forever removed, and the necessity of a subsequent resort to parol evidence in order to establish its character as her separate property, would be wholly obviated. It is possible that a mere statement in the deed that the land conveyed to her was her separate estate,

[1] Code of Civil Procedure, § 1,962.

would be sufficient; but in my opinion the safer and better course would be to make the recitals in the form and manner above described; all question as to their sufficiency would thus be avoided. Although not as essential as in the case of her separate property, yet it would be a method of great practical convenience and benefit, if, on every conveyance to the wife during the marriage of land which was community property, the deed to her should also in like manner recite or state the fact that the land so conveyed was community property. Such a recital would prevent all future dispute between subsequent claimants deriving title from and under the deed to her. On the other hand, in all conveyances of land made to the husband during the marriage, the deeds should contain similar recitals showing that the land so conveyed to him was his own separate property or was community property, as the case might be.

In the second place, to obviate the break or interruption in the regular chain of record title which must sometimes necessarily occur, as hereinbefore described, I would suggest the following simple method. If land which is community property has been conveyed to the wife, the husband alone, by his own deed, as has been shown, can convey it to a third person. Whenever the husband thus exercises his power of disposal over such land, his deed should always recite his own title; in other words, his deed should always refer to and fully describe the conveyance of the land to his own wife, stating the name of the grantor, the date, the date, volume and page of the record, and all other matters of description necessary to identify the conveyance of the land to his wife, and to connect his own deed *on the record* with that conveyance. By this simple and easy expedient the continuity of the chain of record title would be preserved; an intended purchaser from a subsequent holder under the husband, on searching the record could trace the title up, through all the successive holders, to the husband, and the recitals of the husband's deed to *his* immediate grantee would enable him, without the slightest difficulty, to pursue the title through the wife to its source. Otherwise, the record chain of title would *seem* to end at the husband.

These simple methods if universally pursued would do much to prevent disputes as to whether property was "separate" or "community," and to remove the uncertainties and contradictions from the records of titles which must otherwise result from these two species of property.

In conclusion, there would seem to be a very grave doubt whether the community property system prevailing in California and in a few other states, does confer as ample, complete, and certain security upon the wife and widow, as that which she enjoys under the existing law of New York and many other states, where, in addition to her own separate

estate, which is substantially the same in California, she is entitled to the common law dower in all the lands owned by her husband during the marriage. In determining which of these two systems is the better for the wife, the question must wholly depend, not upon what she *may* receive,—what her husband may donate to her or permit her to enjoy, but upon what she *must* receive,—what is absolutely beyond the husband's power of disposal, so that he cannot prevent its enjoyment by his wife or widow. A kind and considerate husband, and every reasonable and just husband, would always make sufficient provision for his widow out of his own property, even if there were no laws securing any share to her, and all of his property was absolutely at the husband's disposal. In this state the husband's separate property is completely at his own disposal. If, therefore, a husband should die soon after marriage, before a sufficient time had elapsed in which to acquire much community property, a young widow *might be left* with a very small and inadequate provision, although the husband owned and beqeathed a separate estate of millions. On the other hand, when a husband dies at an advanced age, after a long period of married life, during which a large community property had been accumulated, his widow is entitled to a share which would seem to be unduly great when compared with the natural claims and the shares of their children. But the great objection to the community property system, as a certain protection for wives and widows, is that the husbands may wholly dispose of it in business operations, in speculations no matter how hazardous, and thus leave absolutely nothing at their deaths for the benefit of their widows. The only restraint upon this power is, that the husband cannot dispose of the community property with the intent of defrauding his wife of her expected share at his death. If the husband disposes of the property under the forms of business operations and speculations, it is almost impossible to prove any such fraudulent intent. It is only when the husband undertakes to give away the community property, in the form of avowed donations, that this restraint on his power can be of any real efficacy.

J. N. P.

CIRCUIT COURT, DISTRICT OF OREGON.

OREGONIAN RAILWAY COMPANY, LIMITED v. OREGON RAILWAY AND NAVIGATION COMPANY.

December 1, 1884.

DENIAL OF KNOWLEDGE OR INFORMATION.—A defendant is not bound to inform himself concerning the truth of an allegation, of which he never had any knowledge, before answering the same; and a denial of any knowledge or information thereof is a sufficient denial, and will not be stricken out as sham, unless it plainly appears that the same is false.

FRIVOLOUS PLEADING.—A frivolous answer or defense is one which contains nothing that affects the plaintiff's case, and may be stricken out on motion; but a motion to strike out for frivolousness is not well taken if the matter included in it is material, if true.

PLEA IN BAR OR ABATEMENT.—In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered unless expressly pleaded in abatement.

ESTOPPEL BY CONTRACT.—A party who contracts with a corporation, as such, is thereby estopped, in an action on such contract, to deny its corporate existence, or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action, the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived.

PLEADING AN ESTOPPEL.—When the matter constituting the estoppel—the compact—does not appear in the previous pleadings, it must be set up by replication; but where the same does so appear, the estoppel must be raised by demurrer.

ACTION to recover rent. The opinion states the facts.

John W. Whalley and *William Gilbert*, for the plaintiff.

Charles B. Bulinger, for the defendant.

DEADY, J. This action is brought by the Oregonian Railway Company, Limited, a foreign corporation alleged to have been formed in Great Britain, under "The Companies' act of 1862," against the Oregon Railway and Navigation Company, a domestic corporation, formed under the general incorporation act of Oregon of 1862, to recover the sum of $68,131, alleged to be due the plaintiff for the use of its railway in Oregon, commonly called the "narrow gauge" road, for the half year beginning May 15, 1884.

It is alleged in the amended complaint, filed August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and delivering for registry, under the British act aforesaid, a "Memorandum of Association" and "Articles of Association," as therein set forth; that the defendant became a corporation under the Oregon act aforesaid, on June 13, 1879, by certain persons making and filing articles of incorporation to that effect, as therein set forth; that, on August 1, 1881, the plaintiff was the owner of a certain railway in Oregon, and then demised the same by a written instrument to the defendant for the term of ninety-six years, for and upon a yearly rental of twenty-eight thousand pounds sterling, to be paid in half-yearly installments in advance, and that the defendant, by its proper officers, duly executed said instrument, they being first thereunto fully authorized by a vote of its directors; and that the defendant thereupon entered into possession of the railway, and operated the same, but has failed to pay the installment of rent falling due on May 15, 1884.

By the second amended answer to this amended complaint, filed October 18, 1884, the defendant expressly admits that it is a corporation formed under the laws of Oregon, and that its president and assistant secretary signed the written instrument aforesaid, and that in pursuance thereof, it entered into the possession of said railway and operated the same until May 15, 1884, when it offered to return the same to the plaintiff, which offer was declined, and that it has since retained the possession thereof, only under a special agreement with the plaintiff, not material to the present inquiry, and denies: (1) That the plaintiff is or ever was a corporation under the companies act of 1862, or otherwise, or at all; (2) that the law of Great Britain confers on the plaintiff the power to lease said railway; (3) knowledge or information sufficient to form a belief as to whether a memorandum or articles of association were made and delivered for registry, as alleged in the complaint, or at all; (4) that plaintiff is, or ever was, authorized to construct, own, operate, lease or sell a railway in Oregon, or that it has ever complied with the laws of Oregon on the subject of foreign corporations doing busines therein; (5) that either the plaintiff or defendant ever had authority to execute said written instrument or any indenture for the leasing of said railway, or that the plaintiff ever demised the same to the defendant; and (6) that any sum of money is due the plaintiff from the defendant; and avers that it has fully paid the rental provided for in said pretended lease for the period during which it was in possession of said railway, to wit: for the period ending May 15, 1884.

The plaintiff moves to strike out this answer, as being "frivolous and immaterial," and for judgment.

In the brief submitted by counsel in support of this motion, it is maintained that the denials of knowledge or information concerning the alleged execution and delivery of the memorandum and articles of association are insufficient, because they relate to matters which are of record, and of which the defendant can inform itself, or to such things as are presumptively already within its knowledge, and therefore it is not at liberty to controvert the allegation otherwise than by a positive denial; citing, Heatherly v. Hadley, 2 Or., 275; State v. McGarry, 31 Wis., 500; Hance v. Rumming, 2 E. D. Smith, 48; Curtis v. Richards, 9 Cal., 38; Nelson v. Murray, 23 Cal., 338; Pom. on Rem., sec. 641; Moak's Van S. Plead., sec. 517. But none of these authorities go so far as to hold that because the subject of an allegation in a pleading is of record, that therefore the party answering or replying thereto, must take the trouble to inform himself so as to be able to deny the allegation positively, if at all.

A party may, by the force of a statute, have constructive notice or knowledge of the existence and contents of a private writing duly admitted to record in a public registry, but there is no presumption that he has any actual knowledge or information on the subject, unless it also appears that he had some connection with the transaction contained in the record or relation to the proceeding out of which it grew. The rule was long ago stated by Mr. Justice Field,

in Curtis v. Richards, *supra*, as follows: "If the facts alleged are presumptively within the knowledge of the defendant, he must deny positively, and a denial of information or belief will be treated as an evasion. Thus, for example, in reference to instruments in writing alleged to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description or of the copies in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. If the facts alleged are not such as *must* be within the personal knowledge of the defendant, he may answer according to his information and belief"—or, rather, he may deny knowledge or information thereof sufficient to form a belief. See, also, on this point, Pom. on Rem., section 641, wherein it is said, in effect, that a party may controvert an allegation by a denial of any knowledge or information thereof, whenever such denial would not, in the light of the circumstances, appear to be palpably false.

Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britian, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding and there is no evidence that it or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose.

Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it, positively, unless it be to recall and verify that knowledge or information of the matter which he once had and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstance.

And if such a denial is improperly made, it may be stricken out as sham—manifestly false in fact. But it is not for that reason either "frivolous" or "immaterial." That depends wholly on the character of the allegation denied. If that is material the denial of all knowledge or information concerning it is also material.

Another ground of this motion, as set forth in the brief, is that the denial of the plaintiff's corporate existence is a plea in abatement, and being pleaded with a defence to the merits, it is to be considered as waived and abandoned; citing rule forty of this court, Hopwood v. Patterson, 2 Or., 49; Or. Cen. Ry. Co. v. Wait, 3 Or., 91.

And first, it is not absolutely necessary to strike out of an answer matter in abatement, which has been waived by a subsequent defence, in the same answer or otherwise, to the merits. Being waived by such subsequent pleading, it is impliedly out of the case. But it may be convenient, particularly in a doubtful case, to move to strike out before going to trial, so as to ascertain and determine the material issues in the case. But such motion, if it includes the whole

answer, as in this case, must fail; and should, in my judgment, be made on the ground that the matter being waived, has become redundant or irrelevant.

There is no doubt that the rule and authorities on the subject of pleading matter in abatement with matter to the merits, is as stated by counsel for plaintiff.

But are these denials of the plaintiff's corporate existence generally, or of particular facts necessary thereto, or of its power to make the contract in question, pleas in abatement or in bar of the action? These denials are equivalent to an allegation that the plaintiff is not only without power to make this contract, but is really a fictitious person. A plea that the plaintiff is a fictitious person is sometimes classed by the text writers as a plea in abatement: 1 Chit. P., 482; Gould P., ch. V, sec. 38. But the latter, in section 60 of the same chapter, says: "That the plaintiff never was in esse, seems also to be a good plea in bar. For that a right of action should exist, in favor of an imaginary person, is plainly impossible."

This is not a case where an admitted cause of action is being prosecuted in the name of a fictitious person, like Doe v. Penfield, 16 John., 308. In that case, the fact that the plaintiff was a fictitious person was pleaded in abatement of the action, while the cause of action or indebtedness of the defendant to the real party in interest was not controverted. But this is a case in which the cause of action —the liability of the defendant—is bound up in and dependent upon the legal existence of the alleged plaintiff, and a denial or defense which puts that fact in issue, is, to all intents and purposes, a plea in bar, and unless expressly pleaded in abatement merely, should be so considered.

It is also contended by counsel for the plaintiff that the defendant having contracted with the plaintiff as a corporation existing under the laws of Great Britain, by the corporate name of "The Oregonian Railway Company, Limited," for the lease of its railway, is not now permitted to deny such corporate existence or the power to make such contract.

The law is well settled that a person who contracts with an apparent corporation as such, is estopped, when sued on such contract, to say that the plaintiff had no corporate existence or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defense, its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is, that legal disability, as in the case of a minor, is a defense personal to the party who is under it, and cannot be taken advantage of by another: Cowell v. Springs Co., 100 U. S., 61; Bigelow on Estoppel (3d ed.), 464–5. But notwithstanding this, the defense of a want of corporate existence or power, if made, is not a "frivolous" one. A defense is only "frivolous" when it contains nothing that can affect the plaintiff's case: Witherell v. Wilberg, 4

Saw., 233. But these denials, unless the plaintiff sets up and claims the benefit of the estoppel, whenever the opportunity occurs, are a good defense to the action. They are material, and if the plaintiff waives the estoppel and goes to trial on the issue arising thereon and fail to prove its corporate existence and power, the verdict and judgment must go against it.

The matter which may estop the defendant in this case from denying the corporate existence of the plaintiff is the fact of its contracting with the latter as such corporation. If this fact did not already appear in the complaint the plaintiff could not have the benefit of the estoppel, unless he set it up in a replication; and that is the way in which the point is generally made in the pleadings. But in this case, the matter which operates as an estoppel—the contract of leasing—is set forth in the complaint. In such case the defendant may claim the benefit of the estoppel by a demurrer to the plea, which contains the defense, of a want of corporate existence or power: 1 Chit., p. 634; Bigelow on Estoppel (3d ed.), 591.

I have not seen a precedent of such a demurrer, but the form may be readily devised from the usual replication of an estoppal to a plea.

The demurrer should not be general—that the facts contained in the plea do not constitute a defense to the action—but special and to the effect that the defendant ought not to be heard or allowed to say or allege that the plaintiff is not a corporation or has no power to make the contract sued on, contrary to its own acknowledgment and deed, as appears by the complaint and is admitted by the answer.

The first, second, third and part of the fourth and fifth of these denials are intended to and do controvert the corporate existence and power of the plaintiff and cannot therefore be considered frivolous; and the same may be said of the denial of the defendant's power to enter into this contract. But the question of the plaintiff's corporate existence, or the power of it or the defendant to execute the lease should more properly be made by demurrer to the complaint.

The denial of indebtedness is clearly frivolous; for taken as a whole, it only amounts to an averment that all the prior installments of rent have been paid. So of the denial that the plaintiff has complied with the laws of the state on the subject of foreign corporations. The act requiring certain foreign corporations to comply with certain provisions thereof before doing business in the state has no application to railway corporations, and is confined in its operation to the corporations mentioned in the title thereof: Or. & W. T. & I. Co. v. Rathbun, 5. Saw., 32.

But the motion to strike out on the ground of frivolousness being taken to the whole answer cannot be allowed in part, and is therefore disallowed altogether.

The defendant also moves for leave to file a third amended answer containing the same matter as the one under consideration with two

additional affirmative defenses. Without considering its materiality, I think proper to allow it to be filed, and thus give the plaintiff an opportunity to meet the defenses attempted to be made by it, in the light of this decision and as it may now be advised.

DISTRICT COURT OF ALASKA.

UNITED STATES v. KIE.

Filed November 10, 1884.

POWER OF DISTRICT JUDGE TO ADMIT TO BAIL—DEFENDANT CHARGED WITH MURDER.—The power of a district judge under section 1,016 of the United States revised statutes, to admit a prisoner to bail in a criminal case where the punishment may be death, is discretionary. Such power should only be exercised when the necessity is most urgent, and when peculiar reasons exist and are shown to the court for granting the application. The fact that the prisoner is suffering from disease, which his confinement may have increased, is not sufficient to warrant his admission to bail, unless further confinement might seriously affect his body or mind, and possibly bring about his death.

RIGHT OF PRISONER TO SPEEDY TRIAL—CONFINEMENT TO AWAIT TRIAL.—Confining a prisoner to await his trial at the next regular term of the court, is not depriving him of his right to a speedy trial, as guaranteed by the constitution of the United States. Nor does the fact that such confinement must necessarily continue until such term entitle the prisoner to be admitted to bail.

APPLICATION of defendant charged with murder to be admitted to bail. The opinion states the facts.

John J. McLean, for the petitioner.

E. W. Haskett, U. S. Attorney, for the United States.

MCALLISTER, J. This is an application on behalf of one Charles Kie by his attorney, John J. McLean, Esq., to be admitted to bail, although said Kie is in confinement on a charge of murder.

The petition contains several clauses, and various matters are set out in support of the application.

After most carefully examining these several clauses I am of the opinion that there are only two which the court can properly consider: namely, the *second* clause as regards the physicial condition of the prisoner, and the probable effect that a longer period of confinement may have upon his health, and the *fifth* clause as regards the said prisoner's constitutional right to a speedy trial. The other matters alleged and set out in the petition, are, I think, immaterial, and allowing that the facts are as herein stated, the court could not, upon that showing, admit the prisoner to bail: therefore I shall confine myself to the consideration of the second and fifth clauses.

By section 1,016 of the revised statutes of the United States, authority is given any judge of a district court to admit to bail in a criminal case where the punishment may be death; the statute also provides "that the judge shall exercise his discretion, having regard to the nature and circumstances of the offense, and of the evidence, and to the usages of law." This petition appeals directly to that

discretionary power which the statute vests in the judge, and I have examined it with great care.

First, I shall consider the second clause, or ground, upon which which the application is made. It is as follows: "That the above named defendant has been confined in prison, and in irons continuously, since about the twelfth day of July, 1884, being in charge of the naval authorities for a part of the time, and now at the present time in charge of the United States marshal for this district. During this period of confinement the above named defendant has suffered from disease, and this disease has been rendered more acute and painful by his close confinement, this disease of his body has affected his mind so much so that his attorney believes that melancholy has been superinduced by the same, and that much further delay in admitting him to bail will render him insane, or result in his death. Hereunto is appended the certificate of Doctor Hugh S. Wyman, a regular practicing physician and graduate of medicine, of the university of Michigan, as follows:

"U. S. MARINE HOSPITAL SERVICE, DISTRICT OF THE PACIFIC,
"PORT OF SITKA, A. T., SURGEON'S OFFICE.

"I certify on honor, that, having examined Charles Kie, I find him to be suffering from secondary syphilis, complicated with derangement of the heart's action, and much constitutional debility.

"H. S. WYMAN, M. D."

As to the first allegation as regards the length of time the prisoner has already been confined, to wit: from the twelfth day of July, until now, some four months, it is in my judgment, considering that he is charged with murder, not an unreasonable confinement, especially under the somewhat peculiar circumstances of the case; the facts, as developed at the preliminary examination, show that on the twelfth day of July, last, there was no civil law in this territory, that the prisoner was arrested and delivered over to the custody of the naval authorities, and after the arrival of the civil officers in the territory in the early part of October, was delivered into their custody. On the twenty-first day of October a preliminary examination was held and the prisoner duly committed on a charge of murder and is now in custody awaiting the action of the grand jury.

This confinement certainly is not unreasonable; but it is alleged that during this last-mentioned period, and at the present time, the prisoner is suffering from a most painful disease, which has seriously affected his body and mind; this presents a serious question, and one deserving of most careful examination. The fact that a prisoner, although confined in prison on a most grave charge, is ill and suffering, and that his sufferings are aggravated by his confinement, should appeal most strongly, in my judgment, to that discretionary power with which the court is clothed, to be exercised, however, as the statute says, "with regard to the nature and circumstances of the offense, and of the evidence, and the usages of law," and this power, above all, is to be exercised with great discretion, so that, while, on the one hand, a prisoner should not

be allowed to languish in jail, on the other hand, the court should not, except upon the strongest grounds, and the clearest evidence, open the prison door, and by so doing put it in the power of the prisoner to escape; therefore, bail should only be allowed in such a case as this, when the necessity is most urgent, when peculiar reasons exist, and are shown to the court, for granting the application. I may almost say it should be an extreme case which would justify the court in granting such a petition as the one now before me; whether this is such a case, I have most serious doubts.

There is undoubtedly evidence before the court to the effect that the prisoner is suffering from a painful disease, and that his confinement may have increased it; it is also probable, and, no doubt, this disease, and the confinement he has undergone, may have weakened him somewhat; but there is no evidence that the prisoner is in such a condition, either of body or mind, that the court should look upon this as an exceptional case. As I before remarked, the question presented is a serious one, and not free from difficulty; and if the evidence before me had sustained the allegations in the petition, and it had been shown to my satisfaction that the prisoner was in such a physical condition that further confinement might seriously affect him in body and mind, and possibly bring about his death, I would unhesitatingly grant the prayer of the petitioner, and admit the prisoner to bail; but, from the evidence before me in support of this allegation, and from my own knowledge of the physical and mental condition of the prisoner, I am of the opinion that, under the circumstances, this said prisoner, Charles Kie, has neither been confined an unreasonable time awaiting trial, nor is he at the present time in such a condition, either physically or mentally, as to cause the court to exercise its power under the statute, and admit him to bail.

I now come to the fifth clause of the petition, which is as follows: "The continued imprisonment in the common jail at Sitka, Alaska territory, of the said defendant is *illegal* and *unjust* in that he, the said defendant, is entitled to a just and *speedy trial*, according to article six of the amendments to the constitution of the United States of America, and he therefore prays that this to to him vital right be immediately granted by admitting him to bail."

By the provision of the constitution mentioned in the above clause of the petition, the prisoner undoubtedly has the right to a speedy trial. All persons held on a criminal charge have the legal right to demand a speedy and impartial trial by jury. The right was guaranteed to the English people by the great charter; it has been confirmed in subsequent bills of right, iterated and reiterated by the courts time and again. In this country the same right is also generally guaranteed by the constitutions of the several states. That the prisoner may claim this right, there is no doubt; but what is to be understood by a speedy trial, is the question now to be determined. It is clear that one arrested and put in jail has not the right

to demand a trial immediately, he must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a speedy trial mean a trial immediately upon the presentation of the indictment; it simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation.

The law is the embodiment of reason and good sense; hence, while it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not exact impossibilities, extraordinary effort or exertion from the courts; nor does it contemplate that the right of a speedy trial, which is guaranteed to the prisoner, shall operate to deprive the government of a reasonable opportunity of fairly prosecuting criminals.

Section 582 of the criminal practice act of the state of Nevada indicates what may be understood by a speedy trial. That section declares "that if a defendant, indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next term of the court at which the indictment is triable after the same is found, the court shall order the indictment to be dismissed unless good cause to the contrary be shown."

In the case at bar, the prisoner cannot complain that the court has not endeavored to give him an immediate trial; the court has declared its willingness to hold a special session for that purpose, while not considering it a hardship on the prisoner that he should await his trial at the regular term of the court on the second Monday of May next.

Under the provisions of the Nevada statute the regular method of procedure is to bring the prisoner to trial at the next regular term of the court after the indictment is found, and this is undoubtedly the usual method of procedure. In this case, however, the court has declared its willingness to hold a special session, but finds it impossible even by so doing to give the prisoner a fair and impartial trial, for the reason that the marshal of this district is without funds to transport witnesses, and has no means of transportation at his command; therefore the prisoner must await his trial at the regular term of the court in May next, by which time no doubt the marshal will have the necessary funds and means at his command to enforce the attendance of witnesses, and carry out the orders of the court; and in my judgment this is not in any way a hardship on the prisoner. If, on the other hand, it could properly be claimed that this prisoner was being kept in confinement, awaiting the organization of this territory, he might most properly petition to be admitted to bail; but such is *not the case*. He is simply now in prison, awaiting the next regular term of the court; and I do not consider it a hardship upon him to be kept in confinement until that time, and am of the decided opinion that such confinement does not deprive him, or

encroach, in the slightest degree, upon his constitutional right to a speedy trial. He is simply undergoing a just, proper and reasonable period of confinement.

The application is therefore denied.

SUPREME COURT OF COLORADO.

POIRE v. ROCKY MOUNTAIN TRANSPORTATION COMPANY.

Filed October 31, 1884.

TRIAL BY REFEREE—EXCEPTIONS TO RULINGS ON REPORT OF.—When no exceptions are preserved to the rulings of the district court upon the issues presented by the report of a referee and the exceptions thereto, or to the final judgment entered thereon, the supreme court is precluded from reviewing such judgment upon the evidence.

THE SAME—BILL OF EXCEPTIONS—REVIEW OF EVIDENCE.—Where no bill of exceptions has been taken or preserved, and the evidence contained in the record is not properly authenticated, the supreme court cannot consider any exceptions that may have been saved at the trial to the admission or rejection of testimony, but must presume that the findings of fact are correct.

ERROR to the district court of Lake county. The opinion states the facts.

T. A. Green and *C. H. St. John*, for the plaintiff in error.

C. W. Wright, for the defendant in error.

BY THE COURT. This cause was, by consent of parties, referred. The referee was directed to try the issues presented, and report findings of law and fact thereon.

This he did, and exceptions being taken to his findings, the court, upon due consideration thereof, overruled such exceptions, and entered judgment upon the referee's report. To reverse that judgment, the cause is now before us on error.

The principal issue tried by the court below, being one of fact, was, whether or not the endorsement and transfer by plaintiff of the note mentioned in the pleadings, was procured by duress. This issue was found against plaintiff in error, who was plaintiff below.

No objection was preserved either to the ruling upon the issues presented by the report and the exceptions thereto, or to the final judgment rendered in the district court. Therefore, we are precluded from reviewing this judgment upon the evidence, *i. e.* from determining whether or not it is supported thereby: Martin v. Force, 3 Col., 199; Law v. Brinker, 6 Col., 555; Breen v. Richardson, 6 Col., 605.

No bill of exceptions was taken or preserved, and the evidence was not properly authenticated. Hence this court sustained a moto strike out the same.

There being no evidence before us, we cannot consider any exceptions that may have been saved at the trial to the admission or rejection of the testimony.

But if this finding was right, nothing remains for us to consider. The only other matter submitted is a question of law; and it does not arise in this case unless the referee and court were mistaken in their conclusion on the subject of duress aforesaid. It is, therefore, wholly unnecessary for us to examine the arguments made and the authorities cited upon the legal proposition mentioned.

The judgment is affirmed.

SMALL ET AL. *v.* BISCHELBERGER.

Filed October 31, 1884.

COUNTY COURT—CERTIORARI TO JUSTICE'S COURT—PETITION FOR.—The county court is expressly authorized, by section 1,992 of the general statutes, to review the action of a justice's court on *certiorari*, where, without fault on his part, the petitioner is unable to take his appeal in the usual way. The petitioner for such appeal must allege, *first*, that the judgment before the justice was not the result of negligence on his part; *second*, that the judgment, in his opinion, is erroneous and unjust, stating wherein such error and injustice consist; and *third*, that it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing.

ON A MOTION TO QUASH SUCH WRIT OF CERTIORARI THE AVERMENTS of the petition therefor must be taken as true. They cannot be contradicted by affidavits.

THE SAME—WHEN DEFENDANT ENTITLED TO WRIT.—The plaintiff in an action in the justice's court, promised the defendant, for a valuable consideration, to dismiss such action. Relying upon such promise, the defendant failed to attend at the trial. Instead of dismissing, the plaintiff procured a judgment, but withheld the levy of the execution until after the time for appeal had expired. The defendant was ignorant of the judgment until the execution was levied. *Held*, upon a petition showing the above facts, that the defendant was entitled to a writ of *certiorari* from the county court to review the action of the justice.

ERROR to the county court of Pueblo county. The opinion states the facts.

Wescott & Irwin, for the plaintiff in error.
John M. Waldron, for the defendant in error.

HELM, J. This cause was first tried before a justice of the peace; it was afterward removed to the county court by *certiorari* and there tried *de novo*. The proceedings in the latter court are now before us for review upon error.

A preliminary question, relating to the jurisdiction of county courts in connection with *certiorari*, ought perhaps to be noticed. In this state there are two statutory proceedings under this title: one, for the purpose of reviewing, under certain circumstances, the action of an inferior tribunal, board or officer; the other, for the purpose of securing the trial *de novo* of cases previously heard by justices of the peace, where, without fault on his part, the petitioner is unable to take his appeal in the ordinary way. The former is provided for in chapter twenty-nine of Dawson's Code, the latter in the general statutes, section 1,992 *et seq.* Under the former, no justice, *county* or mayor's court can entertain jurisdiction; under the latter, the county court is expressly authorized to do so. Section 323 of the code, being a subsequent provision, might perhaps be construed as depriving the county court of the right to jurisdic-

tion under any circumstances, were it not for the proviso in section 332 of that instrument. This proviso clearly preserves the system in the general statutes, so far, at least, as county courts are concerned.

The *certiorari* proceeding, now before us for review, was had under the system provided in the general statutes; hence, there is no question as to the jurisdiction of the county court to issue this writ in a proper case. Section 1,995 requires that petitioner shall show in his petition three things, viz: *first:* that the judgment before the justice was not the result of negligence on his part; *second:* that the judgment, in his opinion, is erroneous and unjust, stating wherein such error and injustice consist, and, *third*, that it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing.

No objection seems to have been made or argued in the county court, and none is argued here, as to the sufficiency of the petition in stating the second of the foregoing grounds; but a motion was interposed to quash the writ, and dismiss the appeal upon insufficiency in the averments of the first and third.

The petition contained the following, among other statements: that, on the day set for trial of the cause before the justice, but previous to the hour fixed, one of the defendants in error came to petitioner, and proposed to dismiss the suit, provided he would execute a certain deed theretofore placed in *escrow;* that he accepted the proposition, immediately executed said deed, and notified defendants in error that he had done so; that, relying upon the promise to dismiss, petitioner did not appear before the justice; but that, instead of dismissing the cause, defendants in error, in violation of their agreement and in fraud of petitioner's rights, procured a judgment; that they withheld the levy of execution until after the time allowed by law for taking an appeal had expired, for the purpose of cutting him off from procuring a re-trial in the higher court; and that, until the levy of execution, nineteen days after judgment, petitioner was wholly ignorant that the same had been rendered against him; he supposing all the time that defendants in error had complied with their contract to dismiss the case.

We think the application to quash was properly overruled.

For the purposes of this motion the foregoing matters stated in the petition must be taken as literally true.

The promise of Small, one of the partners, and plaintiffs—to dismiss the action was supported by a valuable consideration; it constituted the material feature so far as they were concerned of a valid and binding contract. Having fulfilled his part of the contract and notified plaintiffs in the pending suit of such performance, petitioner had a right to rely upon the observance by them of their promise to dismiss; and under the circumstances it was a fraud on their part to take the judgment. Suppose that instead of executing the deed mentioned, petitioner had paid a sum of money agreed upon, in consideration of the promise to dismiss the suit, would any lawyer

maintain that it was still his duty to attend before the justice and see that plaintiffs carried out their part of the contract?

We think not, he would be perfectly justified in either case in presuming that they would treat him with the same good faith he had himself displayed.

It follows of course, from this conclusion, that petitioner's neglect to take his appeal within the time allowed by law, is excusable. For if the judgment against him was wrongfully and fraudulently obtained, and he had no knowledge thereof, he cannot be held negligent for not taking an appeal in the ordinary way.

Any doubts upon this subject would be removed by the averments of the petition that plaintiffs intentionally withheld the execution levy, for the purpose of preventing the appeal.

To deny the writ in this case would be allowing one to reap the benefit resulting from his own violation of a binding contract, where such breach thereof, is characterized by bad faith amounting to fraud.

The case at bar is readily distinguishable from Tilton v. Lavimer County Ag. Association, 6 Colo., 288, cited by counsel. There the promise to dismiss was without any consideration whatever, and there was no legal obligation to perform. Besides this fact, petitioner was a corporation, and the petition failed to name the individual to whom the promise was made; it also failed to state that such person had authority to act in the premises.

The court say: "If the naked promise of a plaintiff to dismiss a pending action is sufficient to excuse a party defendant from any further attention to the case, it certainly can only have this effect when made to some one duly authorized to represent the defendant."

The foregoing discussion is based upon the principle already stated that, for the purposes of the motion to quash, the averments of the petition are assumed to be true. But it appears that after denial of this motion and before the trial, defendants in error offered to prove, by witnesses then present, that many of these averments were wholly false; this the court refused to allow, and upon such refusal rests the second assignment of error.

Two cases are cited by counsel which seem to sustain the propriety of the proceeding proposed, viz.: State v. Woodward, 9 N. J. L. R., 21; and Rutland v. County Commissioners, 20 Pick., 71.

We are unable to learn from an examination of these cases whether those *certiorari* proceedings were statutory or under the common law. Certain it is that the procedure there considered was different from that which we have. Counsel frankly admit that statutes exactly similar to ours have received a construction conflicting with the one they now urge upon us. In Davis v. Randall *et al.*, 26 Ill., 243, the court declared that "there is no provision in the statute authorizing a writ of *certiorari* to bring up proceedings from a justice of the peace, which allows affidavits to be read in support of, or against the petition for such purpose. That must

stand on its own merits, and be tested by itself, without extraneous support."

We find nothing in the statutes under which the writ in this case was issued, authorizing a trial by affidavit or testimony, of the truthfulness of the matters averred in the petition on the subject of negligence at the trial, or of failure to take an appeal in the ordinary way: and we are not at liberty to supply the requisite legislative provision.

Our answer to the clear and cogent suggestions of counsel must be: that a sufficient bond is required; and, as in ordinary appeals, no substantial injustice should result in the end; also that the petition must be under oath, and petitioner is liable to a prosecution for perjury if its averments are knowingly false.

The third and last assignment of error which we shall consider, challenges the findings and judgment as being contrary to the weight of evidence.

We now discover no objection to the law announced in Finnerty et al. v. Fritz, 5 Colo., 179, and other cases cited.

But we do not think that the record brings this cause within the principle of agency upon which counsel rely. Without reviewing in full the evidence, it is sufficient for us to say that we would not be warranted thereby in disturbing the judgment. There is testimony to uphold the theory of counsel for plaintiffs in error; but it is disputed, and the judgment may well be permitted to stand. It is certain that the sale of the land was never consummated, and that defendant in error has received no purchase money. To reverse the judgment we would have to find, that the commission was not payable out of the proceeds; that plaintiffs in error brought a responsible and willing purchaser, acceptable to defendant in error, upon satisfactory terms; and that solely through the negligence or default of defendant in error, the sale was prevented.

This we are not prepared to do, and the judgment is affirmed.

PEOPLE v. JOBS.

Filed October 31, 1884.

JUDGMENT IN THIS CASE, as reported *ante*, page 236, affirmed, upon a petition for rehearing.

PETITION for a rehearing. The facts are stated in the former opinion, reported *ante*, page 236.

W. T. Hughes and *L. C. Rockwell*, for the plaintiff in error.

R. S. Morrison, for the defendant in error.

HELM, J. In view of the authorities cited, a few suggestions seem necessary concerning the "subtle yet important distinction" upon which counsel mainly relies for a rehearing of this cause.

We are asked to say that that portion of the charter of Georgetown which establishes the office of the police judge and prescribes the jurisdiction of the incumbent thereof is void, because in conflict with the state constitution.

The existence of an office similar to that filled by respondent was recognized under the organic act of the territory in Deitz v. Central, 1 Colo., 323. The name "police judge" was discarded, but the official acts of the individual occupying the position were declared to be valid. Authority so to hold was found in the grant of judicial power by the organic act to justices of the peace. But the court expressly declines to say whether or not the incumbent should assume to be, and act as such officer.

The constitution superseded the organic act; but in the distribution of judicial powers, it clearly provided for this office; even the objection mentioned in Deitz v. Central, to the name "police judge" no longer exists: People *ex rel* Howell v. Curley, 5 Colo., 412. The powers conferred and the name or title also are both within the purview of the later instrument: Sec. 1, art. 6.

Respondent in this case was not elected to the office of justice of the peace; he was chosen to fill that of police judge and his judicial powers were exclusively confined to proceedings under the town ordinances and a few other matters relating to the corporation.

If there was no constitutional difficulty in the way, he could not act as a justice of the peace until he had complied with certain prerequisites not essential to the office of police judge.

"It *shall be lawful* for the police judge to give bond with such securities as are required by law from justices of the peace in this territory, and *on filing of this bond*, the police judge shall have the same jurisdiction as is now conferred by law upon other justices of the peace in this territory:" Section 5 of an amendment to the charter of Georgetown, adopted in 1874, three years subsequent to the filing of the decision in Deitz v. Central, *supra*.

If, therefore, the charter provisions authorizing the election of a police judge, and clothing him with jurisdiction to enforce the ordinances, had been adopted since 1876, as a general law, there would not, in our judgment, be any constitutional objection thereto. But as stated in the principal opinion, this charter is not obnoxious to the constitution on the ground that it is a local or special act.

According to our views, then, the position filled by respondent was a *de jure* office before the constitution, and its legal existence cannot be successfully challenged since the adoption of that instrument. What difference does it make, upon principle, that the existence of this office was sustained under the organic act by virtue of the powers thereby conferred upon justices of the peace, while under the constitution we uphold it because authorized by the provision relating to judicial officers for cities and towns? The "substance of the powers conferred" remains the same; names are not controlling; and the office itself is recognized by both of the organic laws.

This case is easily distinguishable from that of State *ex rel* v. Maynard, 14 Ill., 419, to which counsel invites our attention. The differences between the two cases will readily appear upon a cursory reading of that opinion, and we decline to lengthen this one by discussing them.

The rehearing is denied.

COLORADO CENTRAL RAILROAD COMPANY v. MARTIN.

Filed October 31, 1884.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WANT OF CARE.—In an action to recover damages for negligence, the plaintiff cannot recover if he contributed to the disaster by his own negligence, or want of ordinary care and caution, to such an extent that but for such negligence or want of care on his part, the accident would not have happened.

THE SAME—RAILROAD COMPANY—MASTER AND SERVANT.—The plaintiff in error, in anticipation of an attack upon its trains by robbers, provided breech-loading shot guns and ammunition for their defense. These guns were placed by the superintendent of the company in charge of the train baggage-master, with instructions to keep the guns unloaded and wrapped up in a blanket, except when passing over that portion of the road where an attack was apprehended. Upon reaching a certain station on the road, the guns were to be unpacked and charged, ready for use; and after passing the same on the return of the train, the cartridges were to be withdrawn, and the guns again wrapped up, and, upon reaching the headquarters of the company, the package was to be delivered to the station baggage-master, to be kept over night, and upon the return of the train, he was to replace the package. The plaintiff, a conductor on the train, who had entire command thereof, and knew of the foregoing regulations, was injured by the accidental discharge of one of the guns when the same were being replaced on the train by the station baggage-master. *Held:* that, whether the company was guilty of negligence in not providing gun-racks, or other suitable means for transporting the guns, was a question for the jury; that the plaintiff, as conductor of the train, was charged with the duty of seeing that the instructions of the superintendent were observed; and that the injury resulted from the negligence of a fellow-servant, for which the company was not liable.

APPEAL from the district court of Arapahoe county. The opinion states the facts.

Teller & Orahood, for the appellants.

Browne & Putnam, for the appellee.

BECK, C. J. It appears from the transcript of the record that there have been two trials of this cause in the court below, the first resulting in a verdict for the plaintiff of $7,000, and the second in a verdict of $2,000. Counsel for the appellee, who was plaintiff below, insist that no error intervened on the second trial, and cite authorities to sustain the rulings and instructions of the district court, but say in the concluding paragraph of their brief: "The verdict of the jury was so small, that if the court can grant a new trial without violating any of the known principles of the laws governing the case, we will not complain."

The disposition of this court is to sustain the judgments of *nisi prius* courts, when it can be done without violating the known and settled principles of the law governing the cases and questions presented for review.

In the present case the judgment can only be sustained on the theory that the defendant was guilty of negligence in failing to provide proper and safe means of conveying guns upon its trains, for

their defense against train robbers, and that the plaintiff was not guilty of such contributory negligence as tended to produce the injury complained of.

One of the well known and well settled principles of the law, upon the subject of negligence, is, that when the plaintiff so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened, he is not entitled to recover. The jury was informed of this rule, but it is apparent, upon a review of the evidence, that it was ignored by them in their deliberations.

We are of opinion that the verdict is not supported by the evidence, and also that the court committed two errors upon the trial. The first error was in instructing the jury, as a matter of law arising upon the facts proven, that the defendant was undoubtedly guilty of negligence. The other error was in the refusal to instruct the jury, as prayed by defendant's counsel: "That, under the evidence in this case, in view of the law of the case, the plaintiff is not entitled to recover, and your verdict should be for the defendant."

The effect of the instruction given was to declare the defendant guilty of negligence, as a matter of law, and to leave it for the jury to say, whether, under all the facts and circumstances of the case, the plaintiff was guilty of such negligence as contributed to the injuries received by him, or whether he acted as a man of ordinary prudence in remaining in the service of the defendant, in view of the negligence of the latter, after the same became known to the plaintiff. These instructions were certainly misleading, when applied to the facts disclosed by the proofs of both parties to the controversy.

The material and uncontradicted facts are, that an attack by train robbers had been threatened upon defendant's train on the portion of its railroad extending from Denver, Colorado, to Cheyenne, Wyoming territory, which lies north of Fort Collins, in the state of Colorado. Trains had been attacked upon the Union Pacific railroad shortly before, and the officers of the defendant company, having private information that an attack of its trains was contemplated, deemed it prudent to provide arms and ammunition for their defense, which was done about September 1, 1878. Prior to that date the train officers carried their own arms.

The arms and ammunition provided by the railroad company were three breach-loading shotguns, and one hundred cartridges charged with buck-shot.

These guns were placed by the superintendent of the defendant company in charge of the train baggage-master, there being but one passenger train on the road, which train made the round trip from Denver to Cheyenne and back each day.

The instructions of the superintendent were to keep the guns unloaded and wrapped up in a quilt or blanket, which was provided, except when passing over that portion of the road upon which the

attack was apprehended. After passing Fort Collins, outward bound, the guns were to be unpacked and charged, ready for use, and after reaching or passing the same point on the return the cartridges were to be withdrawn and the guns again wrapped up in the blanket. Upon reaching Golden, (the headquarters of the company), the package was to be delivered to the station baggage-master, to keep until the return of the train from Denver next morning, when he was to return the package to the train.

Two conductors, the plaintiff and one Davis, ran the train upon this route, upon alternate days, each taking command of his train at Golden in the morning, upon its return from Denver.

Both conductors knew of these regulations, and had frequently seen them carried out. The work of inserting the cartridges, and of afterwards withdrawing them, was easily and quickly done, and it does not appear that any accident occurred in carrying or handling the guns upon the train.

The injury complained of occurred at Golden, on the twenty-sixth day of September, 1878. The immediate cause of the accident was the failure of the train baggage-master, on the twenty-fifth day of September, 1878, to withdraw the charges from the guns upon the return trip from Cheyenne, and before delivering the package to the station baggage-master at Golden. The plaintiff was in charge of this train on the latter day as conductor. As usual, he spent the night in Denver, and after leaving the train next morning upon reaching Golden, that conductor Davis might make his regular trip thereon, one of the guns was accidentally discharged, while being put on board the train by the station baggage-master, the charge taking effect in the body of the plaintiff and seriously injuring him. The guns were in the same condition at the time of the accident as when delivered to the station baggage-master the evening previous, all being rolled up in the blanket.

Respecting the duties and authority of the conductors of this train, the testimony is that it is the duty of the conductor to take charge of the train and everything on board from the time it leaves the depot, until it arrives at its destination. All tools and other things carried for the use of the train, all treasure boxes and property, are in charge of the conductor, and all the employees on board are subject to his orders. In case of an attack upon the train he would be in command of its defense and have control of the arms. These are the affirmative facts disclosed by the evidence which we deem pertinent to the controlling questions presented by the record. The plaintiff testified that he had received no instructions concerning the guns, but admitted that the train baggage-master was subject to his orders and that in case of an attack on his train, he, the plaintiff, would have had charge of the guns and control of the defense. He admitted that he had never inquired whether the charges were removed from the guns before being placed in the care of the station baggage-master at Golden, or not, and did not know whether they were being handled at that point in a loaded or un-

loaded condition. He made no inquiry whether the guns were loaded or not, on the twenty-fifth day of September.

Concerning the duties of the Railroad Company, the court charged the jury, among other thing, as follows: "under such circumstances, the court charges you that it was the duty undoubtedly of the defendant company either to provide gunracks for the safe storage and carriage of the guns upon the train, so that they would not have to be taken off and put upon the train each day as the train passed and repassed Golden station, or else to have kept some competent and experienced person or persons to take charge of said guns and see to it that they were taken proper care of to guard against any accident, and that it was undoubtedly negligence to leave the putting of said guns upon the trains, the putting them off again from the train to the station baggage-master and train baggage-master respectively, as common baggage, in addition to their other numerous duties to be by them performed. * * * The court instructs you that the company or persons that employ dangerous weapons or elements in the management of the business engaged in, must use extraordinary care in their management or use, and if you find from the evidence that the defendant at and before the accident referred to in the pleading and evidence, was carrying guns on its trains, then it was required by its duty to its employees to use the most approved means for their transportation, so as to save harmless its servants required to use them; and the court further instructs you that if you find the defendant did carry those guns as it is alleged, then it was required either to carry said guns in a gunrack or by placing said guns in the hands of a special agent charged with their custody, or some other manner eqally safe."

When it is remembered that the Railroad Company did not leave to the respective baggage-masters mentioned, the duty of putting loaded guns on and off its trains, but that the instructions of superintendent Henry were to withdraw the charges on passing Fort Collins on the return trip; and when it is further considered that unloaded guns are just as harmless as any other species of baggage, it becomes evident that the above instructions over-stated the duty and responsibility of the defendant.

Had the instructions of the superintendent been observed, it would have been as impossible for the accident to have happened by putting on board the train this package of guns, as if the package had contained umbrellas or walking sticks instead of guns.

In view of the evidence, it seems clear to our minds that plaintiff, as conductor of the train, was chargeable with the duty of seeing that these or other reasonable precautions were observed by the train baggage master. If the officers of the defendant company had done nothing but provide the guns and ammunition for the defense of its trains, which is conceded to have been proper under the circumstances, it would have been the duty of the conductors, by virtue of their authority, to have made and caused to be observed, such rules for the handling and care of these guns as would have

ensured the safety of both passengers and employees, and the safety from theft of the guns themselves. We cannot endorse the proposition that the failure of the defendant to provide one or more special agents of experience to take charge of these shot guns, or its failure to provide gun racks upon the train for their storage and safety, constitutes negligence, *per se*.

It is not charged in the complaint, nor does any witness testify that the train baggage master was not a person of experience in the use of fire arms, nor does it appear that the plaintiff ever objected to his acting as custodian of the guns. The complaint and replication charge the negligence resulting in the accident upon the station baggage master at Golden, over whom the plaintiff had no control, and upon the railroad company. The real facts are ignored, to wit: That the negligence which caused the accident occurred on the previous day on board the plaintiff's train; in the failure to withdraw the cartridges before placing the guns in the hands of the station baggage master. The latter testified that he was not aware they were loaded, and the circumstances of the case show he had reason to believe they were not loaded.

Doubtless, it would have been a convenience to have had gun racks upon the train. The object of removing the guns into the company's baggage room every evening at Golden, was to prevent them from being stolen during the night in Denver. A secure closet upon the train in which they could have been safely locked up during nights, would have saved much handling of the guns, and had the same been provided it is probable that the accident complained of would not have occurred. Neither would it have occurred if the superintendent's instructions had been observed on board the plaintiff's train.

Cases frequently arise wherein it becomes the duty of the trial court to determine the question of the negligence of a party as a matter of law as where the facts clearly show an obvious disregard of duty and safety; where a party has failed in a clear legal duty; where the evidence so clearly shows the want of prudence and discretion that there can be nothing for the jury to pass upon: Behrens v. K. P. Ry. Co., 5 Colo., 400; Erst v. Hudson River R. R. Co., 35 N. Y., 41–47; Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich., 122; Pittsburg & Connelsville R. R. Co. v. McClurg, 56 Pa. St., 297.

We are of opinion that the negligence charged against the defendant does not come within the above principles, or within any well settled rule of law which justifies the determination of the question as matter of law; on the contrary, the matter does seem to come within the opposite rule, that where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury: See authorities, *supra*; and also Langhoff v. Milwaukee & Prairie du Chien Ry. Co., 19 Wis., 515.

It has been well said that to warrant the court in instructing the jury that a party is guilty of negligence, the case must be such as

to allow no other inference from the evidence, and if the question depends upon a state of facts from which different minds may honestly draw different conclusions, the question must be submitted to the jury: Wells' questions of law and fact, sec. 265, and authorities cited.

In respect to the negligence of the plaintiff, the admitted facts of the case show that while he had full knowledge of the facts that the guns were in charge of the train baggage-master during each day; that if needed for defense at all it was only upon the northerly portion of the road; of the custom of leaving them at Golden during the night, and although invested, by his position as conductor, with authority over the train baggage-master, as well as over all other employees upon the train, and with ample power to make and cause to be observed all rules necessary for the safety of passengers, employees and property, he failed to take any precautions whatever so far as this record shows, to guard against accident from the handling of the guns. He neither gave orders concerning the care of the arms, nor made inquiries how they were being cared for.

Independent of any orders from the superintendent, the conductor could and should have commanded the custodian of the guns to withdraw cartridges upon leaving that portion of the road upon which danger was apprehended; common prudence dictates that this precaution should have been taken, to guard against accident.

There is no force in the suggestion, that the baggage master's numerous duties conflicted with the safe handling of the guns. The withdrawal of the charges was the work of a moment, and there was ample opportunity to perform this duty while baggage was not being handled.

The evidence clearly shows the want of prudence and discretion on the part of the plaintiff, and an obvious disregard of duty and safety.

When the facts are clearly settled, and the course which common prudence dictates can be clearly discerned, the question of negligence is to be decided as matter of law: Sherman and Redfield on Negligence, p. 13, sec. 11, and notes.

We must hold, upon the record before us, that it presents the case of an injured party, who, knowing the dangers of his position, failed to exercise that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under like circumstances. We said, in Behrens v. K. P. Ry. Co., *supra*, that a recovery of damages could not be sustained under such circumstances; that the doctrine of all the cases is, that if a plaintiff so circumstanced might have avoided the injury by the exercise of ordinary care, he cannot recover although the defendant was negligent.

If, therefore, it be conceded that the jury might have found the defendant guilty of negligence, had the question been submitted to the jury, it would have become a case of mutual fault or negligence, in which case the law neither casts all the consequences upon the

defendant, nor attempts any apportionment thereof: Cody on Torts, 674–8; C. C. R. R. Co. v. Holmes, 5 Col., 197.

In this condition or state of the case, it was error for the court to refuse to instruct the jury, as prayed by defendant's counsel, that the plaintiff could not recover: R. R. Co. v. Jones, 5 Otto, 439. But, aside from this error, the verdict of the jury cannot stand because it clearly appears that the plaintiff's negligence contributed to the injury, and because the verdict is against the law and the evidence.

The negligence of the train baggage master in failing to carry out the instruction of the superintendent of the defendant company, was the negligence of a fellow servant, in the course of a common employment; and it not appearing from the testimony that he was an incompetent person to have the care and custody of firearms, or that he was inexperienced in their use, but only that he was guilty of negligence in that behalf, the defendant, for this reason, in addition to those above given, could not be held responsible under the circumstances in this case, for the result of this negligence.

For the errors mentioned, the judgment will be reversed, and the cause remanded.

MACKEY v. FULLERTON ET AL.

Filed November 14, 1884.

APPROPRIATION OF PAYMENTS—DEBTOR AND CREDITOR—GENERAL PAYMENT.—A debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. Where money is paid generally on an account without any appropriation it should be applied to the first items in the account. And in an action to recover a balance due on a running account, the debtor cannot be heard to dispute the validity of the items so paid.

APPEAL from the district court for Galpin county. The opinion states the facts.

J. E. Rockwell, for the appellant.

W. C. Fullerton, for the appellees.

BECK, C. J. This was an action commenced by the appellees against appellant in the county court of Galpin county, for the recovery of a balance of five hundred and ten dollars and six cents, alleged to be due the late firm of Sherrick & Lewis, upon an account for goods, wares and merchandise. There have been two trials of the cause, in each of which the plaintiffs recovered judgment for the full amount of their bill; first, before the county court, and again before the district court of Galpin county, the latter trial being before a jury.

Sherrick & Lewis were partners, doing business as merchants in Nevadaville, in said Galpin county; their stock in trade being groceries and miners' supplies.

The defendant appears to have been a regular customer of said Sherrick & Lewis for a considerable time prior to their assignment to the appellees for the benefit of their creditors, which latter event occurred about the first day of September, 1881. The complaint alleges: "That defendant became indebted to said Sherrick & Lewis in the sum of five hundred and ten dollars and six cents, for the balance of an account for goods, wares and merchandise, sold and delivered to the defendant by said Sherrick & Lewis, between the eleventh day of December, A. D. 1879, and the twenty-fifth day of August, A. D. 1881, at Nevadaville, in said county."

The defendant, answering, admitted that he was indebted in the sum of four hundred and ten dollars and six cents, and denied his indebtedness as to the balance of the account.

After the appeal to the district court he filed a further answer, by leave of the court, averring that the sum of one hundred dollars, in the account sued on, was for the pretended sale of a barn, situate upon ground belonging to the Monier metallurgical works, in Nevada, and that said Sherrick & Lewis had no title to the property sold.

Prior to the commencement of the trial in the district court, the plaintiffs disclaimed, in open court, through their counsel, that any part of the account sued on was for the sale of a barn, and declared that the entire account was for a balance due for groceries, hay, grain and miners' supplies. A record was made of these admissions, and, upon closing their evidence in chief, plaintiffs asked leave of the court to withdraw said admissions, which the court granted against the objections of the defendant, which ruling was excepted to and is assigned for error. It is probable that the admissions were withdrawn for the reason that on the production of the books containing the defendants' entire accounts, a charge for the barn was found to be one of the items.

Upon examination of the testimony we discover no necessity for the withdrawal of the admissions.

The defendant appears to have been a regular customer of Sherrick & Lewis at their store in Nevadaville, and as was their custom, they presented their bills to him monthly, for groceries and miners' supplies. He paid to them sums of money upon account when convenient, which were credited, and the next bill would contain only the new items since purchased, together with the balance due upon the former bill.

The testimony showed that defendant's accounts ran through thirty-eight books, but that the books were balanced monthly, and that while bills were presented to customers every month, the items for one month were not repeated in the bill for the next month.

The books show a charge of one hundred dollars against the defendant for a barn sold him in the month of November, 1880.

It would seem, however, under the general rule of law concerning the application of payments upon a running account, that the

barn had been paid for, and, as a matter of fact, did not comprise a part of the account sued on.

The rule of law is, that the debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. When money is paid generally on an account without any appropriation, the rule is that it should be applied to the first items in the account: 2 Pars. Contracts, 629, 631, 811; Hill v. Robbins, 22 Mich., 475; Crompton v. Platt, 105 Mass., 255.

The proof upon the trial showed that the barn was sold to the defendant by the late firm of Sherrick & Lewis on the twenty-fourth of November, 1880, and charged up to him upon the books of the firm in the general running account for merchandise, at the price of one hundred dollars. On the first of December following, defendant's account, including the price of the barn, amounted to the sum of three hundred and fifteen dollars, for which several items a bill was then presented to the defendant by Mr. Sherrick of said firm. The defendant received the bill and said he would pay it as soon as he got round to it.

This witness testified that defendant paid this bill in full. That he paid two hundred dollars on the tenth of December, and one hundred and fifty-one dollars and sixty cents on the first of January following, which two sums amounted to more than the bill rendered December 1.

The witness testified further, that although about seven monthly bills were presented the defendant, from the time of the sale of the barn to the close of his account, but one bill contained the item of this sale.

These statements clearly show an application, by Sherrick & Lewis, of the moneys paid by the defendant subsequent to December 1, upon the account then due, which was legal and proper, it not appearing that any direction to appropriate the payments otherwise were given by the defendant, and it affirmatively appearing that the latter made no objection to the charge for the barn until after the assignment of Sherrick & Lewis to the plaintiffs, on September 1, 1881.

It does not avail the defendant to say, as he did in his testimony, that he did not look at the bill of December 1, presented him by Sherrick, and did not know that it contained the item of the barn. Willful ignorance is equivalent in law to actual knowledge. A man who abstains from inquiry when inquiry ought to be made, cannot be heard to say so, and to rely upon his ignorance: Kerr on Fraud and Mistake, 237–238.

Even if it were proper to litigate the subject of the sale of the barn in this action, the defendant has no available ground of error to complain of. His main defense is, that he supposed he was buying the lot upon which the barn stood, as well as the barn, and was ready to pay one hundred dollars therefor upon receiving a deed for

the property, but that he had since learned that Sherrick & Lewis could not make title, as they did not own the lot.

Opposed to this is the testimony of Sherrick, that he told defendant at time of the sale that the Monier metallurgical works owned the lot. The credibility of these two witnesses upon this point, was submitted to the jury by the second instruction given by the court, and it is resolved against the defendant.

In short, the evidence shows that defendant bought the barn and paid for it; that another person, who was then occupying it was turned out, and that the possession thereof was delivered to the defendant, who put his mules into it, and occupied it as long as he desired. The effect of his defense to the present action is, to seek to recover back the sum paid therefor, for unless an offset of the one hundred dollars is allowed, he is indebted upon the account for groceries and supplies in the sum of five hundred and ten dollars and six cents, the sum sued for. In no view of the case can he attack the title of the vendors of the barn in this proceeding. The matter of the purchase and payment of the barn was voluntarily closed and settled by the parties before the assignment of Sherrick & Lewis to the plaintiffs, and as to the latter parties the matter was closed forever.

The judgment is affirmed.

DEWALT *v.* HARTZELL, ET AL.

Filed November 14, 1884.

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER.—An agreement between the treasurer of a mining company and a bank, whereby the former promised to remit to the latter the amount of all drafts drawn by the manager of the mining company on, and paid by the bank, is not an agreement to answer for the debt of another and need not be in writing.

OVERRULING DEMURRER—TIME TO ANSWER.—During the term the court may limit the time in which the defendant may answer, after a demurrer to the complaint has been overruled, to two days.

CHANGE OF VENUE—PREJUDICE OF JUDGE—AFFIDAVIT OF.—An affidavit for a change of venue on the ground of prejudice of the judge and of the inhabitants of the county, must state the facts showing such prejudice. A mere averment of prejudice is not enough.

APPEAL from the district court of Custer county. The opinion states the facts.

J. F. Frueauff, for the appellant.

STONE, J. The appellant, DeWalt, and the appellees, the two Hartzell brothers, were, together, owners of one-half of the capital stock of a certain mining company. The mine, operated by the company, was situate near Silver Cliff in Custer county. Appellant was the treasurer of the said mining company, and was engaged in the banking business at Leadville. The appellees were bankers at Silver Cliff. An arrangement was made between appellant and appellee that for business convenience in paying the expenses of working the mine, the manager of the mining company should draw

orders upon appellant payable at Silver Cliff; that appellees should pay such order at their bank in Silver Cliff, and should then transmit the same to appellant at Leadville, who, as the treasurer of the said company, should remit the amounts of such orders to the appellees.

Suit was brought in the court below by the appellees to recover from appellant the sum of two thousand five hundred and sixty-three dollars and eighty-four cents, advanced and paid out under the arrangement above stated, for labor, tools and other expenses in working the mine. Appellant, in his answer, pleaded *inter alia*, the statute of frauds, for that the alleged agreement of appellant to repay as averred was to pay the debt of another, viz., the said mining company, and was not in writing, signed, etc. To this plea the replication denied that it was the debt of another.

The court refused to instruct the jury, as prayed by appellant, that if they believed that the indebtedness paid by appellees was the indebtedness of the mining company, and not that of appellant, and that the promise of appellant to pay the same was not in writing, they should find for said appellant, and the refusal to give such instruction is assigned for error.

There was no error in refusing this instruction. It was inapplicable to the case made by the evidence, and calculated to mislead the jury. The indebtedness shown was that of appellant as treasurer of the mining company, and as between him and appellees, who were acting as his agents in making the advances for him, it was the same as his individual indebtedness.

The agreement was between mutually interested parties. As treasurer, appellant was liable for the sums he had authorized the manager to draw upon him for and promised to pay. The advances by appellees were made at appellant's request and for his accommodation. Considering the relation of the parties to the mining company, and to each other, it cannot be said that the promise of appellant was to pay the debt of a third party. It amounted simply to an agreement for the transfer to appellees by appellant of certain funds in his hands in settlement of advances therefor by appellees who stood in the same relation to appellant that the manager did whom the appellant had authorized to draw upon him for said funds. In short, it was a promise to pay the liabilities of the promisor, and not such a case as can be brought within the statute of frauds, which was pleaded in bar of the agreement.

As there was no error in refusing the instruction in question, there was, for the same reason, no error in overruling the demurrer to the complaint.

Error is also assigned, "because the court, in overruling the demurrer to the complaint, allowed but two days in which to file an answer."

In support of this assignment, counsel for appellant rely upon section 74 of the code as amended by the law of 1879 (see laws 1879, p. 216), which it is insisted fixes ten days "as the general time

in which all steps in regard to demurrers, answers or applications are to be taken." In answer to this, it is only necessary to say that counsel are mistaken; the provision of the statute cited refers only to demurrers and amended pleadings filed and allowed *in vacation;* while the same section declares that when such proceedings are had "during the term of court, the court shall fix the time by order, to expedite the trial."

Another assignment of error is predicated upon the refusal of the court to grant a change of venue on the petition therefor by the appellant.

We think the petition fails to set forth facts sufficiently, either in respect to the alleged prejudice of the judge, or of the inhabitants of the country to warrant us in interfering with the ruling of the court under the discretion vested therein by the statute touching applications of this character. Beyond the bare allegation of prejudice, sufficient facts should be set out by the petitioner from which the court may be able to judge of the probable truth or falsity of the averments, otherwise a change of the place of trial, with its involved expense and delay, might go, as a matter of course, upon the mere petition therefor, supported by an indefinite affidavit, as in this case.

The drafts, or orders, of the manager drawn upon appellant and paid by appellees were received in evidence over the objection of appellant; and, against like objection, testimony was heard as to what was the arrangement or agreement between appellant and appellees under which the payments in question were made by appellees, and the ruling of the court in admitting such evidence is assigned for error.

This evidence was pertinent to the issue made by the pleadings; and, in accordance with our view sustaining the validity of the agreement, the evidence in question was competent.

There was no error in overruling the motion for new trial.

Perceiving no error in the record, the judgment will be affirmed.

SUPREME COURT OF OREGON.

STATE *v.* DRAKE.

Filed November 13, 1884.

IRRELEVANT LANGUAGE ADDRESSED TO JURY—BILL OF EXCEPTIONS.—Objections taken to irrelevant language addressed to the jury by counsel will not be reviewed by the appellate court, unless the same are embodied in a bill of exceptions.

CO-DEFENDANT IN CRIMINAL PROSECUTION—EVIDENCE OF.—A defendant in a criminal case, both at the common law and under section 166, title 1, chapter 16, of the criminal code, is incompetent to testify for and on behalf of one jointly indicted with him, although the defendant offered as a witness is not on trial at the time.

NEW TRIAL—EVIDENCE OF ACQUITTED CO-DEFENDANT—DISCRETION.—Whether a new trial will be granted on behalf of a defendant convicted in a criminal case, because a co-defendant tried at the same time and acquitted, or, upon severance, subsequently tried and acquitted, is a material witness for him, *quaere.* Conceding, however, that it would be a matter addressed to the sound judicial discretion of the court below, and in a proper case ought to be allowed, the record here does not show an abuse of such discretion.

APPEAL from the circuit court of Marion county. The opinion states the facts.

W. M. Kaiser and *Tilmon Ford*, for the appellant.

George E. Chamberlain, District Attorney, W. H. Holmes and *W. G. Piper*, for the respondent.

LORD, J. The defendant was jointly indicted with Mary E. Swartz at the June term, 1884, of the circuit court for Marion county, for the crime of murder. A separate trial having been granted, the cause came on for trial at the term specified, and resulted in a verdict of guilty as charged in the indictment. A motion for a new trial was interposed, supported by the affidavit of the defendant, which, after argument, was overruled, and the defendant, by his counsel, duly excepted thereto. From the order of the court overruling this motion, the defendant appeals to this court and assigns the following as grounds of error.

1st. The court erred in allowing the attorney for the prosecution, against objection, to argue that because defendant was in the habit of carrying a pistol, showed that he was a bad man, and that this habit of carrying a pistol was a circumstance indicating guilt.

2nd. The court erred in allowing the counsel for the prosecution, in his closing argument, to refer to what the newspapers said about crime, against the objections of counsel.

3rd. The court erred in allowing the attorney for the prosecution, against the objection of my counsel, as will fully appear by the affidavit hereto attached, and made a part thereof—to refer to and comment upon the Cincinnati riot, which he claimed was caused by the jury acquitting the defendant, then on trial.

4th. The court erred in allowing the attorney for the prosecution in his closing argument, against objection of my counsel to intimate and argue that there would be a riot here, if the jury did not return a verdict of guilty against me.

5th. Because the defendant can, if granted a new trial, prove by Mary E. Swarts, the co-defendant, who has, since defendant's trial, been acquitted, the facts as stated in the affidavit hereto attached, which said facts are material to defendant's defense; and defendant could not produce the said Mary E. Swarts as a witness in his behalf at said term, for the reason that she was then jointly indicted with this defendant.

As the first four assignments of error, so far as this case is concerned, involve a decision of the same question; they will be considered together. And, substantially, that question is, whether the objections, or matters assigned as error, are presented by this record so as this court can take judicial cognizance of them. Evidently, in the preparation of their brief, counsel for the defendant treated the record as containing a bill of exceptions; but, in the oral argument, it was claimed that the ruling of the court upon the affidavit and motion, which were in writing, and upon file in the court, being upon the record, it brought the matter within the pur-

view of section 230 of the code of civil procedure, and rendered a bill of exceptions unnecessary to enable this court to review it. Originally, at common law, no matter could be assigned as error except such as appeared in the record, and as the parties were bound by it, as absolute verity, they were not allowed to impugn or contradict it by averment. The rulings of the court in the progress of the trial, and often of vital importance as affecting the result, did not appear in the record, nor were there any means of introducing them into it, and the consequence was, that the party believing himself aggrieved was without remedy or redress. To obviate and remedy this defect, the statute, Westm., 2, 13, ed. I, ch. 31, was passed, which established in the practice what is now known as a bill of exceptions. Its object was to bring into the record the particular matter excepted to, and supposed to be error, and which the record otherwise would not disclose, to lay the foundation for proceedings in error. It was required, therefore, to be in writing, clearly stating the point wherein the court is supposed to have erred, with the necessary facts and circumstances; to attest the accuracy and authenticity of which, it must be signed and sealed by the judge who made the ruling or decision: Bacon's Abridg. "Bill of Exceptions"; 2 Chitty's Blackstone, 372; 1 Archbold's Nisi Prius, 43; Huddleson v. State, 7 Baxter, 56; Berry v. Hale, 1 How. (Miss.), 318; Berly v. Taylor, 5 Hill, 579; Kitchell v. Berguin, 21 Ill., 45. It is not thought that chapter 2, title 7, page 151, of exceptions in our code has renovated or affected in any substantial particular, the practice as it existed at the common law. The purposes and objects of a bill of exceptions, under the code, is to subserve the same end, and to introduce matter which the record would not otherwise disclose for the information of the court having cognizance of the case in error. Now, it is perfectly clear that the matter alleged in the affidavit of the defendant could in no way constitute any part of the record, except through the instrumentality of a bill of exceptions. It is not intended in such cases that a party may make a statement in writing of what he conceives to be his grievances, and by swearing to it and filing it, and then moving for a new trial, and the court overrules the motion, he has incorporated the matter into the record, so as to make it a part thereof, and to enable this court to review it. If this can be done, the statement of exceptions, provided by the code, to be settled, signed and allowed by the court before whom the case was tried, to bring such matter into the record, and lay the foundation for appellate review, becomes a useless and meaningless thing. The whole business may be accomplished without the aid of the court, and untrammeled by its authority. It has always been supposed that the record of a court is made up under the solemn sanction of the court, and to make exceptional matters, occurring during the progress of the trial, a part of such record, it must be so ordered by the court. Irrelevant language, addressed to the jury, is no part of the record of that court, until made so by bill of exceptions under judicial

order. But when made, and properly before us, we have not failed to condemn it when its harmful results were manifest: Terry v. Mulvaney, 8 Or., 520. But, without putting such matter in a bill of exceptions, and authenticating it in the manner required by law, the court cannot receive it, because there is no legal evidence before the court that it contains a correct record of the proceedings: Edwards v. Kearney, 13 Neb., 532.

The next assignment of error, is the overruling of the defendant's motion for a new trial, because, if granted, the defendant would be able to prove, by Mary E. Swartz, a co-defendant, who, since the trial of the defendant, has been acquitted, the facts as stated in his affidavit, which facts are claimed to be material to his defense; and that he could not produce the said Mary E. Swartz as a witness in his behalf at said trial, for the reason that she was then jointly indicted with him. It is manifest from the statement of this objection, that counsel for the defendant did not construe the act to amend section 166, title 1, of chapter 16, of the criminal code, as affecting the disqualification of a co-defendant, or they would undoubtedly have availed themselves of this privilege in behalf of the defendant at his trial. It is, however, insisted by counsel for the state, that the effect of the amendatory act was to remove the disqualification which previously existed, and render a co-defendant a competent witness; and that the failure to call such witness to testify, for the reason of the supposed incompetency, cannot avail upon this motion. We are of the opinion that the amendatory act did not affect the law in respect to co-defendants, and that this is clear from its scope and purpose. Section 166, of the criminal code, provides that: "A defendant in a criminal action or proceeding cannot be a witness for or against himself, nor for or against his co-defendant, except as provided in sections 162 and 163."

Section 162 provides: "When two or more persons are charged in the same indictment, the court may, at any time before the defendant has gone into his defense, on the application of the district attorney, direct any defendant to be discharged from the indictment so that he may be a witness for the state," and section 163: "When two or more persons are charged in the same indictment, and the court is of the opinion that, in regard to a particular defendant, there is not sufficient evidence to put him on his defense, it must, if requested by another defendant then on trial, order him to be discharged from the indictment, before the evidence is closed; that he may be a witness for his co-defendant." But by the act to amend section 166, session laws, 1880, p. 28, it was provided that: "In the trial of an examination upon all indictments, complaints, information and other proceedings, before any court, magistrate, jury, grand jury or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so charged or accused, shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being

left solely to the jury, or to the discrimination of the magistrate, grand jury or other tribunal, before which such testimony may be given, provided, his waiver of said right shall not create any presumption against him; that such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal." The effect of this amendment was only to remove the disqualification of the person charged and on trial, and to make him, at his own request, but not otherwise, a competent witness. There is no reference whatever to co-defendants not on trial and to whom, from the language employed, it can be made to apply. Under a statute of somewhat similar import, in State v. Dee, 14 Minn., 42, the court say: "The language, 'shall at *his* request, but not otherwise, be deemed a competent witness,' can hardly apply to a co-defendant not on trial. A co-defendant not on trial, having no interest in the separate trial of his co-defendant, is not to be presumed to be in court. He may, and, in many cases, must be in jail. What object could he have in requesting permission to testify even if opportunity were given him? How does he acquire a standing place in court from which to make the request? He is neither a party to the trial, nor the attorney of the party. This view is, we think, still further supported by the subsequent language of the amendment, which goes on to provide as follows: Nor shall the neglect or refusal to testify, create any presumption against the defendant. How is it possible that the *neglect* or *refusal* of co-defendant, not on trial, to testify, could create any such presumption, if such co-defendant is competent *only* upon his own request." It is hardly necessary for us to add anything by way of comment. We are satisfied that the amendment cited did not affect the disqualification of the co-defendant not on trial, as a witness. He remains, under the code, as at common law, in a criminal case, incompetent to testify for and on behalf of one jointly indicted with him, and this though the defendant offered as a witness, be not on trial with him at the time: Wharton's Criminal Evidence, sec. 455, and cases cited; 1 Greenl. Ev., 358–363–379; Roscoe's Crim. Ev., 153–4–5; Commonwealth v. Marsh, 10 Pick., 57; Stauss v. Commonwealth, 74 Penn. St., 458; State v. Dumphey, 4 Minn., 438.

The reasons for the rule are thus stated by Christiancy, J., in Grimm v. The People, 14 Mich., 306: "1st. That if the party jointly charged were allowed to testify for the other, both would be likely to escape conviction by perjury, for which the greatest possible temptation would thus be offered; and, 2nd, as the party, if thus allowed to testify, could not be compelled to answer any question which might tend to criminate himself, the substantial benefit of a cross-examination would be lost, and the witness, being thus allowed to state those facts which might tend to aid the prisoner and screen himself, and to withhold those which would tend to the conviction of either, his testimony would be likely rather to conceal and per-

vert, than to elicit the truth." But does the fact that since the defendant's trial the co-defendant has been acquitted, and thereby become a competent witness, furnish a sufficient ground for a new trial. A new trial will not be granted for the purpose of enabling the appellant to use the testimony of one who was tried jointly with him, and acquitted: 3 Wharton's Crim Law, secs. 3,341, 3,359, 3,360; 1 Bishop on Crim. Procedure, sec. 1,033. In The People v. Vermilyea, 7 Cow., 383, the court say: "Another ground is, the acquittal of Davis. He has become a competent witness by virtue of his acquittal; but the absence of all authority on the point, is a stronger argument against the insufficiency of this ground for granting a new trial. Such a rule would be highly inconvenient in practice." And in Sawyer v. Merrill, 10 Pick., 18, the court say: "On general principles, the court doubt, as a matter of policy and convenience, an application like this ought to be granted. The petitioner would put it on the ground of newly discovered evidence; but that is incorrect. It is the case of an incompetent witness having become competent. To grant the petition would be to make every case of a witness becoming competent a ground for a new trial. After a trial, it is generally easy to find some additional or cumulative evidence, but the rule is, that there shall not be a new trial, unless it is newly discovered evidence, and to some new point or ground of action or defense, to which the evidence given on the former trial did not apply:" State v. Bean, 36 N. H., 128.

The case before us is one of an incompetent witness having become competent, and the motion is made not on the ground of newly discovered evidence, but to obtain the evidence of an acquitted co-defendant whose evidence the defendant claims is important and now within his power to produce, but which the rules of law had put beyond his reach at his former trial. In Lyles v. State, 41 Tex., 172, it was held, that when there are two parties jointly indicted and tried, one of whom is acquitted and the other convicted, it is error in the court below to refuse a new trial to the party convicted, when his motion is sustained by the affidavit of the party acquitted to facts material to the defense, which by reason of the joint trial could not be used in evidence. In Rich v. State, 1 Tex. Ct. App., 206, two defendants being jointly tried for murder, one was acquitted, but the other was convicted of murder in the second degree, whereupon the latter moved for a new trial on the ground that his acquitted co-defendant was a material witness in his behalf, and supported his motion with the witness' affidavit disclosing his presence at the renconter, and statements respecting it. And it was held that the witness was rendered competent by his acquittal, and no diligence could have procured his testimony prior thereto, wherefore if his testimony was material to the defense, there may have been error in refusing a new trial. In Williams v. State, 4 Tex. Ct. App., 5, it was held that when joint defendants sever, if one be convicted and subsequently the other be acquitted, material testimony of the latter is cause for a new trial of the former: Hubener

v. State, 3 Tex. Ct. App., 459. Under these authorities it is immaterial whether the defendants be jointly or severally tried, if the evidence of the acquitted co-defendant is material, it may furnish a ground for a new trial. But these cases show that the motion for the new trial must be sustained by the affidavit of the party acquitted, to facts material to the defense, and which, as we understand it, would render a different result probable on a re-trial. If we were disposed to adopt the reasoning of these cases last cited upon the facts to which they are applied, it could not avail the defendant upon this record. The motion is not supported by the affidavit of the acquitted co-defendant, nor are the facts which the defendant alleges he can prove by his acquitted co-defendant of that character which would be considered material for his defense, or which would render a different result probable on a re-trial. These facts are at best cumulative, and would only serve to contradict the state's witnesses. As newly discovered evidence such facts would be clearly insufficient, and to what other ground they might be assigned under the provisions of our code for a new trial, it is difficult to understand. In Holcomb v. State, 8 Lea. (Tenn.), 426, the court say: "We find no authority holding that the one convicted is entitled to a new trial as a matter of right in order to have the benefit of the testimony of the one acquitted." At most, then, it can only be matter resting in judicial discretion and that this court never reviews, except for abuse of this discretion.

Whether a new trial will be granted on behalf of a defendant convicted in a criminal case because a co-defendant tried at the same time and acquitted, or upon severance, subsequently tried and acquitted, is a material witness for the convicted defendant, it is not necessary for us to decide, but conceding for the purposes of this case that it would be matter addressed to the sound judicial discretion of the court below, and in a proper case ought to be allowed, the record here does not show a case in which such discretion has been wrongfully exercised, and therefore the judgment must be affirmed.

SUPREME COURT OF NEVADA.

SIMPSON *v.* WILLIAMS.

Filed November 28, 1884.

APPROPRIATION OF WATER—RIGHTS OF APPROPRIATORS.—As between two appropriators of the water of the same stream, the one whose appropriation was first made, has the prior right to the use of such water.

THE SAME—AMOUNT OF WATER TO WHICH APPROPRIATOR IS ENTITLED.—The amount of water to which a prior appropriator is entitled, is limited to the amount actually applied to the purpose for which the appropriation was made.

POSSESSION OF LAND—PRESUMPTIONS ARISING FROM—OCCUPANT.—One lawfully in possession of land may maintain an action for any interference with the possession thereof. And the actual occupant will be presumed to be lawfully in possession unless the contrary appears on the trial.

APPEAL from a judgment of the fifth judicial district court for Nye county, entered in favor of the defendant and from an order denying plaintiff's motion for a new trial. The opinion states the facts.

D. S. Truman, for the appellant.

Curler & Bowler, for the respondent.

BELKNAP, J. This is an action to determine conflicting rights to the waters of Duckwater creek. The district court rendered a decree in favor of defendant, predicated upon the fact that his appropriation of the water was prior in time to that of the plaintiff.

It is contended that this conclusion is unsupported by the evidence.

It was shown at the trial that during the year 1866 J. D. Page had made claim to the land occupied by defendant Williams and diverted several hundred inches of the waters of the creek. Page made no use of the water, and his diversion of it appears to have been for a speculative purpose. But this is immaterial under the facts of the case, because in the following year he sold his rights to Withington, and he, as early as the spring of 1868, commenced using the waters for the purpose of irrigation.

The first appropriation of the waters by the predecessors in interest of the plaintiff was made in the fall of 1868.

There is no conflict in the testimony upon these facts, and the court correctly determined the question of priority of appropriation in favor of defendant.

The district court awarded defendant the prior right to use two hundred inches of water.

It is claimed that this allowance is unsupported by the evidence.

The witnesses for the defendant generally testified that since the year 1870 about one hundred acres of the lands occupied by defendant had been cultivated for grain and vegetables, and about fifty acres had been kept as meadow land. They estimated the volume of water used for the purpose of irrigation at from one hundred and thirty inches to one hundred and fifty inches. Those who testified upon the point gave as their opinion that lands cultivated for grain or vegetables required an inch of water per acre, and that hay or grass lands required about half that amount.

One witness, however—A. M. Self—testified that "one hundred acres of grass land requires one hundred inches of water." And it was shown that during the years 1874 and 1875 two hundred acres of the land—one hundred of which was cultivated and the remainder meadow—was irrigated. This was the maximum acreage irrigated.

The amount of water to which defendant is entitled is limited to the amount actually applied to the purposes of irrigation. In determining this amount, the court apparently disregarded the testimony of the witnesses who fixed it at from one hundred and thirty inches to one hundred and fifty inches, and, accepting the testimony of the witness Self, concluded that the amount of water actually used to irrigate the two hundred acres of land must have been two hundred

inches. The finding is further sustained by the testimony of Withington, who said that from the spring of 1867 until the summer of 1878 two hundred and fifty inches of water was used throughout the irrigating season of each year.

The evidence was conflicting as to the quantity of water used. It is the peculiar province of the trial court to determine controverted questions of fact, and this court cannot interfere with such determination where there is a substantial conflict in the evidence.

Appellant also contends that defendant has not such an interest in the land as enables him to maintain the affirmative defense of ownership pleaded by him. It appeared that the land was owned by Withington, between whom and defendant there existed a contract of purchase and sale.

Defendant had been in possession of the premises for some time, but the nature of his possession is not disclosed by the record. No objection, however, was made to the introduction of testimony proceeding upon the theory of a right in Williams to the possession of the land and the use of the waters of the creek. Under these circumstances, we must disregard questions first made upon motion for new trial, and which could have been obviated by amendment of the pleadings, had objections been seasonably taken, and consider whether the facts of defendant's (Williams) case constitute a defense to this action. The justice of the case requires that he should be treated, for the purposes of this appeal, as the lawful occupant of the premises. As such occupant he could maintain an action for any interference with his rights injurious to his possession. The rule is thus stated in Mr. Dicey's Treatise upon Parties to Actions, p. 333: "The person to sue for any interference with the immediate enjoyment or possession of land, or other real property, is the person who has possession of it, and no one can sue merely for such an interference who has not possession." As the result of this principle, the author states, at page 340, "that when land is in the hands of a tenant, the person to sue for a trespass is the tenant and not the landlord."

The judgment and order of the district court are affirmed.

IRWIN *v.* STRAIT ET AL.

Filed November 28, 1884.

APPROPRIATION OF WATER—RIGHT OF, WHEN BEGINS—RELATION.—In determining the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water. The right to the use of the water relates back to the time when the appropriator begins his dam, ditch, flume or other appliance, by means of which the appropriation is effected; provided, the enterprise is prosecuted with reasonable diligence. Under the circumstances of this case, a delay for one season in using the water was not unreasonable.

APPEAL from a judgment of the fifth judicial district court for Nye county, entered in favor of the defendants, and from an order

denying plaintiff's motion for a new trial. The opinion states the facts.

D. S. Truman, for the appellant.

Curler & Bowler, for the respondents.

BELKNAP, J. The original parties defendant in this cause were the same as in Simpson v. Williams, *ante*. The appeal in this case, as in that, is directed against the decree rendered in favor of respondent Williams. To each suit he defended as owner of the Page or Withington ranch on Duckwater creek. The questions presented upon appeal are the same in each case, except the question of prior appropriation of the water. The different plaintiffs acted independently of each other in diverting the stream, and their acts in this regard must be separately considered.

Plaintiff Irwin first diverted the water upon the twenty-first day of August, 1867. For the purpose of this case we shall treat his right as commencing by relation at this time.

The premises in the possession of Williams, and of which he must be considered owner upon this appeal, were purchased in the month of April, 1867, by Withington from Page for farming purposes. During the year 1866, Page had diverted a portion of the waters of the stream. This diversion may have been for a speculative purpose, and we shall not consider it as the inception of a right. The testimony is not clear as to the use made of the water by Withington during the year 1867, save that it continued to flow as diverted by the dam and ditch constructed by Page. In the spring of 1868, and each succeeding year, Withington and those claiming through him have employed the water for irrigating cultivated lands.

Upon these facts, when did the right of respondent, as successor in interest to Withington to the use of the water, commence?

In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume or other appliance, by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.

During the year 1867, Withington did no particular act manifesting an intention to appropriate the water, further than to maintain its flowage upon the land. It was unnecessary for him to do more. The diversion made by Page was suitable to his contemplated appropriation, and a different diversion would not have strengthened his claim. We do not think that in exercising reasonable diligence to appropriate the water, Withington was bound to use it for irrigation during the year 1867. It may have been impracticable by reason of the season or the difficulties incident to an unsettled country, to have applied the water to irrigation the same spring in which he made his purchase. Under the facts

we think his appropriation should date by relation to the time he acquired the property in April, 1867.

The remaining exceptions will not be particularly considered. They were determined adversely to appellant in Simpson v. Williams, and the same ruling will be made in this case.

The judgment and order of the district court are affirmed.

JAMES v. LEPORT.

Filed November 28, 1884.

JOINDER OF DEFENDANTS—INCONSISTENT DEMURRERS.—A defendant having demurred to a complaint on the ground that his co-defendant was improperly joined, cannot, after the complaint has been amended by omitting such party, demur thereto on the ground that he should have been joined.

APPEAL from a judgment of the second judicial district court, Ormsby county, entered in favor of the defendant. The opinion states the facts.

R. M. Clarke and *N. Soderberg*, for the appellant.

A. C. Ellis, for the respondent.

BELKNAP, J. This action was commenced in justice's court against Alexander Leport and Richard Kirman.

It appeared that the determination of the action necessarily involved questions of title to real property, and the cause was thereupon certified to the district court. The complaint was amended in the district court. Defendant demurred to the amended complaint upon several grounds, among others, that Kirman was not a proper party defendant. The demurrer upon this point was confessed, and upon motion of plaintiff the court dismissed Kirman as a party defendant; other amendments were made and the cause proceeded to trial against Leport alone. Defendant recovered judgment. A new trial was granted. At the second trial plaintiff amended his complaint to conform to a ruling of the court, made during the trial, whereupon defendant again demurred upon the ground, among others, that Kirman was a necessary party defendant. The demurrer was sustained. The complaint was again amended and Kirman made a defendant without leave of the court. Plaintiff asked leave to make him a party. Defendant resisted the application and it was denied, and Kirman's name stricken from the last mentioned amended complaint. To this pleading defendant demurred upon the ground that Kirman had not been made a party. The demurrer was sustained; plaintiff refused to amend, and judgment was rendered against him.

It is unnecessary to determine whether Kirman should have been a party to the litigation. That question was eliminated from the case when the plaintiff, accepting the position of the defense upon demurrer, dismissed him. The defendant is estopped from insist-

ing upon a position inconsistent with his former position. He cannot be allowed to affirm at one time and deny at another—to "blow hot and cold" with reference to the same transaction. He cannot object that Kirman is a defendant, and, upon Kirman being dismissed, object that he is not a defendant. Justice and the propriety of judicial proceedings require a party to abide a ruling brought by his own act.

Judgment reversed and cause remanded.

SUPREME COURT OF CALIFORNIA.

No. 7,847.

DYER v. HEYDENFELDT.

Department Two. Filed November 29, 1884.

GRADING STREET IN SAN FRANCISCO—ORDER FOR—NOTICE OF INTENTION.—The board of supervisors of San Francisco, upon the recommendation of the superintendent of streets, were authorized, under the statute of 1872, to give notice of their intention to order that Broadway, from the west line of Buchanan street to the west line of Webster street, be graded, without any petition therefor, when two blocks upon each side of the said portion of Broadway had been graded.

THE SAME—RECOMMENDATION THAT WORK BE DONE—FINDINGS.—In an action to enforce the lien of an assessment for such work, a finding that the same was ordered without the recommendation of the superintendent of streets, is erroneous, when no such issue is raised by the pleadings, and neither party introduced any evidence thereon.

DISMISSAL OF ACTION AS TO CERTAIN DEFENDANTS — PRACTICE.—The dismissal of such actions as to defendants not having any interest in the land assessed, is not error prejudicial to the other defendants.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. M. Wood, for the appellant.

Bishop & Fifield, for the respondent.

THE COURT. The court found that before the board of supervisors gave notice of their intention to order that Broadway, from the west line of Buchanan street to the west line of Webster street, be graded, "two blocks upon each side of the above-mentioned portion of said Broadway street" had been graded. That being so, the board of supervisors were authorized, upon the recommendation of the superintendent of streets, etc., to give notice of their intention to order said grading without any petition therefor: Stat. 1872, chap. DLXII, sec. 4, p. 806.

But the court also found that the work was not ordered upon the recommendation of said superintendent. This finding is attacked on the ground that there is no evidence to support it. It was unnecessary for the plaintiff to allege what proceedings had been had prior to the issuance of the assessment, diagram and certificate: Id., sec. 13. And the defendant did not allege in his answer that the

work was not ordered on the recommendation of said superintendent. In the absence of any such averment in the answer, the fact was not in issue. Neither party introduced any evidence which tended to prove or disprove that the superintendent had recommended that the work should be ordered. On this ground, we think the motion for a new trial ought to have been granted.

It does not appear that any objection was made to the dismissal of the action as to all the defendants except the respondent. In Clark v. Porter, 53 Cal., 409, there was an objection to the dismissal of the action as to any of the defendants. It is found that none of the defendants, as to whom the action was dismissed, had any interest in the land assessed. That being so, the dismissal could not prejudice those as to whom the action was not dismissed.

Judgment and order reversed.

No. 8.515.

JESSEN *v.* SWEIGERT.

Department Two. Filed November 29, 1884.

OWNER OF BUILDING—NEGLIGENCE—INJURY FROM AWNING.—An owner of a building who erects an awning thereon over a public street, or who allows an awning erected by a prior owner to remain, under a license so to do from the city authorities, on condition that the same be securely fastened, is liable to any one who, without fault, is injured through the owner's neglect to keep the awning in repair. Such liability exists although at the time of the injury the building was occupied by a tenant.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

Loughborough & Newhall, for the appellant.

A. P. Needles, for the respondent.

SHARPSTEIN, J. If the defendant had both *owned* and *occupied* the building to which the awning, that fell on the plaintiff, was attached, the evidence, indubitably, would be sufficient to justify the verdict. Bnt the defendant, while owning the building, did not occupy it. It was occupied by a tenant, under a lease, in which the defendant did not covenant to keep the premises in repair; and it is urged by defendant's counsel that section 1,941, civil code, did not impose on the lessor of this building any greater or other obligations in that respect than the common law did. Conceding that to be so, is not the evidence sufficient to justify the verdict? The fact of the awning having been suspended over the sidewalk by a prior owner of the building is not controverted. And there is evidence tending to prove that prior to the accident the defendant was told that the awning was in an unsafe condition, and that on being so informed she expressed an intention to have it repaired. This she denied, when

testifying in her own behalf. There being a material conflict in the evidence on this question, the jury alone could determine it.

In addition to the evidence above referred to, the plaintiff introduced an ordinance which prohibits any person owning or occupying any building, fronting upon any public street, from constructing or maintaining any awning before such building, unless such awning be securely placed. Conceding that this constituted a license by virtue of which the owner of the building was authorized to erect or suspend an awning over a public street in front of his premises, it was a license to do so on condition that such awning should be securely placed. And so long as it continued to be so, it might be maintained. As between himself and the public the owner by erecting the awning became obligated to make and keep it secure. If the owner had covenanted with her tenant to keep the premises in repair, any one injured by reason of her failure to do so might have maintained an action against her or the tenant. Instead of entering into such an agreement with the tenant, in respect of this awning, the owner did so with the public. In Whalen v. Gloucester, 4 Hun., 24, the defendant had under license similar to that above referred to, made a hole in a sidewalk and neglected to keep the cover of it in a proper condition. The premises were occupied by a tenant under a lease which contained a covenant that the lessor should repair, etc. Commenting on this, the court said: "It seems to be clear, therefore, that the defendant is liable, on both theories herein presented, namely, *upon her obligation to the public in her use of the street for her private purposes*, and upon her failure to keep the premises in repair, as between her tenant and herself, even if such relation of landlord and tenant and the consequent possession of the latter might otherwise excuse her."

Where one has secured a privilege from the public on a condition, he cannot, after availing himself of the privilege, avoid his obligation to perform the condition by leasing the premises. Here the awning was erected by a former owner of the building, and has been maintained by the present owner, doubtless for her own profit. The portion of the building under the awning was used for a purpose which may have made an awning very convenient, and the fact of its being there may have enchanced the rent. Under these circumstances we do not doubt the liability of the defendant to any one who, without fault, was injured through her neglect to keep the awning securely in place.

It follows, therefore, that the instructions given by the court were as favorable to the defendant as the facts warranted; and that the court did not err in refusing to give those which it refused to give. The exceptions taken at the trial are, in our opinion, without merit.

Judgment and order affirmed.

THORNTON, J., and MYRICK, J., concurred.

No. 8,499.

STOUT, EXECUTOR &c. v. HASTINGS.

Department One. Filed December 2, 1884.

FINDINGS HELD SUFFICIENT TO SUSTAIN THE JUDGMENT.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

Calhoun Benham and *Bishop & Watt*, for the appellant.

Jas. S. Reynolds, for the respondent.

THE COURT. The findings cover all the material issues raised by the pleadings, and are sufficient to sustain the judgment.

Judgment affirmed.

No. 7,909.

GRAY v. NOON ET AL.

Department Two. Filed December 2, 1884.

FINDINGS—PRIOR JUDGMENT—DECISION OF COURT.—Where a prior judgment is pleaded in bar of an action, a finding that on a certain day a court rendered "its decision" in favor of the defendants, is not a finding that a judgment was rendered.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

F. William Reade, for the appellant.

J. T. Noon, for the respondents.

THE COURT. In this cause, which is an action on an undertaking given on procuring an injunction, a judgment of the justice's court of the city and county of San Francisco, between the same parties for the same cause of action, was pleaded in bar.

The court, as to this defense, found the facts as follows:

"That an action was brought upon said bond in the justice's court, city and county of San Francisco, May (*sic*) 25, 1879, for the sum of two hundred and ninety-nine dollars and ninety-eight cents damages, and that said court upon the eighth of April, 1879, rendered its decision in favor of the defendants and against the plaintiff."

This does not find any judgment in favor of defendants and against the plaintiff. It is a finding that the court rendered its decision in favor of defendants and against the plaintiff. Whether any judgment was pronounced or entered on this decision does not appear anywhere in the findings. The decision may have been one in the nature of a non-suit, and if a judgment had been entered in accordance with such a decision, it would not have been a bar. The findings thus fail to cover a material issue, and are, therefore, defective.

Under the circumstances, we think it best to reverse the judgment and order denying a new trial, and remand the cause for a new trial, and it is so ordered.

WEST COAST REPORTER.

WHOLE No. 51. DECEMBER 18, 1884. VOL. IV. No. 12.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

HAMBLETON *v.* DUHAM ET AL.

December 8, 1884.

REMOVAL—FACTS MUST BE STATED IN PETITION.—A petition for removal of a suit from a state, to a national court, on the ground that it arises under the laws of the United States, must state the facts, and point out the contested construction or question arising thereon, which are claimed to give the national court jurisdiction, so that the court can determine, for itself, from the facts stated, the question of jurisdiction.

MUST BE A CONTROVERSY AS TO CONSTRUCTION.—A suit cannot be removed under the second section of the act of 1875, simply because, in its progress, a construction of a law of the United States may be necessary, unless it in part, at least, arises out of a controversy in regard to the effect or operation of some provision in the law upon the facts involved, and the court should be able to determine from the facts stated, that such controversy will arise upon the facts: 96 U. S., 199.

INFORMATION AND BELIEF.—Whether facts stated on information and belief sufficient, at least, doubtful.

R. Clark, Esq., for motion.

J. H. Craddock, J. Lambert and W. C. Belcher, Esqs., contra.

SAWYER, CIRCUIT JUDGE. The jurisdictional facts, attempted to be alleged, are stated in the form, held to be insufficient, in Wolff v. Archibald, 14 F. R., 369: "as defendants are informed and believe." The court there held, that jurisdictional facts must be positively alleged. On this point, the sufficiency of petition is, at least, doubtful.

But, whether that ruling be correct or not, the allegations are insufficient, because they do not state facts, showing that any particular, disputed question of construction of the statute will arise, or how it will arise, so that the court can determine, for itself, from the facts, that the decision will turn upon a disputed construction of the statute. On this point, only, the conclusion of the petitioner is stated.

For all that appears, from the facts stated, the case may be determined entirely upon a disputed question of fact, as, whether the land is, in fact, swamp land, or upland, or some other question of fact. The petition is insufficient, in this particular, under the decision in Trafton v. Nougues, 4 Saw., 179; Dowell v. Griswold, 5 Saw., 39; Gold Washing Co. v. Keyes, 96 U. S., 199.

Cause remanded to the state court with costs.

CIRCUIT COURT, DISTRICT OF OREGON.

UNITED STATES v. BARNHART ET AT.

December 8, 1884.

INDIAN COUNTRY—UMATILLA RESERVATION.—The Umatilla Indian reservation is a place within the geographical limits and general jurisdiction of the state of Oregon; but it is also a tract of country to which the Indian title is not extinguished, and which has been permanently set apart by treaty as a reservation for the sole and exclusive use of the Indians thereon, and is therefore "Indian country," within the meaning of that phrase, as used in the revised statutes.

INTERCOURSE WITH INDIAN TRIBES.—The United States has jurisdiction over the intercourse with tribal Indians, and congress may prohibit and provide for the punishment of acts relating to or affecting such intercourse anywhere in the United States.

JURISDICTION OF UNITED STATES COURTS OVER CRIMES COMMITTED ON THE RESERVATION.—The United States courts of the district of Oregon have jurisdiction over all crimes committed on the Umatilla reservation by a white man on the property or person of an Indian, and vice versa, so far as the same have been defined by an act of congress.

PLEA OF AUTREFOIS ACQUIT.—B. and A. were indicted in the United States court for the crime of manslaughter committed in killing Indian William, on the Umatilla reservation, and pleaded to the indictment a former acquittal, from which plea it appeared they had been indicted and tried in the state court for the murder of said Indian, and acquitted, to which plea there was a demurrer: *Held*, That the crime of which the defendants were acquitted in the state court was not the same as that charged in the indictment in the United States court, and therefore the plea was bad.

INDICTMENT for manslaughter. The opinion states the facts.

James F. Watson, for the United States.

W. Lair Hill, for the defendant.

DEADY, J. On November 21, 1884, the grand jury of the United States district court for this district, by an indictment then duly found, accused the defendants of the crime of manslaughter, committed as follows: On May 13, 1884, the defendants, being white men, did "feloniously and willfully" shoot, with a revolving pistol, one William, an Indian, then and there being on the Umatilla Indian reservation, in this district, and belonging thereto, whereof he then and there died.

Afterwards the indictment was remitted to this court for trial.

On November 24 the defendants demurred to the indictment, on the ground that the court had no jurisdiction of the offense: and on November 26 they withdrew their demurrers, and on being arraigned pleaded *autrefois acquit* or a former acquittal of the same charge in the circuit court of the state for the county of Umatilla. From the pleas it appears that on June 16, 1884, the defendants were jointly indicted in said court for the crime of murder, committed in killing the said William on May 13, 1884, in said county of Umatilla, which includes said Indian reservation; and thereafter, to wit: on July 2, 1884, were duly tried therein on said charge, on the plea thereto of not guilty, and acquitted.

To these pleas, the district attorney demurs, for that, the facts stated therein "do not constitute a former acquittal of the offense set forth in the indictment, and do not constitute a bar to the prosecution by the United States for said offense."

In U. S. v. Bridleman, 7 Saw., 243, and in U. S. v. Martin, 8 Saw., 473, it was held that the United States courts of this district

have "jurisdiction of a crime committed on the Umatilla reservation, by a white man upon the person or property of an Indian, and vice versa, provided the crime is defined by a law of the United States, directly applicable to the Indian country, or made so by sections 2,145 and 2,146 of the revised statutes.

The crime of manslaughter, when committed on the high seas or in any place within the exclusive jurisdiction of the United States, is defined by section 5,341 of the revised statutes, as the unlawful and willful injuring of another, without malice, but so as to cause death; and this section was extended to the Indian country, so as include the case of the killing of an Indian by a white man, and vice versa, by sections 2,145 and 2,146 of the revised statutes.

Under section eight of article I of the constitution, the power of congress to provide for the punishment of a crime committed by a white man on the person or property of an Indian, and vice versa, anywhere in the United States, is undoubted.

As was said in the case of the United States v. Bridleman, supra, 249, "Upon the national government is devolved the power and duty to supervise and control the intercourse between the Indians and its citizens; so that, as far as possible, each may be protected from wrong and injury by the other, and in the exercise of this power and the performance of this duty, it is not limited or restrained by the fact that the Indians are within the limits of a state."

But, as congress has not seen proper to confer jurisdiction upon the national courts, of the crimes of murder or manslaughter, growing out of intercourse between the whites and Indians, unless committed in the "Indian country," the only debatable point there ever was in these cases, is, whether the Umatilla reservation is "Indian country," within the meaning of that term, as used in the revised statutes. In the Bridleman and Martin cases, supra, the court held that the reservation was such Indian country; and it appears that the point has since been definitely decided in the same way by the supreme court, in Crow Dog, 109 U. S., 556.

In that case, Mr. Justice Matthews, speaking for the court, says, the term Indian country "applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and [but?] *actually in the exclusive occupancy of Indians*, the authority of congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it."

The Umatilla reservation was made by a treaty negotiated with the Indians now in the occupation of it, on June 9, 1855, and ratified by the senate on March 8, 1859—twenty-two days after the admission of the state into the Union. It was thereby set apart for the "exclusive use" of these Indians, and has been occupied by them, under the care and direction of congress ever since: United States v. Bridleman, 246. And although this reservation was never expressly excepted from the jurisdiction of the state, by either treaty or statute, it is nevertheless territory to which the Indian title has never been extinguished and "actually in the exclusive occupancy of Indians," in pursuance of a treaty of the United States. This brings it within the definition or description of "Indian country," in Crow Dog, supra.

The question is not one of power in the national government, for as has been shown, congress may provide for the punishment of this crime wherever committed in the United States. Its jurisdiction is co-extensive with the subject matter—the intercourse between the white man and the tribal Indian—and is not limited by place or other circumstance.

But congress has only made provision for the punishment of this crime, when committed in the Indian country, as defined or described by law. But this reservation being such Indian country the jurisdiction of this court over the offense is undoubted.

Admitting this proposition, counsel for the defendants contends that in the killing of the Indian William, there was but one crime, if any, committed, for which the defendants were subject to trial by either the state or the United States court, and that whichever of these jurisdictions first took cognizance of the case, took it with the absolute exclusion of the other, and therefore the defendants having been first tried and acquitted on this charge in the state court, the question of their guilt or innocence is res judicata, and they cannot be retried upon it in this or any other court.

This argument assumes that this homicide only involves one crime, of which neither the state or national courts have exclusive jurisdiction, but only concurrent.

Where an act constitutes a crime against two sovereignties—as the state and the United States—there may be a "concurrent" right to proceed against the offender, so that whichever of the two governments first acquires jurisdiction of him, shall be entitled to proceed ad finem litis, without interference with the other.

But in the very nature of things, courts of different sovereignties cannot have concurrent jurisdiction of the same offense, unless it is one arising under some law common to them all—as the law of nations.

Piracy, or robbing on the high seas, is a violation of this common or universal law, and, therefore, the courts of every nation in the civilized world have concurrent jurisdiction of it.

And this being so, a trial in one of them, upon such a charge, is considered a bar to a prosecution therefor in another. As was said

in U. S. v. Pirates, 5 Whea., 197: "It (piracy) is against all, and punished by all; and there can be no doubt that the plea of autrefois acquit would be good in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state."

But there was no crime involved in the killing of Indian William punishable in any court, unless the law of Oregon or the United States made it so. No other power had any jurisdiction over the place where the killing occurred, or the persons concerned in it. Nor could either of these make this killing a crime triable in the courts of the other. Neither is there any law common to both of them, as the law of nations, making this killing a crime, and under which either might take jurisdiction of it to the exclusion of the other. The United States had declared the killing to be murder or manslaughter, according to the circumstances of the case, and provided for the punishment of the persons guilty of it in its own courts.

The state also had a law providing for the punishment of persons guilty of such crimes, when committed within its geographical limits, not excluding this reservation. And while the latter comprehends the unlawful killing of any human being in the peace of the state, the former only extends to such killing of a human being, known as a tribal Indian, by a white man, and vice versa. But the crimes defined by these laws, however similar in circumstances or origin, are legally distinct. They are offenses against different sovereignties and triable in different courts.

In U. S. v. Martin, supra, 478, it is "conceded that the admission of Oregon into the Union upon an equality with the other states, without any special reservation of jurisdiction over the place then known and occupied as the Umatilla Indian reservation, extended the jurisdiction of the state thereover, as to all subjects constitutionally within its power of legislation—such as a crime committed thereon by one white man upon another, and it may be by one Indian upon another.

But as this subject of the intercourse between the white man and the Indian is committed by the constitution to the government of the United States, and as congress has provided for the punishment of a white man for the felonious killing of an Indian upon this reservation, and vice versa, it is not admitted that the state has any authority over such killing, or power to punish or absolve the person committing the same.

Local interference in such cases generally results in the punishment of the Indian and the acquittal of the white man.

Most of the Indian wars which have desolated the frontier of this country, in the last thirty years, have been the direct result of crimes committed by a few lawless and savage white men upon Indians, which the local authorities were powerless or indisposed to punish. As a rule, the proceedings in these tribunals have resulted in one judgment for the white man and another for the red one No white man was ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows.

But it may be, that the state can punish acts growing out of the intercourse between the whites and Indians, until congress vests the jurisdiction thereof exclusively in the national courts: See Coleman v. Tennessee, 97 U. S., 514. But be this as it may, and assuming for the present, that the state has authority to provide for the trial and punishment or acquittal of a white person charged with the commission of a wrong upon the person or property of an Indian, on this reservation, still the pleas of a former acquittal are not good. The crime set forth in these pleas, of which it thereby appears the defendants were acquitted in the state court, is not the same crime charged in this indictment. The former is a crime committed by the doing of an act which violated a law of the state of Oregon, while the latter is a crime arising out of a violation of a law of the United States.

A person living under two governments or jurisdictions, as does every inhabitant of the states of this Union, may commit two crimes by doing or omitting one act—one against the state and the other against the United States. And in such case, the conviction or acquittal of the one crime, in a forum of the state, is no bar to a prosecution for the other, in a forum of the United States.

The maxim—*nemo debet bis puniri pro uno delicto*—now improved and incorporated into the constitution of the United States (V amend.) in the words—"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" does not apply, for the offenses are not the same. This inhibition is a limitation upon the power of the government of the United States and not that of the state: Barron v. The Mayor, etc., 7 Pet., 247; Twichel v. The Commonwealth, 7 Wall., 325, and its only effect is, to restrain the former from putting any person in jeopardy twice for the same offense—that is, an offense defined by its laws and triable in its courts.

It matters not how often a person has been put in jeopardy elsewhere or otherwise on account of the act or conduct constituting such crime, it is no defense to a prosecution therefor in the courts of the United States.

In Fox v. Ohio, 5 How., 432, the supreme court held that the state of Ohio could punish a person for passing a counterfeit coin, though made in the similitude of a dollar of the coinage of the United States.

In U. S. v. Marigold, 9 How., 565, the same court held that the United States had authority to punish the same act, as incident to its power to coin money and regulate the value thereof. In this case Mr. Justice Daniel, speaking for the court, p. 589, said: "This court, in the case of Fox v. Ohio, have taken care to point out that the same act, might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and the federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

In Moore v. The People, etc., 14 How., 17, it was held that the act of Illinois, making it an offense to harbor or secrete a fugitive from labor, was not in conflict with the constitution or any law of the United States, and that an act may be an offense, both against the law of the state and another of the United States. Mr. Justice Grier, in delivering the opinion of the court, p. 20, said: "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the law of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the state, a riot, assault or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly avowed that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment of one in bar to a conviction of the other."

In U. S. v. Cruikshank, 92 U. S., 542, Mr. Chief Justice Waite, in discussing the subject of citizenship of the state and the United States, disposes of this question in the following clear statement that amounts, I think, to demonstration:

"The people of the United States resident within any state are subject to two governments: one state and the other national, but there need be no conflict between the two. The power which the one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault upon the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of the peace, in the assault. So, too, if one passes counterfeited coin of the United States, within a state, it may be an offense against the United States and the state; the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereigns and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such form of government.

He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."

Upon these authorities, and on principle, it is clear that the pleas are bad. The defendants have never been tried for the offense charged in this indictment. For either, the state court before which they were tried had no jurisdiction in the premises, and then the proceeding set forth in the pleas was a nullity, or if it had, it was of an offense against the law of the state and not the United States.

But after all, the most serious argument in support of this defense has been the hardship of being compelled to submit to two trials for one act. But that is no defense to the indictment, however much, in a proper case, it might operate to prevent the finding or prosecution of a second one therefor. As was said by Mr. Justice Daniel, in Fox v. Ohio, supra, 435, in reply to the same suggestion: "It is almost certain, that in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender, who should have suffered the penalties denounced by the one, would not be subjected a second time to punishment by the other, for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or when the public safety demanded extraordinary rigor."

And again, it must be borne in mind that the policy of the state and the United States may be and sometimes is at variance on a given subject. In such case, the former may indirectly hinder or defeat the policy of the latter, if a trial in its courts for a crime growing out of an act which also constitutes a crime against the United States can be used as a bar to a prosecution of the offender in the national courts. For instance, the United States, under the fifteenth amendment, may punish any one who discriminates against the exercise of the elective franchise by another, on account of color: U. S. v. Reese, 92 U. S., 217. But if the state may also declare such an act a crime, it may purposely affix a mere nominal punishment thereto, and thus give any one guilty of such an act an opportunity to seek refuge in its tribunals, before the United States can reach him, and by a trial and acquittal therein, at the hands of a sympathizing jury, or the imposition of a mere nominal punishment, effectually prevent the United States from prosecuting the offender in its own courts, and inflicting such punishment upon him as may be necessary to vindicate its authority and maintain its policy in the premises.

Indeed, if a trial and acquittal or punishment in a state court, under such circumstances, is a bar to a prosecution in this court, for the crime of which these defendants stand indicted herein, it is difficult to see why a pardon by the governor of the state would not have the same effect.

In short, it is impossible that the United States can maintain its paramount authority over the subjects committed by the constitu-

tion to its jurisdiction, and at the same time allow a trial in a state court on a criminal charge growing out of an act that congress has defined to be a crime, to be a bar to a prosecution therefor, in its own courts and according to its own laws.

The demurrers to the pleas are sustained; and the defendants are put to plead to the indictment—guilty or not guilty.

SUPREME COURT OF NEVADA.

STATE, EX REL. ESMERALDA COUNTY *v.* THIRD DISTRICT COURT.

Filed December 8, 1884.

CERTIORARI—JUDICIAL OFFICER—MINISTERIAL ACTS OF.—The action of a judicial officer in regard to matters which are exclusively executive or legislative in their nature, even when the statute requiring the performance of such matters is unconstitutional, cannot be removed by *certiorari*.

THE SAME—APPORTIONMENT OF DEBT OF ESMERALDA COUNTY—ACTS OF DISTRICT JUDGE.—The acts required to be performed by the district judge in determining the amount of the indebtedness of Esmeralda county to be assumed and paid by Lyon county, under the act of 1883, are not judicial in their nature, and cannot be reviewed by *certiorari*.

APPLICATION for writ of *certiorari*. The opinion states the facts.

D. J. Lewis, District Attorney, and *Wells & Taylor*, for the petitioner.

W. E. F. Deal, for the respondent.

HAWLEY, C. J. Petitioner claims that the act annexing a portion of Esmeralda county to Lyon county (stats. 1883, 99), is unconstitutional, in this, that it imposes duties upon the district judge (sec. 6), that are not judicial in their nature, in contravention of article III of the state constitution; that, inasmuch as the boards of county commissioners failed to act within the time prescribed by section two, the entire provisions of the act are absolutely null and void.

Respondents contend that if the acts conferred upon the district judge, by the sixth section, are not judicial in their nature, they cannot be reviewed by this court, in this proceeding. The language of the statute relating to the writ of *certiorari* is clear and plain and fully sustained the position contended for by respondents.

"This writ may be granted on application by any court of this state except a justice's or recorder's or mayor's court; the writ shall be granted in all cases where an inferior tribunal, board or officer, exercising *judicial functions*, has exceeded the jurisdiction of such tribunal," etc.: 1 Comp. L., 1,497.

The act under consideration, requires the county of Lyon to assume and pay a portion of the indebtedness of Esmeralda county as a just and fair compensation for the territory detached, and it specifically provides the method by which the amount shall be ascertained. The ascertainment of this amount does not involve any examination or weighing of testimony, or any determination of any

principle of law, or the exercise of any discretion or judgment. The act provides that "the county of Lyon shall assume and pay to the county of Esmeralda, as its portion of the debt assumed on the annexation of the territory detached by this act, such an equal and proportionate amount of the indebtedness of Esmeralda county as the taxable property in said detached and annexed territory, as shown by the assessment roll of Esmeralda county for the year eighteen hundred and eighty-two, bears to the payment of the entire debt:" Section 2.

In performing this duty the district judge was not required to exercise any judicial functions: People v. Alameda Co., 26 Cal., 248.

The duties performed by the district judge, in pursuance of the statute, did not become judicial acts merely because they were performed by a judicial officer. It has often been deemed that the action of a judicial officer in regard to matters which are exclusively executive or legislative in their nature, even when the act of the legislature requiring such duties to be performed is in violation of the constitutional provision, cannot be reviewed by *certiorari*. Under the laws of this state we are only authorized to review the record and proceedings of inferior courts, officers or tribunals, acting in a judicial capacity and exercising judicial functions.

The acts required to be performed by the district judge, in the event of the boards of county commissioners failing to agree, are not of such a judicial nature or character as to authorize this court to review them upon *certiorari*: People v. Board of Education, 54 Cal., 377; Salino Co. v. Petitioners, 45 Mo., 55; People v. Supervisors, 43 Barb., 234; People v. Bush, 40 Cal., 345; Spring Valley W. W. v. Bryant, 52 Cal., 138.

The writ should, therefore, be dismissed.

It is so ordered.

SUPREME COURT OF OREGON.

TOMPKINS *v.* CLACKAMAS COUNTY.

Filed November 16, 1884.

PROCEEDINGS IN INFERIOR COURTS—JURISDICTION MUST APPEAR OF RECORD.—In proceedings in inferior courts the facts conferring jurisdiction and the power to act in a given case must affirmatively appear upon the face of the record.

COUNTY ROADS—PROCEEDINGS TO OPEN—TERM OF COUNTY COURT.—The proper time for the county court to consider the report of the viewers, in proceedings to open a county road, is during the regular term of the court next ensuing after the plat and survey of said road have been delivered to the county clerk, and not during a special term. A claim for damages filed during such regular term is in time.

APPEAL from Clackamas county. The opinion states the facts.

J. K. Kelly, for the appellant.

T. R. McBride, for the respondent.

LORD, J. By the act approved October 26, 1874, four terms of the county court of Clackamas county were required to be held, to wit: On the first Monday in January, April, July and September in each year, and this act was in force until it was repealed in October, 1882.

On the fifth day of September, 1881, a petition was presented to the county court to appoint viewers to view and lay out a county road as described in the records.

On the same day the viewers were appointed and required to meet on the twenty-fourth day of September, to view and locate the road, "*and to report in writing at the next term of this court.*"

On the ninth day of September, an order in the following words was entered in the minutes of the county court:

"The judge thereof, during this term time, by general order, hereby made and entered of record, does hereby appoint the third Monday in October, the seventeenth day of October, as a term of court, commissioners attending for the purpose of transacting county business."

A report, in favor of establishing a road, was made by two of the viewers. It is dated October, 1881, but has no date of filing on it. The road, as laid out by the viewers, passes through the donation claim of D. D. Tompkins, the defendant, from the southern to the northern boundary, which, before the road was laid out, was an inclosed pasture field.

On the seventeenth day of October, 1881, the report of the viewers was read a first time, and on the eighteenth day of October, it was read a second time, and then the report of the viewers was confirmed, and the road established in conformity therewith.

On the fifth day of January, 1882, the first day of the next regular term of the county court, D. D. Tompkins, the defendant, filed his claim for damages, on account of the injury he would sustain, by the opening of the road, amounting to two thousand five hundred dollars. This claim was rejected by the court, on the ground that it ought to have been presented at the appointed term of the county court, held on the seventeenth day of October, 1881.

The simple question for this court to decide is, whether the appointed term of the county court, held on the seventeenth day of October, 1881, or the regular term fixed by law on the first Monday of January, 1882, was the proper time to consider the report of the viewers.

The statute provides that "the plat and survey of said road or alteration shall be delivered to the county clerk by one of the viewers, on or before the third day of the session of the county court, then next ensuing; and it shall be the duty of the county court, on receiving the report of the viewers aforesaid, to cause the laws to be read on two different days of the same meeting; and if no * * * petitions for damages be filed, the court shall, etc:" Statutes of Oregon, p. 723, sec. 5.

When the statute speaks of *terms*, the terms constituted by law are meant, not special terms, appointed by the court: Commonwealth v. Sessions of Norfolk, 5 Mass., 435; South v. Cutter, 10 Wend., 590.

Besides, the record shows that on the ninth day of September, 1881, the Judge, and not the court, acting as a board of commissioners, appointed a term of court to be held on the seventeenth of October. It does not appear that the commissioners were present, or that they concurred in such appointment, and, in fact, it does not appear from the record that the *court* appointed a term to be held on October 17. It was settled that a court of inferior jurisdiction must show by its record, its authority to act in the particular case, or as it is sometimes expressed, the facts conferring jurisdiction and the power to act in the given case must affirmatively appear upon the face of its record.

Now, when it is considered that it is an inferior court proposing through the device of a mere technicality to appropriate the land of a private citizen for a public road and without compensation and *in invitum*, every consideration of public justice and constitutional right requires that the power or jurisdiction of the court in the premises should be without objection. Certainly if the property of the individual is to be taken without compensation by a mere technicality, the record of the proceeding of the court by which it is done should be beyond the reach of a similar objection.

Now, when the defendant appeared at the regular term of the court in January, 1882, and filed his petition for damages, it was found then that the record did not disclose that the special term of which he had no notice, had not been appointed regularly, and to cure that defect, and cut off his claim for damages at the next regular term in April, a *nunc pro tunc* order was made to cure the defect of the order of September 9, 1884. Can the defendant's rights be taken away in this manner? If they can, then an order of no force, and which is impliedly admitted, may be amended by a *nunc pro tunc* order, so as to be held that notice was given, and thus violate the constitutional rights of the citizen by condemning his property without a hearing, and without compensation. We do not think that a *nunc pro tunc* order will be made except in furtherance of justice. Freeman on judgments says: "The failure of a court to act, or its incorrect action, can never authorize a *nunc pro tunc* entry if no judgment be rendered, or if an imperfect or improper one be rendered, the court has no power to remedy any of these errors by treating them as clerical mistakes." Such an order applies only to correct a record between parties, not to correct or change an order of the court, in relation to its own proceedings, by which injustice will result by depriving a party of his property without compensation or a hearing.

The judgment is reversed.

WALDO, C. J., concurred.

CHADWICK v. EARHART, SECRETARY OF STATE.

Filed November 20, 1884.

SECRETARY OF STATE BECOMING GOVERNOR—SALARY AND DURATION OF TERM OF.—Under section 8 of article 5 of the constitution, upon the removal of the governor from office, or upon his death, resignation or inability to discharge the duties thereof, the secretary of state becomes governor, and, consequently, entitled to the salary appertaining to the office, and continues as such for the remainder of the term of the outgoing governor, although in the mean time he may cease to be secretary of state.

APPEAL from a judgment of the circuit court of Marion county. The opinion states the facts.

R. Williams, for the appellant.

Holmes & Hayden, for the respondent.

WALDO, C. J. Two questions are submitted in this case. The first and principal one is whether, when, under section 8 of article 5 of the constitution of Oregon, the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office. Second. If this question be answered in the affirmative, whether he shall continue to perform the duties of the office for the remainder of the term of the outgoing governor, or shall he perform those duties only so long as he shall continue to be secretary of state.

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state, and in case of the removal from office, death, resignation, or inability both of the governor and secretary of state, the president of the senate shall act as governor until the disability be removed or a governor be elected:" Con. of Or., art. 5, sec. 8.

If the office of governor continue after the governor ceases to hold the office under this section; if the office be not vacant, but shall be lawfully filled by one acting therein directly as the agent of the state, and not in the character of deputy of a governor incumbent, it would seem difficult to distinguish such a person from a governor of right and in fact.

Counsel for the respondent claim that in the contingency provided for in said section 8, the duties of the office of governor become annexed to the office of secretary of state, and are discharged as duties incident to the latter office. In other words, that the duties of the office, but not the office itself, devolve upon the secretary of state.

This position seems to require, first, either that the office of governor should continue vacant during the time the secretary discharges its duties, and that such duties be in some way performed by the secretary of state, as such, consistently with a condition of vacancy, or, second, that the office be filled, and yet he who fills it be in nowise governor, but continue to be merely secretary of state.

In the first place, it is not shown how an office can be vacant, and yet there be a person, not the deputy or *locum tenens* of another, em-

powered by law to discharge the duties of the office, and who does, in fact, discharge them. It is not explained, how, in such a case, the duties can be separated from the office, so that he who discharges them does not become an incumbent of the office. And in the second place, how a person can fill the office of governor, without being governor.

It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given a public office, and one who, duly empowered, discharges its duties, and we have an incumbent in that office. Such is the case here. The secretary of state, by force of the function cast upon him, becomes governor, and consequently entitled to the salary appertaining to the office.

Nor does the language of the section, grammatically considered, bear the interpretation counsel have put upon it. Leaving out the co-ordinate clauses following the first clause, and the sentence reads: "In case of the removal of the governor from office, the same shall devolve on the secretary of state." That is, the office shall devolve. So, taken with each of the succeeding clauses, the word "same" stands for office.

The constitution of the United States, providing for the contingency of a vacancy in the office of president, is nearly the same with the provision of our state constitution providing for a vacancy in the office of governor. The only difference, conceivably material, is, that the constitution of the United States has the words "powers and duties," where the constitution of Oregon has only the word "duties." But it is conceived that duties necessarily imply powers, and that, in legal effect, the language of the two constitutions is the same. See United States v. Bassett, 2 Sto., 404. Of this provision of the constitution of the United States, in Merriam v. Clinch, 6 Blatch., 9 (1867), Mr. Justice Blatchford said: "Three times since the adoption of the constitution, the president has died, and under the provision referred to, the powers and duties of the office of president have devolved on the vice president. All branches of the government have, under such circumstances, recognized the vice president as holding the office of president, as authorized to assume its title, and as entitled to its emoluments. The vice president holds the office of president until a successor to the deceased president comes to assume the office, at the expiration of the term for which the deceased president and the vice president were elected."

The case of the People *ex rel.* Church v. Hopkins, 35 N. Y., 74, is much in point. In 1859 a law was passed in New York, establishing the office of superintendent of insurance. The superintendent was to be appointed by the governor for the term of three years, with authority to appoint clerks, one of whom was to be designated his deputy, and to "possess the powers and perform the duties attached by law to the office of principal, during a vacancy in such office, and during the absence and inability of his principal." The superintendent resigned his office, the duties of which thereupon

devolved upon the deputy. The deputy claimed the salary of a superintendent during the time he discharged the duties of the office, and it was held that he was entitled to such salary. The court, by Grover, J., supported the conclusion reached by references, which are especially pertinent in this case: "But there are precedents, which, though not judicial, I regard as entitled to be considered as decisive of the question under consideration. In the constitution of the state, adopted in 1822, will be found the following provision: 'In case of the impeachment of the governor, or his removal from office, death, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant-governor for the residue of the term, or until the governor, absent or impeached, shall return or be acquitted:' Court., 1822, art. 3, section 6. On the eleventh of February, 1828, the office of governor became vacant by the death of De Witt Clinton, the then incumbent of the office, and its powers and duties, under the above provision of the constitution, devolved upon Nathaniel Pitcher, then lieutenant governor. The question arose, whether he was to be regarded, in the exercise of the powers and performance of the duties so vested in him, as acting governor, or in the performance of the contingent duties of lieutenant governor; and, as a consequence, whether he was entitled to the salary of the former office, or the compensation given to the lieutenant governor for his services as such. It was held by William L. Marcy, then comptroller, that he was to be regarded as the acting governor, and entitled to the salary given by law to that officer. The same question, under the same provision, again arose in 1829, upon the resignation of the office of governor by Martin Van Buren, and the powers and duties of the office devolving upon Enos T. Throop, then lieutenant governor, and were decided the same way by Silas Wright, then comptroller. It will be seen that these questions were identical with that in the present case. We surely shall not go far astray in following the precedents established by these able jurists, wise statesmen and rigid economists."

The principle on which the second question is to be decided, namely, whether the appellant ceases to be governor when he ceases to be secretary of state, seems to be this: If an office be appendant, as the expression is in 1 Leon., 321, to another office, the determination of the first office will determine the second. This is the case where an officer holding any office is *ex-officio* entitled to some other office. For instance, in City of Portland v. Denny, 5 Or., 160, the recorder of the city of Portland was *ex-officio* a justice of the peace, but on the determination of his office of recorder, he would have ceased to be a justice of the peace. On the contrary, if the nomination or appointment to an office be by a *descriptio personarum* of one who on some contingency is to enter and fill another office, the description at the time the contingency arises, designates him as the *person* who is to enter and fill the office, and when thus designated he enters into the office, he holds it entirely independent of the

first office. This seems to be the principle which applies when the office of governor devolves on the secretary of state on the happening of any of the events specified in the constitution. That the president of the senate who holds under a similar title, ceases to be president when he becomes governor seems evident, for the two officers are incompatible at common law, and there is no constitutional implication that both offices shall be held together. It would follow, therefore, that the president of the senate would hold the office of governor, once incumbent, without reference to his office of president of the senate. Now, as two offices may remain distinct, though the officer is the same person, it would seem that the same principle as to the office of governor, should govern the holding of the office of governor by the secretary of state.

This question, therefore, must, also, be answered in favor of the appellant, and judgment be entered accordingly.

Judgment reversed.

SUPREME COURT OF CALIFORNIA.

No. 8,446.

GRANGE *v.* GOUGH ET AL.

Department Two. Filed December 2, 1884.

FINDINGS—HOMESTEAD—RESIDENCE.—Finding that the defendants did not nor did either of them reside on the demanded premises at the time of filing their declaration of homestead held supported by the evidence.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial.

John Wade, for the appellants.

E. F. Preston, for the respondent.

THE COURT. The court found that the demanded premises were never at any time the separate property of the defendant, Margaret Gough; and that the defendants did not nor did either of them reside on said premises at the time of filing their declaration of homestead. A homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as provided in title V of the civil code: C. C., 1,237.

We think the evidence, though conflicting, was sufficient to justify these findings.

Judgment and order affirmed.

No. 9,636.

OAKLAND BANK OF SAVINGS v. APPLEGARTH.

Department One. Filed December 2, 1884.

WHEN THE EVIDENCE IS CONFLICTING THE JUDGMENT OF THE LOWER COURT will not be disturbed.

TENDER—OBJECTIONS TO SUFFICIENCY OF—WAIVER.—Objections to the sufficiency of the amount tendered must be made at the time of tender, or the same are waived.

APPEAL from a judgment of the superior court for Merced county, entered in favor of the defendant and from an order denying the plaintiff a new trial. The opinion states the facts.

J. K. Law, for the appellant.

W. S. Goodfellow and *E. Jackman*, for the respondent.

MORRISON, C. J. The plaintiff brought this suit to foreclose a mortgage on lands situate in Stanislaus county, and judgment was rendered for the defendant, on the ground that the amount due on the mortgage debt was duly tendered before suit brought. The principal object in the case seemed to be the institution of a suit before the defendant could make a legal tender of the amount due, and there seems to have been such a small interval of time between the tender and the filing of the complaint, that it was scarcely appreciable. Why this anxiety to bring the suit before the defendant could make his tender is only to be accounted for by the fact that the plaintiff was desirous of collecting the percentage, provided for in the mortgage to cover legal expenses. This mortgage had been sent to the attorney of the plaintiff at Merced for foreclosure, before any steps looking toward a tender had been taken by the defendant, and the ascertainment of the fact that legal proceedings were about to be instituted, probably stimulated the defendant to action and prompted him to make the tender as speedily as possible. At all events, the testimony of the exact time when the tender was made and that relating to the precise moment when the complaint was filed, was such as to raise a doubt which act was first in point of time. The court below found that the tender was first in point of time, and we are not prepared to say that such conclusion was not warranted by the evidence. On a disputed fact of this character the court would hardly strain a point to reach a different conclusion, and we are satisfied with that arrived at by the court below.

The third finding is: "that, on the first day of September, A. D. 1882, at the hour of 2 p. m., and before the commencement of this action, defendant tendered to and offered to pay to plaintiff, the sum of six thousand three hundred and thirty-four dollars and fifty-six cents, in United States gold coin, in payment and satisfaction of said note and mortgage. That plaintiff did not make or specify any objection to said sum of six thousand three hundred and thirty-four dollars and fifty-six cents, or to the amount thereof, nor did plaintiff specify any other as the amount which it required, but then and there refused, and ever since has refused, to

accept from defendant said sum or any part thereof. The defendant has at all times been ready and willing to pay plaintiff said sum of six thousand three hundred and thirty-four dollars and fifty-six cents, and did, at the time of filing his answer herein, bring into court and deposit therein for plaintiff said sum so tendered to plaintiff as aforesaid."

By section 2,076, C. C. P., it is provided that "the person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it: and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterwards."

Under the circumstances of this case, it was no great hardship for the plaintiff to be charged with the costs of the litigation, and we must affirm the judgment.

Motion to dismiss the appeal denied.

Judgment and order affirmed.

MYRICK, J., and ROSS, J., concurred.

No. 20,003.

PEOPLE *v.* RIGHETTI.

Department Two. Filed December 2, 1884.

LARCENY—VALUE OF PROPERTY, HOW STATED—INFORMATION.—An information for larceny need not allege that the value of the property stolen was "in current coin of the United States."

WITNESS SWEARING FALSELY—EFFECT OF TESTIMONY—INSTRUCTION.—The court may instruct the jury that "if any witness has, in their opinion, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution."

LARCENY IN SECOND DEGREE—PETIT LARCENY—VERDICT.—A verdict finding the defendant guilty of larceny in the "second degree," is equivalent, under section 486 of the penal code, to a verdict for petit larceny.

PETIT LARCENY—PUNISHMENT FOR—FINE AND IMPRISONMENT.—A judgment upon a conviction for petit larceny may provide for a punishment by fine or imprisonment, or both. If both are ordered, the judgment may direct that the defendant be further imprisoned until such fine be paid, in conformity with section 1,205 of the penal code.

APPEAL from a judgment of the superior court for San Luis Obispo county. The opinion states the facts.

J. M. Wilcoxson, for the appellant.

Attorney-General, for the respondent.

THE COURT. Information for grand larceny. The defendant, Thomas Righetti, was separately tried.

The information charges the theft to have been of thirty sacks of barley of the value of forty-five dollars and seven sacks of wheat of the value of twelve dollars, all of the value of fifty-seven dollars, the property of Mark Elberg, and that the offense was committed in the county of San Luis Obispo, on the twentieth of September, 1883.

1. There is nothing in the point that the information should have averred "that the value stated was in current coin of the United States:" People v. Poggi, 19 Cal., 600; Penal Code, 487.

The articles are stated to have been taken at the same time and place, sufficiently to constitute grand larceny.

The demurrer was therefore properly overruled.

2. The court instructed the jury: "If any witness has, in your judgment, sworn falsely in any material respect, he is to be distrusted in all others, *and his testimony is not to be accepted and acted on without great caution.*"

The defendant urges that the court should have said "wilfully false," and cited, with other cases, People v. Sprague, 53 Cal., 494. The instruction given, preceding the sentence in italics, is in effect the language of the statute: C. C. P., 2,061. This court held, in People v. Sprague, *supra*, that the word "wilfully" did not change the effect of the language; that the word "false" is not the equivalent of mistake; therefore, if a witness be believed to have sworn "falsely," he is believed to have sworn so wilfully. The addition of the words in italics constituted no error. If a witness is declared by law to be distrusted, is not his testimony to be acted on with caution—great caution? Would defendant's counsel present to us, in earnest, the proposition that if a witness is to be distrusted, still his testimony is to be taken without caution?

3. The instructions concerning circumstantial evidence, considered together, show no error.

4. The jury found the defendant guilty of "larceny in the second degree." The defendant urges that this is no offense known to the law. A complete answer is found in the penal code, section 486: "Larceny is divided into two degrees, the first of which is termed grand larceny, the second petit larceny." Here the degrees are given, and a name is given to each degree. We think the language of the statute justified the use of the term "larceny in the second degree," as standing for and representing "petit larceny."

5. The defendant was sentenced to imprisonment for six months, and to pay a fine of three hundred and sixty-five dollars, with the addition "that is case said fine is not paid at the expiration of said term of six months, he shall be confined in said county jail until said fine be satisfied, not exceeding three hundred and sixty-five days from the eqpiration of said term of six months, at the rate of one dollar per day for each day of said imprisonment."

Petit larceny is punishable by fine, or imprisonment, or both: Penal Code, section 490. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of fine: Section 1,205, Penal Code. This last section is not, as contended for by appellant, limited to cases of fine only, but applies to cases of fine whether the fine be coupled with a sentence of imprisonment, or whether the fine stand alone as the only punishment.

Judgment affirmed.

No. 8,463.

BOARD OF EDUCATION *v.* FRANKLIN ET ALS.

Department Two. Filed December 5, 1884.

RECORD HELD TO DISCLOSE NO MATERIAL ERROR.

APPEAL from a judgment of the superior court for the city and county of San Francisco. This was an action to recover possession of a lot claimed to belong to the school department of the city and county of San Francisco. The plaintiff had judgment.

George F. & W. H. Sharp and *Jarboe & Harrison*, for the appellants.

C. H. Parker, for the respondent.

THE COURT. Without the aid of any argument, oral or written, or any brief, we have examined the record, and we think it discloses no material error.

Judgment affirmed.

No. 9,761.

IN RE TREADWELL.

In Bank. Filed December 6, 1884.

REMOVAL AND SUSPENSION OF ATTORNEY—WHAT CAUSES WILL JUSTIFY.—Whether an attorney can be removed or suspended from the bar for causes other than those specified in section 287 of the code of civil procedure, *quaere;* but in this case the court concludes not to investigate any other charges.

PROCEEDING for removal of an attorney from the bar.

G. E. Harpham, for the petitioner.

A. C. Adams and *W. C. Belcher*, for the respondent.

THE COURT. Without expressing any opinion upon the question whether this court could remove or suspend an attorney for causes other than those specified in section 287, code of civil procedure, we have concluded in this case not to investigate the charges which, if proven, would not clearly constitute a cause for suspension or removal under the provisions of the code. Therefore the objections to the charges growing out of respondent's transactions with the Bank of Woodland and with Adolph Heine and wife, or either of them, are sustained, and the specifications relating to said charges are ordered stricken out.

And it is further ordered, that the issue raised by respondent's plea of not guilty to the remaining charge be referred to A. P. Catlin, Esq., of Sacramento, to take testimony, and report the same to this court with all convenient dispatch.

No. 8,490.

REYNOLDS v. ROBERTSON.

Department Two. Filed December 8, 1884.

ACTION ON JUDGMENT—DEFENSE OF NUL TIEL RECORD—DEMURRER.—A defense of *nul tiel record* to an action on a judgment is good, and a demurrer thereto should be overruled.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

T. C. Van Ness, for the appellant.

H. C. Firebaugh, for the respondent.

THE COURT. The first defense set up in the answer of defendant is substantially that of *nul tiel record*. Such a defense to an action on a judgment is a good one, and the court, therefore, erred in sustaining a demurrer to it.

Judgment reversed and cause remanded for a new trial.

No. 8,441.

GANAHL ET AL. v. SOHER ET AL.

Department One. Filed December 8, 1884.

MINORITY—PERIOD OF, WHEN TERMINATES—STATUTE OF LIMITATIONS—EJECTMENT.—A male person born on the eleventh day of April, 1855, becomes of age, under section 26 of the civil code, at the first minute of the eleventh day of April, 1876. His right of action for the recovery of real estate in the adverse possession of another commences to run from such day, and expires after a period of five years, on the tenth day of April, 1881.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Carter P. Pomeroy, for the appellants.

H. J. Tilden, for the respondents.

ROSS, J. The plaintiffs claim title to the lot of land in controversy as the heirs-at-law of Henry Ganahl, who died intestate, in the state of Georgia, on the twelfth day of May, 1855. That whatever rights, if any, the plaintiffs, Maria Ann and Ann Elizabeth Ganahl, acquired in the premises as such heirs-at-law, became barred by the provisions of the statute of limitations, prior to the commencement of this action, admits of no question. The remaining plaintiff, Henry Gordon Ganahl, was born April 11, 1855. Sections 25 and 26 of the civil code of this state provide:

"Section 25. Minors are:

"1. Males under twenty-one years of age.

"2. Females under eighteen years of age.

"Section 26. The periods specified in the preceding section must be calculated from the first minute of the day on which persons

are born to the same minute of the corresponding day completing the period of minority."

Under the rule prescribed by the section last quoted, Henry Gordon Ganahl became of age the first minute of the eleventh day of April, 1876, and, by virtue of section 328 of the civil code of procedure, he was entitled to commence an action for the recovery of whatever interest he had in the land within the period of five years thereafter, but not after the expiration of that period. In computing the period of five years we must include the eleventh day of April, 1876, because as the plaintiff in question attained his majority the first minute of that day, he had the whole of the day in which to sue; and computing that as the first day of the five years, the whole period of five years expired with the tenth day of April, 1881, and the action not having been commenced until the eleventh day of April, 1881, was barred by the provisions of the statute. We are not, therefore, called upon to consider any other question in the case.

Judgment and order affirmed.

McKEE, J., and McKINSTRY, J., concurred.

No. 8,251.

BEACH *v.* HODGDON ET AL.

Department One. Filed December 8, 1884.

ACTION TO SET ASIDE FRAUDULENT CONVEYANCE—PLACE OF TRIAL OF.—An action by an execution creditor to set aside a deed made by his execution debtor, upon the ground that the same was fraudulently executed, is not an action to enforce a lien upon real property, and need not be commenced in the county where the land is situated.

NEW TRIAL—GROUND FOR AFFECTING ONE PARTY ONLY.—An objection, good as a ground for a new trial on the part of one party only, if not raised by him, cannot be relied on by another party.

AN ORDER STRIKING OUT AN ANSWER IS NOT APPEALABLE.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

W. H. Tompkins, N. F. Flood and *R. H. Lloyd*, for the appellants.

E. J. & J. H. Moore, for the respondent.

ROSS, J. 1. This is not an action to enforce a lien upon real property, but a bill in aid of execution to set aside two certain conveyances made by the execution debtor, upon the ground that they were fraudulently executed. Therefore, the provision of the present constitution requiring actions for the enforcement of liens upon real estate to be commenced in the county in which such real property is situated, does not apply.

2. There is no specification calling in question the order striking out the answer of Hildreth. Nor did Hildreth move for a new

trial. Therefore, no objection which might have been ground for a new trial on his part alone, can be considered.

3. By stipulation of counsel, the answer originally filed was made to stand as the answer to the complaint as amended.

4. We cannot say the court below was not justified in finding that the deeds in question were made in fraud of the plaintiff's rights.

5. The order striking out the answer of defendant Hildreth is not appealable; the appeal therefrom is therefore dismissed and the judgment and order refusing a new trial are affirmed.

McKEE, J., and McKINSTRY, J., concurred

No. 8,274.

DORLAND v. DORLAND.

Department One. Filed December 8, 1884.

LOAN—TIME OF REPAYMENT—PRESUMPTION—STATUTE OF LIMITATION.—A loan of money is presumed to be repayable on demand, when no time for repayment is specified; and the statute of limitations commences to run against such loan from the date thereof.

ESTATE OF DECEASED PERSON—CLAIM BARRED BY STATUTE OF LIMITATIONS—ALLOWANCE OF.—An administrator has no authority to allow a claim against the estate based on a loan which has become barred by the statute of limitations.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

J. M. Wood, for the appellant.

M. Lynch, for the respondent.

ROSS, J. The real contest between the parties to this action relates to the cause of action stated in the first count of the complaint, as amended, wherein it is averred that on the twenty-eighth of April, 1877, the defendant's intestate—Henry S. Dorland—became indebted to the plaintiff's assignor—James F. Dorland—in the sum of two thousand five hundred dollars, gold coin, "for money lent by said James F. Dorland to said Henry S. Dorland, and for money paid, laid out, and expended by said James F. Dorland to and for the use of said Henry S. Dorland, and at his request, which sum he then and there promised and agreed to repay to said James F. Dorland in six months thereafter, with interest," at a certain rate. The court below, in effect, found the facts to be as alleged; and this finding, the appellant contends, and we think, is unsupported by the evidence.

The action grew out of the refusal of the administratrix of the estate of Henry S. Dorland, who died April 14, 1878, to allow a claim presented by James F. Dorland against the said estate for the amount here in question, together with some other amounts concerning which no question is made. There was testimony given on behalf of plaintiff

to the effect that in the early part of 1872, James F. Dorland borrowed of the German Savings and Loan Society for the benefit of his brother, the deceased Henry S. Dorland, the sum of five thousand dollars, for the repayment of which he executed to the bank his promissory note for that amount, secured by a mortgage upon certain real estate; that Henry S. received the money as a loan from James F. Dorland, and paid the interest on the note and mortgage to the bank, and on the twenty-fourth of February, 1873, paid to the bank three thousand five hundred dollars of the princial of said note and mortgage. On the twenty-eighth of April, 1877, the statute of limitations had nearly run against the note and mortgage executed by James F. Dorland in 1872, and there was then due and unpaid thereon the sum of one thousand five hundred dollars. The bank had, also, upon a written order of James F. Dorland, paid one thousand dollars in discharge of a street assessment against the mortgaged property, due from James F. Dorland. For the balance due upon the note and mortgage of 1872, and for the amount paid by the bank in discharge of the street assessment, aggregating two thousand five hundred dollars, James F. Dorland, on the twenty-eighth of April, 1877, executed to the bank a new note and mortgage. One thousand dollars of this amount was for the money the bank paid on the written order of James F. Dorland in satisfactian of a debt due from him. With respect to the remaining fifteen hundred dollars of the amount, the note and mortgage of April 28, 1877, was but a renewal to that extent of the note and mortgage of 1872. It was in 1872 that James F. Dorland let Henry S. Dorland have the money. No time being specified within which it was to be repaid, the presumption of law is that it was to be repaid on demand; and that being so, the statute of limitations commenced to run from the time of the loan: Angell on Limitations, sec. 95, and authorities there cited. To take the case out of the operation of that statute, there must have been some acknowledgment or promise, evidenced by writing, signed by Henry S. Dorland: Code of Civil Procedure, sec. 360; Estate of Galvin, 51 Cal., 215. None such was shown. The statute of limitations had run against the loan to Henry S. Dorland, and the administratrix of his estate was, by section 1,499 of the code of civil procedure, prohibited from allowing a claim against the estate based upon it.

The appeal from the judgment, having been taken too late, must be dismissed.

Appeal from judgment dismissed. Appeal from order refusing a new trial reversed, and cause remanded for a new trial.

McKEE, J., and McKINSTRY, J., concurred.

No. 8,280.

DOOLAN ET AL. v. CUNNINGHAM, Administrator, etc.

Department Two. Filed December 8, 1884.

CLERICAL ERROR IN CONCLUSIONS OF LAW—IMMATERIAL ERROR.—The use of the word "defendant" instead of "defendants," in the conclusions of law found by the court, is a mere clerical error and entitled to no regard.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

George W. Tyler, for the appellants.

Cary & Troutt, for the respondent.

THE COURT. We have examined the record in this case, and find it without error. The use of the word "defendant" instead of "defendants" in the conclusions of law, is so clearly a mere clerical misprision, that we do not think it entitled to any regard.

Judgment affirmed.

No. 8,200.

LUNDY v. CENTRAL PACIFIC RAILROAD COMPANY.

Department Two. Filed December 8, 1884.

RAILROAD—TICKET LIMITED AS TO TIME—RIGHTS OF PASSENGER.—A railroad ticket entitling the purchaser to a continued passage between two given points, if used within a certain time, is good for such continued passage if the same be commenced within the time limited.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. H. Fifield, for the appellant.

Wilson & Wilson, for the respondent.

THORNTON, J. The court below, in granting the nonsuit in this case, misconceived the meaning of the contract for passage between the plaintiff and defendant. In our view, it was only required of the plaintiff that he present himself at the cars of the Union Pacific Railroad Company, or of the defendant, and take passage at any time within nine days from the twelfth day of March, 1874. The plaintiff took passage on the twenty-first of the same month, and was illegally ejected from the cars of defendant by its servant, on the morning of the twenty-fifth following.

The admission of defendant showed clearly that the contract for carrying the plaintiff from Omaha to San Francisco, though made by the Union Pacific Railroad Company, was made by authority of defendant.

We have no doubt that the action was properly brought against the defendant.

We see nothing in the evidence to uphold the ruling of the court below, non-suiting the plaintiff, and the judgment and order denying a new trial are, therefore, reversed and the cause remanded, that a new trial may be had in accordance with the views herein expressed.

SHARPSTEIN, J., and MYRICK, J., concurred.

No. 8,476.

SAMUELS *v.* YOUNGER AND WIFE.

Department Two. Filed December 8, 1884.

DEMURRER TO THE COMPLAINT HELD PROPERLY OVERRULED.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff.

E. W. McGraw, for the appellants.

Carl S. Graef, for the respondent.

THE COURT: The court below did not err in overruling the demurrer to the complaint.

We find no error in the record, and the judgment is affirmed.

No. 8,267.

MCCORMICK *v.* FITZPATRICK ET AL.

Department Two. Filed December 8, 1884.

DEMURRER HELD PROPERLY OVERRULED, and no error in refusing to set aside the judgment.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order refusing to set aside the judgment.

M. C. Hassett, for the appellants.

F. L. Sullivan, for the respondent.

THE COURT. The demurrer to the complaint was properly overruled.

We find no error in the rufusal of the court to set aside the judgment against the defendants.

Judgment and order affirmed.

No. 9,578.

LEWIS ET AL. v. S. P. C. R. R. Co.

In Bank. Filed December 9, 1884.

ACTIONS AGAINST CORPORATIONS—VENUE—CONSTITUTIONAL LAW.—Section 16 of article XII of the constitution, providing that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases," is applicable to actions arising from torts as well as from contracts. Such provision is not in conflict with the fourteenth amendment to the constitution of the United States.

APPEAL from an order of the superior court for Santa Clara county, denying a motion for a change of venue. The opinion states the facts.

Wallace, Pillsbury & Blanding, for the appellant.

Laine & Johnson, for the respondents.

ROSS, J. Section 16 of article XII of the present constitution of the state reads: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

The defendant is a corporation, having its principal place of business in the city and county of San Francisco, and was sued by the plaintiff in the county of Santa Clara to recover damages for injuries alleged to have been inflicted upon him by defendant on the tenth of July, 1883, in the said county of Santa Clara.

Defendant claims the right to have the action tried in the county where it has its principal place of business and a motion to that end having been denied by the court below, the appeal is from the order of refusal. It is urged that the provisions of the constitution quoted, apply exclusively to matters of contract and have no application to actions of tort. We do not think the language employed admits of such restriction. And that none such was intended by the framers of the instrument plainly appears from the proceedings of the constitutional convention at the time the section in question was adopted: Vol. 1, pp. 452–3.

Nor are we able to see wherein the provision of the state constitution in question conflicts with the provision of the fourteenth amendment to the constitution of the United States.

Order affirmed.

MYRICK, J., SHARPSTEIN, J., MORRISON, C. J., and MCKEE, J., concurred.

THORNTON, J. I concur in the judgment.

No. 8,846.

WILLIAMS *v.* SANTA CLARA MINING COMPANY OF BALTIMORE ET AL.

Department One. Filed December 9, 1884.

APPEAL FROM JUDGMENT—NOTICE OF APPEAL—SERVICE OF—JURISDICTION OF SUPREME COURT OVER APPEAL.—The supreme court has no power to hear an appeal from a judgment unless the appellant has served a notice of appeal on all the adverse parties whose rights may be affected by a reversal of the judgment; or, where the appeal is from a part of the judgment, by a reversal of the part appealed from. But a modification of a judgment may be had on an appeal from the whole judgment, although some of the adverse parties have not been served with notice of appeal, provided such modification can not affect the rights of the parties not served with notice.

THE SAME—MODIFICATION OF JUDGMENT.—On an appeal from a judgment as an entirety the power of the supreme court is not limited to an affirmance or reversal of the judgment as a whole. It may modify the judgment when a modification is appropriate and necessary to a correct determination of the rights of the parties.

MINING CLAIM—DEFINITION OF—MECHANIC'S LIEN.—A "mining claim," as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. Independent of acts of congress, providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of *such* lands to which the right of exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, usages or customs. It is not applicable to land, the title to which is held under a Spanish or Mexican grant, although such land is mineral in character, consequently a statute, creating a mechanic's lien, under certain circumstances on "mining claims," is not applicable to mineral land held under a Spanish or Mexican grant.

MORTGAGE—MECHANIC'S LIEN—PRIORITY OF.—The lien of a recorded mortgage or of a deed of trust given as security for a debt takes priority over a subsequent mechanic's lien, under section 1,186 of the code of civil procedure.

THE SAME—NOTICE NOT TO BE RESPONSIBLE FOR IMPROVEMENT.—Section 1,192 of the code of civil procedure requiring the "owner or person having or claiming an interest" in lands on which an improvement is erected, within three days after he has obtained knowledge of the intended improvement, to give notice that he will not be responsible for the same, and providing that, in default of such notice, his interest shall be subject to the lien for such improvement, filed in accordance with the provisions of the code, does not apply to nor affect the interest of a prior mortgagee under a recorded mortgage.

APPEAL from a judgment of the superior court for Santa Clara county, and from an order denying a motion for a new trial. The opinion states the facts.

McAllister & Bergin, and *Winans, Belknap & Godoy*, for the appellants.

W. B. Hardy, for the respondent.

MCKINSTRY, J. (1.) The decree appealed from provides that the proceeds of the sales of certain properties of the defendant, the Santa Clara Mining Company of Baltimore, shall be applied—first, to the amount adjudged in favor of plaintiff, for work and labor done by plaintiff on or in a mine of said defendant, and for work and labor on or in said mine done by assignors of plaintiff; second, to the claim of the defendant, the Farmers' Loan and Trust Company of the city of New York; third, to the amount found due the defendants, the executors of the estate of William O'Brien, deceased, and, fourth, to the claim of the Bank of California.

The appeal is by the executors and by the Farmers' Loan and Trust Company. Notice of appeal was served on plaintiff, but no notice was served on the defendant, the Santa Clara Mining Company, or on the defendant, the Bank of California.

It is contended by respondent, the plaintiff, that this court has no jurisdiction to disturb the judgment, the necessary parties not having been served with notice of appeal.

This court has not jurisdiction to hear an appeal from a judgment unless the appellant shall have served a notice of appeal on all the adverse parties; that is to say, upon all whose rights may be affected by a reversal of the judgment; or, where the appeal is from part of a judgment, by a reversal of the part appealed from. And where the appeal is from the whole judgment this court has no jurisdiction to modify the judgment in such manner as shall affect the rights of the parties on whom notice of appeal has not been served, as such rights have been ascertained and finally determined by the judgment. But the mere fact that the appeal is from the whole judgment does not deprive this court of the power of modifying the judgment, provided such modification cannot affect the rights of the parties not served with notice.

Neither the defendant, the Santa Clara Company nor the defendant, the bank, has appealed from the judgment of the superior court. The first is satisfied with decree providing for the sale of its lands (the proceeds to be distributed among the parties found to have liens thereon), and the bank is satisfied with the priority given to the other liens. It is apparent that a modification of the decree, by which the appellants may be given precedence to the plaintiff, cannot affect the parties not served, provided no additional costs are imposed as a lien upon the property, and the effect of a modification will not be to impose a lien for costs. For the purpose of determining whether such modification should be made, we are of opinion we have jurisdiction to entertain the appeal from the judgment.

Nor do the cases cited by respondent uphold an opposite view. In Senter v. De Bernal, 38 Cal., 637, which was an appeal from a judgment of partition, it was said: "Every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an adverse party within the meaning of the provisions of the code, irrespective of the question whether he appears from the face of the record in the attitude of plaintiff, or defendant, or intervenor." "The *adverse* party * * * means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal:" Thompson v. Ellsworth, 1 Barb. Ch., 627.

It has never been held here that, on an appeal from a judgment as an entirety, the power of this court is limited to an affirmance or reversal of the judgment as a whole. On the contrary, it has been the uniform practice, in such cases, to modify the judgment when a modification is appropriate and necessary to a correct determination of the rights of the parties. When a party appeals from a judgment as a whole, *he seeks* not only the reversal, but also any proper modification of the judgment. Of course, he can never obtain, be-

cause this court has no power to grant, a modification which can affect those not parties to the appeal. The meaning of Senter v. De Bernal is very plain. The court there held that the appellant must notify all the parties who are interested in opposing the relief sought by the appeal, "or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also": 38 Cal., 632.

In re Medburg, 48 Id., 83, it was said that, on an appeal from an order of the probate court removing a guardian of an estate, and appointing another in his stead, the newly appointed guardian is a necessary party, because if the order should be reversed the last appointee would be displaced. Reed v. Allison, 61 Cal., 461, was an appeal from a judgment in a partition suit, where the adjudicated rights of all the parties would be affected by a reversal of the judgment of the lower court. The determination in Wittenbrock v. Bellmer, 62 Id., 558, turned upon "the law of the case," and the existence or non-existence of any judgment to be appealed from; and in O'Kane v. Daly, 63 Cal., 317, the court only held that the co-defendants of appellant would be affected by the reversal of the judgment.

(II.) Sections 1,183 and 1,185 of the code of civil procedure read:

"1,183. Mechanics, material-men, artisans, architects and laborers of every class performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon-road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished. This lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party."

"1,185. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencemt of the work or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

It is contended by respondent that section 1,183 gives a lien to every laborer who performs labor upon any mining claim, and that the words "in the construction, alteration or repair" relate to material to be used in, and not to labor to be performed on "any mining claim, building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon-road, or other structure."

Adopting this construction of the language the section would read: "Mechanics, artisans, architects and laborers of every class performing labor upon any mining claim, etc., and material-men furnishing material to be used in the construction, alteration, or repair of any mining claim, etc., shall have a lien upon the property upon which they have bestowed labor or furnished material, etc." But, while this view of the legislative intention might be satisfactory to the plaintiff herein, it would not perhaps render the meaning of the section of the code more easy of comprehension. Unless mining claims can be "constructed, altered or repaired" material cannot be used in their construction, alteration or repair.

But if it be conceded that one who works upon or in a mining claim may secure a lien for the value of his labor on the whole claim, the court below did not find that plaintiff or his assignors "bestowed labor" upon a *mining claim*. A "mining claim," as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners: Copp's U. S. Mining Decisions, 136, 142; Weeks on Mineral Lands, 118. Independent of acts of congress, providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of *such* lands to which the right of exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, usages, or customs.

In the case now here the court below found that the defendant, the Santa Clara company, was the owner of two tracts of land, one being a portion of the Rancho Los Capitancillos and consisting of eleven hundred and nine 67-100 acres (the title whereto was derived through a patent from the United States), and the other containing three hundred and fourteen 88-100 acres, being Pueblo tract, No. 2, formerly belonging to the city of San Jose. The court also found that "the whole of said land is *commonly known* as the Guadalupe mine;" and then proceeded to declare a lien in favor of plaintiff upon both tracts, and to decree that the fourteen hundred and twenty-four 55-100 acres should be sold to satisfy it.

The lands directed to be sold were not a "mining claim," either in the popular sense of the words, or as the term has been employed in judicial decisions, or as it is used in the code. The Fremont grant is not a "mining claim," although many mines have been opened within its boundaries, and the owners of the grant may claim such mines to be their own. The right of the defendant, the Santa Clara Company, to a portion of the Rancho Los Capitancillos, or to a portion of the Pueblo lands of San Jose, and to extract ores therefrom, in no way depended upon a claim to the posssesion made in recognition of and in conformity to local rules, adopted by miners of a mining district, or in accordance with the usages or customs of a lo-

cality. The defendant derives its title, as would seem, from the Mexican or Spanish government to the larger tract; certainly so as to the Pueblo land. We take notice that no patent, based upon "mining claims," could have been issued under any act of congress for the whole, or for eleven hundred and nine acres of the Rancho Los Capitancillos The plaintiff could not acquire the statutory lien upon the lands of the Santa Clara Company, simply because the statute does not authorize it. It may be that the statute is not sufficiently comprehensive; indeed, it would, perhaps, be difficult to say why one class of "material-men," or laborers, should have preference over another; why, for instance, the furnisher of seed, or the plowman, should not have a lien on the farm of him to whom the seed is supplied, or for whom the plowing is done. But the legislature has seen fit to limit the benefit of the lien to particular classes, and we are not authorized to extend it to others.

(III.) There is another view of the case before us, which we think to be correct, and which requires a modification of the judgment.

It is admitted that the instruments executed by the defendant, the Santa Clara Company, to the appellants, and constituting liens upon the property decreed to be sold, were recorded prior to the time when any labor was done by plaintiff or his assignors. In the absence of any statutory provisions as to record or notice, the appellants' liens would have precedence, in accordance with the maxim, *qui prior est in tempore, potior est jure.*

Section 1,186 of the code of civil procedure provides :

"The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance, of which the lien-holder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished."

There can be no doubt that the effect of the section last quoted, as applied to the facts of the case before us, is to give priority to the liens of appellants; or rather, the section does not take from them their priority, since their liens were recorded.

Both appellants are to be treated simply as incumbrancers. The fact that the instrument made to one is a deed of trust, does not extend the interest of that one in the eye of a court of equity, which looks beyond the form to the actual nature of contracts.

It is, however, insisted by counsel for respondent, that the appellants had knowledge that he or his assignors, or some of them, were working in a mine of the Santa Clara Company, and failed to give notice that they would not be responsible for the labor, and, as a consequence, *lost* their priority.

Section 1,192 of the code of civil procedure reads :

"Every *building* or *other improvement* mentioned in section 1,183 of this code, *constructed* upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the *construction, alteration, or repair*, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon."

The language of the section last recited, which treats of *buildings* and *improvements*, and of knowledge of the *construction*, etc., would hardly cover a case like the one now before us. But, however that may be, it is very plain the "owner or person having or claiming an interest" in the lands on which an improvement is erected, is not the person referred to in section 1,186 as having a "lien, mortgage or incumbrance."

The rule *noscitur á sociis* is clearly applicable to the "person having an interest" of section 1,192. The section provides a mode for binding the "owner" or person having an interest, that is, one having a legal estate less than the fee, or such an equity as may be enforced by securing a transfer of a legal estate. The right of mortgagees and incumbrancers, with reference to those to whom the provisions of the code concede a lien, are fixed and determined by section 1,186. By that section it is in effect provided that the mortgagee, whose mortgage is duly recorded, shall have precedence of any lien arising out of work subsequently done or material subsequently furnished. It is certainly remarkable, if it had been the intention of the code-makers that the recorded mortgage, thus given priority, might be deprived of its priority by the failure of the mortgagee to do an act, imposed upon him by the subsequent conduct of another, that such event should not have been provided for in the section which treats of the relative rights of the laborer or material-man, and other lien-holders, mortgagees or incumbrancers.

But it is well settled in this state that a mortgage is merely a lien on, and passes no estate or interest in the mortgaged premises, except for the purposes of taxation: McMillan v. Richards, 9 Cal., 365; Dutton v. Warschauer, 21 Id., 609. In Mack v. Wetzlar, 39 Cal., 256, it was said, a mortgagee has neither *jus in re* nor *jus ad rem*, but a mere right to have his debt paid out of the proceeds of a sale of the mortgaged property, unless it should be otherwise paid; that it is a right which will pass by simple assignment, but will in no case pass by a conveyance of the land alone. It is manifest that one having such a right has not "an interest in the lands," on

which a building or improvement may be constructed, within the meaning of section 1,192 of the code of civil procedure.

That section declares no consequence to follow upon a failure, by a person having or claiming an interest in the lands who has obtained knowledge of the "construction, alteration or repair," and who fails to give notice that he "will not be responsible for the same," except that the interest of such person "shall be subject to any lien filed in accordance with the provisions of this chapter," and *sold* to satisfy the same. It seems sufficiently plain that the section of the code refers to an estate or interest in land which may be sold and conveyed and does not provide that a mere lien shall become "subject" to another subsequent lien, in the sense that the later lien shall acquire precedence over the prior.

As the questions we have considered arise upon the findings and decree, it is not necessary to determine whether we have jursdiction of the appeal from the order denying a new trial. That appeal may be dismissed.

The appeal from the order denying the motion for a new trial is dismissed.

The judgment is reversed and the cause is remanded with direction to the court below to modify the judgment in accordance with the views hereinbefore expressed.

ROSS, J., and MCKEE, J., concurred.

No. 8,474.

WATT ET AL. *v.* WRIGHT ET AL.

Department One. Filed December 9, 1884.

PLACE OF TRIAL OF REAL ACTIONS—CONSTRUCTION OF CONSTITUTION.—Section 5, article VI, of the constitution of 1879, requiring "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated," is not retrospective in its operation. Consequently, the superior court of the city and county of San Francisco, as the successor of the district court, has jurisdiction to hear and determine an action for the foreclosure of a mortgage, pending in such latter court at the adoption of the present constitution, although the land affected thereby is situated in another county.

DEMURRER—MISJOINDER OF DEFENDANTS—IMMATERIAL ERROR.—Where certain persons are made defendants, in an action to foreclose a mortgage, on the ground that they claim some right or interest in the land subsequent to the lien created by the mortgage, and they demur because of their misjoinder, the action of court in overruling such demurrer, although erroneous, will not warrant a reversal, if the court finds that they had not acquired any rights in the mortgaged premises.

FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS—ABSENCE OF MORTGAGOR FROM STATE.—The absence of a mortgagor from the state does not suspend the running of the statute of limitations upon the mortgage as to creditors of the mortgagor, who have obtained attachment liens on the premises subsequent to the mortgage.

LEVY OF ATTACHMENT ON UNOCCUPIED LAND—POSTING NOTICES.—An attachment lien upon unoccupied real estate is not created, under section 542 of the code of civil procedure, unless the officer executing the writ posts upon the land a copy of the description of the land, in connection with a copy of the writ of attachment, and of the notice that the land had been attached.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

J. H. Budd and *J. M. Rothchild*, for the appellants.

Taylor & Haight, and *Jarboe & Harrison*, for the respondents.

MCKEE, J. On the second of October, 1873, the defendant, Wright, mortgaged certain real property situated in Fresno county, to secure payment of a promissory note given, in words and figures, as follows:

"SAN FRANCISCO, October 2d, 1873.

"On the second day of January, 1874, without grace, for value received, I promise to pay to Messrs. Watt and McLennan, or order, at their office in the city of San Francisco, the sum of four thousand ($4,000) dollars, in United States gold coin, with interest at the rate of one and one-half per cent. per month, payable quarterly in like gold coin. The interest, if not paid as it becomes due, to be added to the principal, and become a part thereof, and bear interest at the same rate.

"This note is secured by a mortgage of even date herewith.

[Signed] "J. W. A. WRIGHT."

Watt and McLennan, the promisees named in said note, were a firm, of which Robert Watt, F. P. McLennan and William Watt were members. William Watt died on the sixth of July, 1878. His will was admitted to probate. Robert Watt, David Watt and Emily Watt were appointed executors and executrix thereof; and as such they qualified and entered upon the discharge of their duties. On the fifteenth of October, 1879, they and the surviving partners of William Watt, deceased, brought the action in hand, in one of the late district courts of the city and county of San Francisco, and against the mortgagor and against the other defendants as subsequent and subordinate lien claimants upon the mortgage premises, to foreclose the mortgage. In the action a decree foreclosing the mortgage and barring the subsequent claims of liens upon the mortgage premises was rendered by the superior court of the city and county of San Francisco. From the decree all the defendants to the action except Wright, the mortgagor, appealed, and the questions raised on the appeal by the assignment of errors are:

1. That the superior court had no jurisdiction to try and determine the action.

2. That there was a misjoinder of parties plaintiffs to the action.

3. That the cause of action stated in the complaint against not only the mortgagor, but the other defendants, as subsequent lien claimants, was barred by the statute of limitations.

1. The action was pending in the district court when the constitution of 1879 went into effect. The constitution abolished the district courts; but it provided, by section 3 of article XXII, for the transfer of all proceedings pending therein to the superior courts,

and gave to these courts "the same power and jurisdiction over those proceedings as if they had been, in the first instance, commenced, filed or lodged in the superior court." At the same time the constitution required "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate or any part thereof affected by such action or actions is situated:" Section 5, article VI, Constitution. And it is contended, that, as the mortgaged premises, in controversy, were situated in Fresno county, the superior court of the city and county of San Francisco, acquired no jurisdiction of the action. But as we held in Gurnee v. the Superior Court: 58 Cal., 88; that provision of the constitution was only prospective in its operation; it, therefore, did not apply to actions which were commenced, according to law, in the district courts and were pending there when the constitution went into operation. To such actions when transferred to the proper superior court, according to the requirements of the constitution, the jurisdiction of the superior court attached; and the court was authorized, in the exercise of the jurisdiction granted to it over such actions, to hear and decide them, in the same manner and to the same extent, as it would actions commenced within its own original jurisdiction.

2. The objection that there is a misjoinder of parties plaintiffs was not taken by Wright, the mortgagor—as to him the complaint was taken as confessed; but Webster and Trahern, who were made defendants, upon the ground that they claimed some right or interest in the land subsequent to the lien created by the mortgage, raised the question by demurrer and answer. Their demurrer was overruled and as to them the cause was tried upon their answer; and as the court found that they had not acquired any rights by statutory levy, or judgment lien, upon the mortgage premises, the error, if any, in overruling the demurrer, or in holding that there was no misjoinder of parties plaintiffs, was error without injury.

3. The mortgage debt matured on the second of January, 1874, and the action to foreclose the mortgage was not commenced until the fifteenth of October, 1879—more than five years and nine months after the cause of action accrued. Meantime, however, as the plaintiff alleged, and the court found, as fact, Wright, the mortgagor, on several occasions, temporarily absented himself from the state. These successive temporary absences amounted in all to twenty-two months; during which time the running of the statute of limitations upon the mortgaged debt was suspended as to the mortgagor: Sec. 351, C. C. P.; Rodgers v. Hatch, 44 Cal., 280; and as to him the action was not barred.

But if not barred as to the mortgagor, it is contended, that the action is barred as against the other defendants, because the absences of the mortgagor from the state did not suspend the running of the statute of limitations upon the mortgage as to them; and as they had acquired rights in the mortgaged premises by attachment

liens subsequent to the mortgage; it was necessary for the mortgagees, in order to avoid the statute of limitations, to bring this action against them, as subsequent encumbrancers or lien claimants, within four years after the cause of action accrued; for, as the statute of limitations commenced to run when the cause of action accrued, its running was not suspended by any disability as against those who were always within the process of the court.

The contention is made upon the authority of Wood v. Goodfellow et al., 43 Cal., 185. That was a case in which it appeared three mortgages had been given on the premises; the first was given in June, 1860, on the undivided interest of Goodfellow in the premises; the second, in October, 1860, upon the entire interests in the premises of Goodfellow and the other joint owners; and the third in May, 1862, on the same joint interests. About six months after the execution of the last mortgage, Goodfellow left the state, and never returned. Foreclosures of the last two mortgages were obtained in regular proceedings, to which the first mortgagee was not made a party. Under those decrees of foreclosure the mortgaged premises were sold. On the twelfth of December, 1862, the purchaser went into possession; and, on the thirtieth of March, 1864, conveyed the premises by deed to the Keystone Quartz Mining Company, which entered into possession under its deed, and were in possession on the eleventh of May, 1864, when the administrator of the estate of the first mortgagee (who had died on the fourth of March, 1868) commenced an action against the company and Goodfellow, the mortgagor, to foreclose the mortgage. Goodfellow made no defense. The company pleaded the statute of limitations. And as the company had been, by itself and its grantors, in the actual possession of the mortgaged premises, under a claim of right, which originated in the judicial proceedings upon the subsequent mortgages, for more than five years before the commencement of the action, and more than seven years had run since the cause of action accrued on the mortgage debt, the lower court sustained the plea of the statute of limitations.

In affirming that judgment, the late Supreme Court said: "It is the settled doctrine of this court * * * that when third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection: and we see no difference in principle between a suspension of the running of the statute, resulting from an express waiver, and one caused by the voluntary act of the mortgagor, in absenting himself from the State." The doctrine thus announced is made to rest upon the reason that interests in mortgaged premises, acquired subsequently to the mortgage, constitute property; and the owners thereof stand in the same relation to the mortgage upon the property by the original owner, as if their property was bound as collateral security for the payment of the mortgage debt; but the time for the payment of the debt cannot be ex-

tended by any agreement between the mortgagor and the mortgagee to which they were not a party; nor by the voluntary act of the mortgagor in absenting himself from the State; and if the mortgagee allows the time of the statute of limitations to run upon the mortgage debt, their property cannot be taken from them and applied to the payment of the debt which, as to them, is barred by the statute. Assuming, therefore, that the appellants here acquired the mortgagor's equity of redemption, by the judicial proceedings founded upon the levy of an attachment, on the fifth of August, 1876, on the mortgaged premises, it follows—as the cause of action on the mortgage debt accrued on the second of January, 1874, and the action was not commenced until October 15, 1879—more than five years and nine months having run, that, under the rule of Wood v. Goodfellow, *supra*, the time of the statute had run, and the cause of action was barred, as to the subsequent lien-holders, notwithstanding the twenty-two months absence from the State had suspended the running of the statute of limitations as to the mortgagor.

But it is claimed that the appellants were not subsequent lien-holders upon the mortgaged premises, and have not acquired any interests in them subsequent to the plaintiff's mortgage, because, while it is true they commenced an action against Wright, the mortgagor, on the third of August, 1876, in which a writ of attachment was issued, which came to the hands of the sheriff of Fresno county to be executed according to law, he did not, in law or fact, levy the attachment upon the mortgaged premises. And the court finds: "The said sheriff did not, at any time, attach any portion of the real estate and lands described in the said mortgage, or any of the right, title or interest of the defendant, Wright, therein." The finding is founded upon the return of the officer to the writ; there was, therefore, no conflict of evidence as to the fact. The return is as follows:

"STATE OF CALIFORNIA, } ss.
COUNTY OF FRESNO. }

"I hereby certify that I received the annexed writ of attachment on the third day of August, A. D. 1876, and executed the same on the fifth day of August, A. D. 1876, by attaching all the right, title and interest of the defendant, J. W. A. Wright, of, in and to the following described property, to wit: All sec. 1, T. 12 S., R. 17 E., 639.48 acres, and all W. ½ of sec. 6, T. 12 S., R. 18 E., 335.10 acres, situate, lying and being in the county of Fresno, state of California, by posting a notice and a copy of said attachment on the land described, and by filing in the office of the county recorder of the county of Fresno, for record, a copy of said attachment, and a notice of the attachment, with a description of the property attached annexed to said copy of attachment, this tenth day of August, 1876.

"J. SCOTT ASHMAN, Sheriff.
"By A. WITTHOUSE, Deputy Sheriff."

This return was made under section 542, C. C. P., which required an officer to whom a writ of attachment was directed and delivered, to execute the same, if upon real property, by filing with the recorder of the county in which the property may be situated, (1) a copy of the writ of attachment, together with a description of the property attached, and, (2) a notice that it is attached, and by leaving with the occupant of the land, if the land be occupied, similar copies of the writ, description of the land and notice of the attachment, or, if the land be not occupied, then, by posting similar copies of the writ of attachment, description of the land attached, and notice of its attachment in a conspicuous place on the land.

Whether the land in controversy was occupied or not does not appear by the return: but, assuming that it was not occupied, the return does not show that the officer posted "in a conspicuous place on the land," or at all, a copy of the description of the land in connection with a copy of the writ of attachment and of the notice that the land had been attached. The failure of the officer to do these things, as required by law, and in the order prescribed by law, was fatal to the validity of the levy by attachment: Sharp v. Baird, 43 Cal., 577; Main v. Tappener, Id., 206; and the performance of the acts done, as stated in the return of the officer, was insufficient to create a statutory lien by attachment upon the property.

Nor was there any lien created on the property by the docketing of the judgment rendered in the attachment suit on the sixteenth of August, 1879, because the mortgagor had, in October, 1877, conveyed the equity of redemption in the mortgaged premises, and all his right, title and interest therein to Robert Watt, subject to the mortgage. As, therefore, there was neither statutory levy nor judgment lien, the appellants acquired no title to the mortgaged premises and the plaintiffs were entitled to the decree of foreclosure against them.

There is no error in the record.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,433.

SCHROEDER v. GRADY, TAX COLLECTOR, ETC.

In Bank. Filed December 10, 1884.

STATE BOARD OF EQUALIZATION—ASSESSMENT OF MORTGAGES—EQUALIZATION OF.—Under section 9, article XIII, of the constitution, the state board of equalization, in raising the assessment roll of a county, has power to increase the valuation of mortgages as already assessed.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

D. M. Delmas and *J. P. Hoge*, for the appellant.

William Craig and *E. C. Marshall, Attorney-General*, for the respondent.

THE COURT. ROSS, J., DISSENTING. The questions involved and argued in this case were disposed of in People v. Dunn, 59 Cal., 328. With the conclusion reached in that case we are satisfied, and do not wish to change it.

Judgment affirmed.

ROSS, J., DISSENTING. If the case of the People v. Dunn, 59 Cal., 328, in so far as it related to the assessment of mortgages, was rightly decided, the judgment now appealed from should be affirmed. I joined in that decision, but subsequent examination and reflection has convinced me that in the respect indicated the case was wrongly decided. The precise question is this: At twelve o'clock noon, of the first Monday in March, 1883, there was due upon a certain mortgage ten thousand dollars, and no more; the mortgage was assessed upon the assessment roll at ten thousand dollars; afterwards the state board of equalization increased the entire assessment-roll of the county fifteen per cent. Does this action of the state board operate upon this mortgage assessment? Proceeding upon the idea that it is the commercial value of the debt secured by the mortgage which forms the subject of the assessment, we held in the Dunn case the affirmative of the proposition. And therein, as I conceive, arose the error in the ruling. It is not the commercial value of the debt which forms the subject of the assessment. And this, I think, appears from the provision of the constitution itself. Section 4 of article XIII reads:

"A mortgage, deed of trust, contract, or other obligation, by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property, and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied upon such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

Here, then, is a provision to the effect that in the case of a debt secured by mortgage, the mortgage shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby: and a further provision that the value of the property affected by the morgage, less the value of the security, shall be assessed and taxed to the owner of the property, and the value of the security shall be assessed and taxed to its owner. As the mortgage, which in the case under consideration is the security, is, for the purposes of assessment and taxation, to be deemed and treated as an interest in the property affected thereby, it follows that the value of the security, which, by the terms of the constitution, is required to be assessed and taxed to the owner thereof, is so much in value of the land as would be required to satisfy the mortgage. It is manifest that this cannot be more than the amount of the mortgage, while it may be less—less, for example, where the value of the property mortgaged has decreased to such an extent as to be less than the amount of the mortgage. It seems to me, therefore, that where, as in the case before us, the full amount due upon a mortgage has been assessed to the holder thereof, the order of the state board increasing the assessment roll of the county can no more apply to such an assessment than it can to the assessment of money already assessed at its legal value. That this is the view taken by the legislature of the provisions of the constitution upon the subject, appears from the statutory provisions in relation to assessments, and particularly by section 3,678 of the political code, which provides that "when partial payments have been made on a debt secured by mortgage or deed of trust, the owner is authorized to make the proper deduction, *listing only the balance due* on the first Monday in March." No one, I presume, would contend that the legislature, providing, as it did, that when partial payments have been made on a debt secured by mortgage, only the balance due should be listed, prescribed or intended to prescribe, that when no payments had been made, *more* than the amount due should be listed. For these reasons I dissent from the judgment.

No. 8,342.

HOBART v. TILLSON, TAX COLLECTOR, ETC.

In Bank. Filed December 10, 1884.

WRIT OF PROHIBITION—FUNCTIONS OF—JUDICIAL AND MINISTERIAL POWER.—Under the constitution the only office of the writ of prohibition is to prevent courts or other officers from going beyond their jurisdiction in the execution of judicial power The legislature cannot enlarge or extend the office of such writ, so as to include ministerial functions.

THE SAME—TAX COLLECTOR—PROHIBITION DOES NOT LIE AGAINST.—A tax collector is a ministerial officer and as such he cannot be restrained by prohibition from executing the functions of his office.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff and from

an order denying the defendant a new trial. The opinion states the facts.

J. F. Cowdery and *David McClure*, for the appellant.

McAllister & Bergin, for the respondent.

McKEE, J. By section 9 of an act entitled "an act in relation to the assessment and collection of taxes upon personal property in the city and county of San Francisco," passed April 18, 1874, it was provided as follows:

"Sec. 9. The assessor may, at any time prior to the fourth Monday in October in each year, specially assess any property which may have been omitted, and which shall not be entered upon the regular assessment-roll, and if he makes any such special assessment, he shall forthwith deliver a copy thereof to the tax collector, and the original to the auditor, who shall charge the tax collector with the amount of taxes due thereon; and all such special assessments shall be as valid and shall have the same force and effect as regular assessments."

Acting under the provisions of that law the assessor of the said city and county, before the fourth Monday in October, 1880, made a special assessment of personal property, as belonging to the plaintiff in this case, which had not been entered upon, but which was omitted from the regular assessment-roll which had been made and returned by the assessor for the fiscal year 1880–81. A copy of that special assessment came to the hands of the tax collector to collect, according to law, the amount of the taxes levied thereon. But upon a verified petition to the effect that the assessment was and is wholly void, and that the taxes levied thereon were also void, being filed and presented to the superior court of said city and county, a writ of prohibition was issued restraining the tax collector from collecting said taxes; and upon a final hearing the court perpetually prohibited the tax collector from collecting the same. In so ruling the court erred.

In the case of The Farmers' Co-operative Union v. Thresher, 62 Cal., 407, which was a petition for a writ of prohibition to restrain a tax-collector from proceeding to sell personal property for an alleged illegal tax, we held, upon the authority of Cameron v. Kenfield, 57 Cal., 550, that the legislature could not enlarge or extend the office of the writ of prohibition, so as to include ministerial functions. The only office of the writ is, therefore, to prevent courts or other officers from going beyond their jurisdiction in the execution of judicial, not ministerial, power.

A tax collector is a ministerial officer, and as such he cannot be restrained by prohibition from executing the functions of his office. When process comes to the hands of a ministerial officer for service according to law, the duty devolves upon him to serve it, and he must do so at his risk. If the process be voidable or void, or if the acts of the officer under it are illegal, the law provides ample and adequate remedies for redress, to which resort must be had; but

the officer himself will not be prohibited from the performance of his duty. If that were permissible, the clerk of a court could be prohibited from issuing process, or the sheriff could be prohibited from executing it, or a tax collector from collecting the revenues of the state or a county, or from doing any other ministerial act, and thus the political affairs of the state would be involved in confusion. Hence we have uniformly held that the writ of prohibition does not run against ministerial acts: Le Conte v. Berkeley, 57 Cal., 269; People v. Board of Election Commissioners, 54 Id., 404; Maurer v. Mitchell, 53 Id., 289; Spring Valley W. W. v. San Francisco, 52 Id., 111.

Judgment and order reversed and cause remanded with direction to the court below to sustain the demurrer to the complaint.

THORNTON, J., ROSS, J., MYRICK, J., MORRISON, C. J., and SHARPSTEIN, J., concurred.

NOS. 8,736–8,737.

MARSHALL v. LIVERMORE SPRING WATER COMPANY ET AL.

Department One. Filed December 11, 1884.

LIEN ON REAL ESTATE—AGREEMENT FOR MUST BE IN WRITING.—An agreement for the purpose of creating a lien upon real estate is void unless the same is in writing, subscribed by the party to be charged. In an action to enforce such lien it is not necessary to allege that the agreement was in writing.

FORECLOSURE OF MORTGAGE—DECREE, WHAT TO EMBRACE.—A decree in an action to foreclose a mortgage can not direct a sale of a greater interest than that mortgaged. Thus, where the mortgage merely covered certain lands and improvements owned by the mortgagor at the time of the execution of the mortgage, the decree must be limited to such property, and cannot embrace property of the mortgagor subsequently acquired.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the plaintiff, and from an order denying the defendants a new trial.

M. Mullany and *Joseph Leggett*, for the appellants.

A. N. Drown and *James Wheeler*, for the respondent.

ROSS, J. These appeals were submitted together, and will be so considered. Both are taken from a decree of foreclosure and sale, and from an order refusing a new trial of the action—one being brought by the defendant and the other by the intervenor. According to the averments of the complaint in intervention, the liens claimed by the intervenor grew out of contract. The agreements out of which they are alleged to have arisen are not in the pleading expressly stated to have been in writing, nor was that necessary. But if by statute they were required to be in writing, the intervenor was bound to prove them by the production of the writings or other competent evidence—issue having been taken on the making of such agreements: Vassault v. Edwards, 43 Cal., 463. By section 1,971 of the code of civil procedure it is provided:

"No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or con-

cerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance, or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereto authorized by writing."

And sections 2,922 and 2,924 of the civil code read:

"2,922. A mortgage can be created, renewed or extended, only by writing, executed with the formalities required in the case of a grant of real property."

"2,924. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge."

At the trial the intervenor admitted that the alleged agreements were not in writing, but were entirely verbal. They were, therefore, void under the provisions of the statute, and being void, the court below rightly found that they were not made: Porter v. Muller, 53 Cal., 680.

But in one respect the decree appealed from is erroneous. It directs the sale of a greater interest than the defendant mortgaged. By this we must not be understood as saying that the plaintiff should not, in his complaint, have more specifically described the property mortgaged. On the contrary, whenever there is uncertainty in the description of the mortgage property, the action foreclosing the mortgage is the proper place in which to put an end to the uncertainty if it can be done: Crosby v. Dowd, 61 Cal., 602. But, of course, the decree cannot embrace property not included in the mortgage. Here, the defendant mortgaged, first, "all of its interest, claim, demand and property of, in and to the waters of the creek known as Mocho, and all easements, rights of way, dams, ditches, reservoirs, pipes, flumes, gates, faucets, connections and appurtenances used in appropriating said water, or in conducting the same to said town of Livermore or elsewhere;" second, "and also, all the water, water rights, pipes, flumes, lands, rights of way and property of every description *now owned or used*, (that is to say, at the time of the execution of the mortgage, owned or used) by said mortgagor, in, belonging to or in connection with its water-works, in the town of Livermore, in said Alameda county, and in or in connection with or belonging to the Las Pocitas Springs and creek, in said Murray township;" third "and also, all the lands and improvements which said mortgagor *now* (that is to say, at the time of the execution of the mortgage) owns on the elevated ground around or in close proximity to its reservoirs used in appropriating said waters of Las Pocitas springs and creek."

In making its decree the court below properly limited the sale it directed to be made of the property *thirdly* described in the mortgage to such of said property as the mortgagor owned at the time

of the execution of the mortgage, but, with respect to the property *secondly* described in the mortgage, the court decreed a sale of "all the waters, water rights, pipes, flumes, lands, rights of way and property of every description at the date of the said mortgage, *or since*, owned or used by the mortgagor in, belonging to, or in connection with its said water-works in the town of Livermore, in said Alameda county, and in or in connection with or belonging to Las Pocitas creek and springs in said Murray township."

In directing a sale of such property, coming within the last above description as the mortgagor acquired *since* the execution of the mortgage, the court manifestly went beyond the limits of the mortgage. In that respect the decree may, and it is claimed by appellants that in fact it does, include property acquired by the defendant subsequent to the mortgage and which does not fall within either of the descriptions firstly and thirdly given in the mortgage. If we could see clearly that the rights of the respective parties could be protected by simply directing a modification of the decree to accord with the views above expressed, we would remand the cause for that purpose; but as the case is presented we are of opinion that the safest way is to direct a new trial.

Judgment and ordered reversed and cause remanded for a new trial.

McKINSTRY, J., concurred.

McKEE, J., I concur in the judgment.

No. 9,102.

TRUETT v. ADAMS.

In Bank. Filed December 11, 1884.

GRANT OF LAND—DESCRIPTION BY GENERAL NAME—EXCEPTION FROM GRANT.—A grant of a tract of land with well-known boundaries, designated and known by a general name, passes all the land within the tract so named or designated; and, upon the same principle, where in the grant of a tract of land by metes and bounds, there is excepted therefrom a portion of the tract with well known boundaries, designated by a general name by which it is known, the tract so designated does not pass by the grant.

DOUBTFUL DESCRIPTION OF PREMISES—INTERPRETATION OF.—In determining what land was intended to be conveyed, where the description in the deed is doubtful, it is the duty of the court to assume as nearly as possible the position of the contracting parties, and to question the circumstances of the transaction between them, and then to read and interpret the words which they used in the light of these circumstances.

THE SAME—EVIDENCE OF ACTS AND DECLARATIONS OF PARTIES.—Where the location of premises intended to be conveyed can be ascertained from the terms used in the instrument of conveyance, neither the acts nor declarations of the parties are admissible to show their understanding of the description contained in the conveyance. But where the terms used to describe the premises meant to be conveyed are equivocal, ambiguous or insufficient, the subsequent acts of the parties while in interest showing the practical construction put upon the terms of the description by them, may be resorted to for the purpose of ascertaining their intention. And where it is proved that a line has been agreed upon, either expressly or by long acquiescence, as the dividing line between two tracts of land, courts will not disturb the line.

APPEAL from a judgment of the superior count for Alameda county, entered in favor of the defendant and from an order denying the plaintiff a new trial. The opinion states the facts.

L. E. Bulkeley, for the appellant.

H. P. Irving, for the respondent.

McKEE, J. This was an action to recover an undivided interest in a block of land situate within the city of Oakland, and embraced within what has been heretofore known as the "Encinal, or Ensinar, of Temescal."

To the original owners of the land, the Encinal of Temescal was well-known as a tract of land bounded on the east by the estuary of San Antonio, on the south by said estuary and the bay of San Francisco, on the west by the bay of San Francisco, and having for its northern boundary a straight line running from the estuary of San Antonio to the bay of San Francisco; and, as known by these boundaries and that name, it formed part of the Temescal ranch, of which, it is admitted, Vincente Peralta was in the years 1851 and 1852, the owner and intpossession.

From Peralta, the plaintiff claims to have acquired title to the premises in dispute, by, through and under a deed from R. P. Hammond, to whom and others, Peralta, on the third day of August, 1853, granted a portion of the Temescal ranch by boundaries which would have included the Encinal of Temescal; but in the descriptive clause of the grant there is the following exception, viz.: "Excepting therefrom all the land comprehended in the Encinal of Temescal sold on the thirteenth of March, 1852, to John Caperton and others."

It is well settled that the grant of a tract of land with well known boundaries, designated and known by a general name, passes all the land within the tract so named or designated; and, upon the same principle, where, in the grant of a tract of land by metes and bounds, there is excepted therefrom a portion of the tract with well known boundaries, designated by a general name by which it is known, the tract so designated does not pass by the grant.

It would therefore seem that Peralta, by his grant to Hammond, intended to, and did, in fact, except from the operation of the grant the entire Encinal, either for those to whom he declared he had previously sold it, or for himself; and whether for them or himself, no part of the land "comprehended in the Encinal" passed to Hammond. So that the plaintiff, who claims only as the grantee of Hammond, acquired whatever right Hammond had to land outside the Encinal tract; and, as it is only by virtue of that right that she claimed title to the land in controversy, it was incumbent on her, in order to recover, to show that the land was not a part of the Encinal tract: City of San Jose v. Uridias, 37 Cal., 339. She, however, admitted it was within the Encinal, and, therefore, within the exception in her grantor's deed, if the description in the deed embraced the Encinal.

But the plaintiff's contention is that Peralta sold to Caperton and others only a portion of the Encinal, and that the land in controversy, although within the Encinal, was without the portion of it

which Peralta sold, and, therefore, not within the exception of the Hammond deed.

The court below, however, found as a fact, that, on the thirteenth of March, 1852, Peralta sold and conveyed the whole of the Encinal to Caperton and others. The finding is challenged as contrary to the evidence in the case. The evidence upon which the finding rests consisted of the contract of sale between the original parties, of date the thirteenth of October, 1851, and of the deed executed and delivered on the thirteenth of March, 1852, in fulfillment of the contract, and of parol testimony of the acts and conduct of the vendor and grantor and the vendees and grantees under the contract and deed, in connection with their claim of ownership and use of the Encinal. The contract and deed are both in the Spanish language. The deed, after reciting the fact that it was executed in fulfillment of the contract, designates the land conveyed as "*Una porcion del terreno llamada El Encinal, descrito en dicho contrato,*" that is to say, in English: A portion of my land called "Ensinar," which is described in said contract. The contract describes the land thus: "*la parte de mi rancho llamada Ensinar comprendida desde la punta de la primera laguna que esta cerca de la casa de Valdez, linea recta, a la orilla y punta primera del Canal donde estan los alemanes actualmente; esto es todo el terreno desde esta linea al sur y donde quedan plantados hoy mismo dos estacas,*" that is to say, in English: The portion of my ranch called Ensinar, which is comprised from the point of the first lake which is near the house of Valdez in a direct line to the edge and first point of the canal where the Germans actually are; that is, all the land from this line—"*al sur*"—to the south, and up to where are planted this day two stakes.

The first expression in this description shows that on that occasion Peralta sold that part of his ranch known by the name of Ensinar, and situated to the south of a line which he undertook to locate. For that purpose, as it was a peninsular tract of land, well known by the name by which he designated it, bounded on the southeast by the waters of the estuary of San Antonio, on the south by the waters of the same estuary, and on the west by the bay of San Francisco, it was only necessary to describe the line on the north, extending from the estuary on the east to the bay on the west, which separated the Encinal from the main land of the ranch. For that purpose the vendor used the natural objects of a lake near the house of Valdes to the east, and a canal to the west, near where some Germans were located.

The idiomatic forms of expression used by Peralta in describing that line on the north, and the land which he sold to the south of it, are not free from ambiguity. It is doubtful whether by them he intended to sell merely the land directly to the south of a straight line produced west from the point of the lake, near the house of Valdes, to a point where it touched the slough near the house of the Germans, or all the land to the south of such a line and from the west stake across the salt marsh to the waters of the bay, and from

the east stake across any intervening marsh lands between it and the estuary; and as the language of the contract is doubtful we must construe it so as to ascertain the intention of the parties to the contract, for that is the object of all the rules of construction. In trying to ascertain that intention, it is the duty of a court to assume, as nearly as possible, the position of the contracting parties, and to question the circumstances of the transaction between them, and then to read and interpret the words which they used in the light of those circumstances.

Now, the evidence shows that the subject matter of negotiations between the contracting parties was the peninsular tract of land called the Encinal, or Oak Grove of Temescal. The owner and the proposed vendee rode around it preliminarily to its purchase, and the former pointed out to the latter the locality of the line on the north which divided the peninsula from the mainland; and that was understood by both parties to be a line from the headwaters of the estuary on the east extended west to the bay of San Francisco. With that understanding a line was to be drawn across the solid ground of the neck of the peninsula, in connection with and from the first point of the lake, near the house of Valdes on the east, and to the first point of the tide slough on the west, and two stakes were to be planted where the line intersected the salt marsh on either side to the west and east. One stake was planted at the point where the line intersected the salt marsh on the west. From that point the salt marsh extended west 29.50 chains to the bay; the other was planted at the point of the lake to the east, between which and the waters of the estuary there was a distance of about fourteen hundred feet with intervening parcels of salt marsh. When the stakes were driven the vendor declared he sold all the land to the south of the line from the lake to the canal *and* where were planted the two stakes. To the south lay the Encinal, bounded on its three sides by the waters of the estuary on the southeast, by the same waters on the south, and by the waters of the bay of San Francisco on the southwest. Was not that the land which was sold?

It is observable, that no attempt was made to describe any of the boundaries of the Encinal, except the boundary line on the north; and as the Encinal was a peninsular tract of land, the terms used to represent this line must have been intended to mark the neck of the peninsula. From this neck, no lines were drawn or called for, running directly south from the natural objects of the lake and the canal, or from the stakes to the southern boundary; and no terms were used from which it could be inferred that the vendor and grantor intended to limit the land sold to a specific portion of the Encinal. On the contrary, the expression used is "all the land to the south of the line drawn from the lake to the canal *and* where two stakes are planted." Evidently these words were not used definitely with the directions of the compass, they must therefore be construed as referring to the whole of the land within the natural

boundaries of the Encinal, whether it lay to the southeast, the south, or the southwest of the established line to the north.

And this construction coincides with the construction given to the instruments by the acts and conduct of Peralta and his grantees, under both the Caperton and Hammond deeds, and the manner in which those parties exercised their respective rights under their deeds for nearly a quarter of a century. During that time all parties claiming under those deeds have acquiesced in the location of the north line from the estuary by the first point of the lake to the first point of the canal and on through the salt marsh to the bay as the true division line between the Encinal and the Temescal ranch.

It is objected that parol evidence was not admissible to prove acquiescence in the establishment of that as the north line, or the acts and declarations of the parties to the contract and deed as to their understanding of the description of any of the boundaries of the land. Undoubtedly where the location of premises intended to be conveyed can be ascertained from the terms used in the instrument of conveyance, neither the acts nor declarations of the parties are admissible to show their understanding of the description contained in the conveyance. But where the terms used to describe the premises meant to be conveyed are equivocal, ambiguous, or insufficient, the subsequent acts of the parties while in interest showing the practical construction put upon the terms of the description by them, may be resorted to for the purpose of ascertaining their intention: Mulford v. LeFranc, 26 Cal., 88. In Stone v. Clarke, 1 Met., 378, the rule is thus stated: "When the construction of a deed is doubtful, great weight is to be given to the construction put upon it by the parties, especially in doubtful questions of boundaries which must be presumed within their knowledge." And where it is proved that a line has been agreed upon, either expressly or by long acquiescence, as the dividing line between two tracts of land, courts will not disturb the line: McCormick v. Barnum, 10 Wend., 104; Sneed v. Osborne, 25 Cal., 619.

The findings of the court below were sustained by the evidence; and as no prejudicial errors appear in the record, the judgment and order are affirmed.

MYRICK, J., SHARPSTEIN, J., and THORNTON, J., concurred.

MCKINSTRY, J. I concur in the judgment.

ROSS, J., CONCURRING. I concur in the judgment, upon the ground that the block of land in controversy is included within the tract of land sold by Peralta on the thirteenth of March, 1852, to John Caperton and others, and therefore falls within the exception contained in the deed under which the plaintiff claims.

No. 9,492.

MULLER v. JEWETT ET AL.

Department Two. Filed December 11, 1884.

CLAIM AND DELIVERY—VERDICT—JUDGMENT.—In an action to recover possession of certain cattle and for damages for their detention, when the answer denies all the material averments of the complaint, a verdict for the defendants for one half of such cattle is not responsive to the issues, and should be disregarded by the court; and a judgment for the defendants entered on such verdict is erroneous. The jury should have also found as to the other half of the cattle sued for.

APPEAL from a judgment of the superior court for Kern county, entered in favor of the defendant. The opinion states the facts.

Peck & Mahon and *S. Solon Holl*, for the appellant.

R. E. Arick, for the respondents.

THORNTON, J. This is an action to recover possession of fifty head of cattle and for damages for the detention thereof. Issue was joined on all the material averments of the complaint. The cause was tried by a jury, and they returned the following verdict: "We, the jury, find in favor of the defendants for one-half of the G O cattle."

The verdict did not respond to the issues joined in the cause. The verdict was in favor of the defendants for one half of the cattle sued for, and was entirely silent as to the other half. Assuming that the plaintiff was entitled to a verdict for the other half, the jury did not by its verdict say so.

On this verdict a judgment was rendered in favor of the defendants for one-half of that certain brand of cattle known as the G O brand, now in the county of Kern, state of California, and for costs amounting to $164.57,

On what theory this judgment could be entered on such a verdict we cannot perceive. The jury should have been directed by the court, on its own motion, to retire and find as to the other half of the cattle sued for: C. C. P., sec. 619. The verdict, in failing to respond to the issues raised by the pleadings, was a nullity, and should have been, after the discharge of the jury, so regarded by the court. For the foregoing reasons the judgment should not be allowed to stand.

Inasmuch as this court has passed on the appeal in Crites v. Muller and Wilkinson: 3 West C. Rep., 649; so that the judgment in that case can be pleaded by supplemental answer on the return of this cause to the court below, we will say nothing as to the points made upon the rulings by the court admitting in evidence the judgment roll in the case just above mentioned.

Judgment reversed and cause remanded for a new trial.

MYRICK, J., and SHARPSTEIN, J., concurred.

WEST COAST REPORTER.

WHOLE No. 52. DECEMBER 26, 1884. VOL. IV. No. 13.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* DULL ET AL.

December 15, 1884.

ACT OF CONGRESS GRANTING LAND TO THE SOUTHERN PACIFIC R. R.—CONSTRUCTION OF.—The act of Congress of March 3, 1871, in effect provided that "*there be* and *hereby is* granted to the Southern Pacific Railroad Company of California * * for the purpose of aiding in the construction of said railroad * * * every alternate section of public land, not mineral, designated by odd numbers * * * whenever on the line thereof, the United States having full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office." *Held*, that such act constituted a present grant, that could only be defeated by failure to perform the conditions subsequent therein, and upon proper proceedings to take advantage of such failure: that the general right to the land, subject to the exceptions found in the act, vested at the date of the passage of the act, on March 3, 1871, and attached to the specific land at the moment of the filing of the plat in the office of the commissioner of the general land office. Thenceforth it was not in the power of any officers of the government, by any action of theirs, to divest, or in any way limit, or modify, the rights of the company so vested.

THE SAME—WHEN GRANT ATTACHED—MEXICAN GRANT.—Such congressional grant attached to lands lying within the exterior limits of a Mexican grant, but outside of the limits thereof as finally surveyed, if prior to the date of filing such plat in the office of the commissioner of the general land office, the Mexican grant had been finally located.

THE SAME—CONFIRMATION OF MEXICAN GRANT UNDER ACT OF JUNE 14, 1860.—Under the act of congress of June 14, 1860, proceedings for the confirmation of a Mexican grant are in the nature of proceedings *in rem;* under such act the location of a Mexican grant becomes final, after the publication by the surveyor-general of the notice provided for therein, in the absence of any application to have the plat and survey returned to the district court for examination. A survey so made final by publication has the same effect as a patent, and thereafter is in no sense *sub judice;* the jurisdiction of the commissioner of the general land office is thereupon exhausted as to everything but the ministerial duty of issuing a patent, and any further acts of his, such as ordering a re-survey, are void. All lands outside of the survey, thus made final, become public lands of the United States, and subject to any other disposition under the law.

STATUTORY GRANTS—PUBLIC RECORD—NOTICE.—All the world must take notice of statutory grants of land clearly defined on the face of the statute, and other public records, indicated by the statute.

THE SAME—CASE IN JUDGMENT.—The defendant entered upon land within the exterior limits of a Mexican grant, with the intention of securing a pre-emption right, but subsequently abandoned his location under the mistaken supposition that such land was *sub judice*, and located elsewhere; four years afterwards, and eighteen months subsequent to the filing of complainant's map, he returned to his original location. *Held*, that such return did not connect itself with his former residence, and continue or re-instate the right first initiated, and that the right of the complainant having attached, it was too late to acquire a new right of pre-emption; and a patent issued to him, based upon such subsequent location, was either void, or held in trust for complainant, and the patentee could convey no title to a purchaser for value without actual notice, in fact, of complainant's title.

Joseph D. Redding, for the complainant.

Barclay & Wilson and *Estee & Wilson*, for the defendants.

SAWYER, CIRCUIT JUDGE. This is a bill in equity to control the legal title vested in the defendants, by virtue of a patent of the United States, and to decree that defendants hold the title in trust for complainant, or for any other relief in equity to which complainant may be entitled. The land is within the limits of the grant to complainant of the alternate odd sections of land, to aid in the construction of a railroad from the intersection of the Texas Pacific Railroad, on the Colorado river, to connect with San Francisco, California, under the acts of congress of July 27, 1866, secs. 3 and 18, 14 Stat. 294, 299, and of March 3, 1871, sec. 23, 16 Stat. 573. A topographical map of the country, through which this part of the Southern Pacific Railroad was to pass, was duly made by the engineers, and adopted by the company, upon which map was delineated the line, and route of the road, so that its location appeared thereon, with reference as well to the sections of the public lands, as to the towns, cities, counties and rivers in the said region. The map, with the line and route, so delineated, thereon, certified by the chief engineer, president and secretary of complainant, and under the corporate seal of the corporation, was, on April 3, 1871, duly filed with the secretary of the interior, who duly accepted it, and on said day transmitted the same to the commissioner of the general land office, to be filed in that office, and, on that day it was filed by the commissioner, in his office, whereby the line of the road was definitely located, and the grant attached to all lands at that time subject to the grant under the said several acts. On April 21, 1871, the commissioner of the general land office transmitted a copy of said map to the receiver of the land office, at Los Angeles, which map was duly filed in that office, on April 29, 1871. The road was afterward fully completed by complainant, in accordance with the said acts of congress, and subsequent acts, amendatory thereof, and extending the time for completing said road, whereby the rights of said complainant become perfected, to all the lands within the purview of the grant, as designated by these acts. The land in question is part of an odd section within the limits of the grant.

After the completion and acceptance of the road, the complainant, in due form of law, repeatedly applied at the proper land office for the patent, to which it claimed to be entitled, tendering all necessary charges and expenses; but a patent was refused.

On November 25, 1867, defendant, Dull, having all the qualifications necessary for the purpose, in good faith, entered, as a preemptor, upon the land in question, with the intention of acquiring the title of the United States. He built a house on the land, and resided there, continuously, from November 15, 1867, till about June 1, 1868,—a little over six months—when he left the land, and located in another place, in consequence of the survey made in the meantime by Hansen, hereinafter mentioned, which included the land in question, within the boundaries of Tajanta rancho, as surveyed by him, believing, as he did, that land, so situated, was not open to preemption. In the latter part of 1872, the survey of

Hansen was rejected, by the government at Washington, as having been made without jurisdiction, and as being void. Thereupon, after such rejection, and a year or more after the filing of the plat, as aforesaid, by complainant, by which the line of the road was definitely located, Dull returned, and, again, settled on the land, and, on April 9, 1874, filed his declaratory statement in the proper land office. The patent in question, was, afterward issued to him, on December 30, 1880, upon a settlement, as stated by the secretary of the interior, in his opinion, to have been made in the latter part of 1872, being the settlement made on his second entry, before referred to.

The survey of Hansen was made under the following circumstances. The Tajanta rancho grant, being a Mexican grant of a league of land within larger exterior limits, having been finally confirmed under the act of 1851, a survey of the rancho, as confirmed, was made by deputy surveyor, Hancock, in December, 1858. This survey was approved by the surveyor general, September 17, 1860, after the passage of the act of June 14, 1860, relating to the subject, and it is governed by that act: 12 Stat., 33. The notice of the survey, and filing of the approved plat was published, in all respects, as required by the provisions of that act. The plat and survey were retained in the office of the surveyor general for the time required by the act, and no application for ordering it into court, and no such order having been made, the survey became final under the provisions of said act, in the latter part of September, 1860, and was afterward duly transmitted by the surveyor general to the general land office at Washington. Sometime prior to February, 1868, the confirmee of the grant, applied to the surveyor general to set aside the Hancock survey, already become final, and have a new one made, which application was referred to the commissioner of the general land office for his instructions. The commissioner directed the surveyor general to examine the case, and if he found the matter to be still within the jurisdiction of the surveying department, to have a new survey made. The surveyor general afterward ordered George Hansen to make a survey, and, he, thereupon, made the survey hereinbefore mentioned, in the month of February, 1868, and forwarded it to the general land office; but the commissioner, and the secretary of the interior, decided, that it was not within the jurisdiction of the surveyor general to make the survey, on the ground that the Hancock survey of 1858, had become final, in 1860, under section 5 of said act of 1860, which provides, that: "the said plat and survey, *so finally determined by publication,* order or decree, *as the case may be, shall have the same effect and validity in law, as if a patent for the land, so surveyed, had been issued by the United States.*"

The said Hansen survey was rejected, as void, on that ground. The Hancock survey, which became final under the statute in September, 1860, did not include the land in controversy, but the land was situate within the exterior boundaries of the Tajanta rancho, as

claimed in the petition for confirmation, and the confirmee continued to claim the land as being within the grant, until the rejection of the Hansen survey by the secretary of the interior, on the ground stated on February 21, 1872. In December, 1872, after the rejection of the Hansen survey on the grounds stated, defendant, Dull, returned to the land and, thenceforth, occupied, in good faith, till the issue of his patent. He filed his declaratory statement in the proper office, April 9, 1874.

Prior to the commencement of this suit, defendant, Dull, conveyed the land in question, and his title, whatever it is, has passed to and and become vested in defendant, Scheffelin, who, prior to his purchase, caused the county records of the county of Los Angeles, in which the land is situated, to be searched, and the legal title thereto appeared, upon said records, to be vested in his grantor, free from incumbrances; and said purchase was made by him, without any actual knowledge, in fact, of any right, title, interest or claim of complainant, or any other person of, in, or to said land, or any part thereof. He purchased the land in good faith for his own use and benefit, and paid therefor two thousand five hundred dollars, which was the full value of the land, at that time.

The congressional grant to the complainant, relied on, is found in section 23 of the act of March 3, 1871: 16 Stat., 579; and is in the following language: "That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California, is hereby authorized (subject to the laws of California), to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six." For the particulars of the grants, it will be seen, reference is made to the act of July 27, 1866, incorporating the Atlantic and Pacific railroad, and making the provisions of that act applicable to complainant: 14 Stat., 292. Referring to section 18 of that act, so made applicable: id. 299; it appears that in consideration of the construction of the connecting railroad, therein provided for, and "to aid in its construction," the Southern Pacific Railroad Company of California, complainant herein, "shall have similar grants of land, subject to all the conditions and limitations herein provided," that is to say, the same grants, and upon the same terms, and conditions, as are prescribed for the Atlantic and Pacific railroad. Section 3 of the act: id., 294; on substituting the name of the complainant for the Atlantic and Pacific railroad, provides: "That there *be* and *hereby is* granted to the Southern Pacific Railroad Company of California * * * for the purpose of aiding in the construction of said railroad * * * every alternate section of public land, not mineral, designated by odd numbers * * * whenever on the line thereof, the United States having full title, not reserved,

sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, *at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office.*" It is settled by numerous decisions, that the words "that *there be*, and *hereby is, granted*" lands, in an act of congress, constitute a *present* grant, that can only be defeated by failure to perform the conditions subsequent, and upon proper proceedings to take advantage of the failure to perform them. The general right to the land, in this instance, subject to the exceptions found in the act, vested at the date of the passage of the act, March 3, 1871, and attached to the specific land, at the moment of the filing of the plat in the office of the commissioner of the general land office, as provided by section 3 of the act, already cited: S. P. R. R. Co. v. Orton, 6 Saw., 198; Schulenberg v. Harriman, 21 Wal., 60; Leavenworth, etc., R. Co. v. U. S., 92 U. S., 741; Railroad Co. v. Smith., 9 Wal., 95; Ryan v. C. P. R. R. Co., 5 Saw., 262, affirmed 99 U. S., 383; C. P. R. R. Co. v. Dyer, 1 Saw., 641; Knevals v. Hyde, 20 Alb. L. Jour., 370; Van Wyck v. Knevals, 106 U. S., 360.

In the last case cited, the court says: "The grant is one *in præsenti*, * * * that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it, arises from the fact that the sections designated as granted are incapable of identification until the route of the road is "definitely fixed." When that route is thus established, the grant takes effect upon the sections, by relation, as of the date of the act of congress. In that sense, we say that the grant is one *in præsenti*. It cuts off all claims, other than those mentioned, to any portion of the lands, from the date of the act, and *passes the title as fully as though the sections had then been capable of identification.*"

In the same case, the supreme court settles the question, also, as to when the grant becomes specific and definite, by attaching itself to particular odd sections. Says the court: "When a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. It then becomes the duty of the secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the secretary's order, or upon notice of the withdrawal being given to the local land officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the secretary, nor any other officer of the land department, can extend the period by requiring something to be done subsequently, and,

until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings, to defeat the act of congress, or at least seriously impair its benefit. Parties learning of the route established—and they would not fail to know it—might, between the filing of the map and the notice to the local land officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them. This view of the law disposes of the claim of the defendant. A map designating the route of the proposed road, made by the engineers of the company after careful surveys, and adopted by its directors, was filed on the twenty-fifth of March, 1870, with the secretary of the interior, who accepted it, and on the twenty-sixth of that month, transmitted it to the commissioner of the general land office with directions to instruct the proper local officers to withhold from sale, or other disposition, the odd numbered sections within the limits of twenty miles on each side of the route:" Id., 365.

So in this case, the plat duly approved by the engineers, and adopted by the proper officers of the company, was filed in the office of the commissioner of the general land office on April 3, 1871; and, on that day, the title of complainant vested, as to all the odd sections within the prescribed distance, of which the land in question was a part of one, to which, at the time, there was no existing vested right, in another; or which was not, at the time, within some other exception of the grant. Thenceforth, it was not in the power of any officers of the government, by any action of theirs, to divest, or in any way, limit, or modify, the rights of complainant, so vested, under the act of congress.

The title of the complainant having vested on April 3, 1871, it attached to the land in question, unless it is within one of the exceptions found in the act. The ground mainly relied on to bring it within one of these exceptions, is, that, on that day, the land in question was within the exterior limits of the Tajanta grant, *sub judice*, at the time, and, therefore, not subject to grant within the rule established by the supreme court in Newhall v. Sanger, 92 U. S., 761. If the Tajanta grant had been finally located before that date, then it was no longer *sub judice*, and the lands being outside the limits of the final survey, were public lands, and subject to grant, and the congressional grant attached, unless the land was within some other exception. This point is settled beyond controversy by the decision of this court, affirmed by the supreme court, in Ryan v. C. P. R. R. Co., 5 Sawyer, 260, and 99 U. S., 382. The supreme court says in the case, with reference to land selected after the final rejection of the Mexican grant, in lieu of other lands excepted from the grant to the railroad company: "When so selected, there was no Mexican, or other claim impending over it. It had ceased to be *sub judice*, and was no longer in litigation. It was as

much public land, as any other part of the National Dominion:" 99 U. S., 388.

The question, then, is, when did the location of the Tajanta grant become final? We have seen from a statement of the facts, that the Hancock survey was made prior to the passage of the act of June 14, 1860, 12 Stat. 33, and was approved by the surveyor general September 17, 1860, after its passage; and that the effect of the proceeding is determined by that act. The publication of notice was duly made, and the survey and plats were retained for inspection in the office of the surveyor general for the term prescribed by the act. No application was made to order it into court, in pursuance of the provisions of the act, and no such order was made. The survey thereby became final, under the act, after which it was transmitted to the commissioner of the general land office. The effect of a survey thus become final, is declared by the explicit, express terms of the statute, in language so clear, that it cannot be misunderstood, and that is susceptible of but one construction. It is as follows: "And the said plat and survey *so finally determined by publication, order, or decree, shall have the same effect and validity* in law, *as if a patent for the land so surveyed had been issued by the United States.*" The language is in the alternative, and puts a survey, become final by publication, upon the same footing with one made final by an "order, or decree" of the court, and makes it, in express terms, in its legal effect, the equivalent of a patent. This act took away the entire jurisdiction of the commissioner of the land office, which existed under prior statutes, to revise, or reject, or confirm surveys, of Mexican grants, and transferred it to the courts, where parties interested, not satisfied with a survey, were required to make an application to order it into court; and, also, made the survey and location final by default of the parties interested, if no such application should be made. When this survey thus became final, under the act, it was *res adjudicata* on the location, and there was no authority, or jurisdiction, in the land department, or in any other officer of the government, to, in any way, interfere with it. There remained but the mere ministerial duty of issuing the patent, which would be convenient evidence of title, already fully vested, under the statutes, by the survey, which had become final under the act, and been made equivalent to a patent. Upon this survey becoming final under the provisions of the act of 1860, the grant ceased to be *sub judice;* and all lands outside of the survey, thus made final, became public lands of the United States, and subject to any other disposition under the laws. Nothing can be *sub judice* before a tribunal, or officer, that has no authority or jurisdiction to adjudge the matter, or to in any way meddle or interfere with it. Any attempt to exercise such authority, or any claim made against action already final, and beyond the reach of further jurisdiction, is simply a nullity. From the moment the location became final, the commissioner of the general land office was *functus officio,* as to everything but the ministerial duty of issuing the patent. His jurisdiction and power in all other respects

were exhausted, and his further acts were void. The confirmation of a survey, under the act of 1860 has often been held to be conclusive: Bissell v. Henshaw, 1 Saw., 583–4; Treadway v. Semple, 28 Cal., 655; Wright v. Semple, 32 Cal., 659; Henshaw v. Bissell, 18 Wal., 268–9. It is held that the proceeding is in the nature of a proceeding *in rem;* and equally conclusive upon those who fail to appear and contest the location upon a notice published under the act of 1860. Says the court, in Bissell v. Henshaw, 1 Saw., 585: "The proceeding is one somewhat of the nature of a proceeding *in rem* under the statute, in which all parties are bound to intervene and protect their interests. If not, there could be no object in this provision of the act." And the supreme court, in affirming the same case on appeal, said:

"By the proceedings thus authorized, the approval of the survey brought before the court, had, as against claimants under floating grants, the force and conclusiveness of a judicial determination in a suit *in rem*, and all such claimants were concluded by it. * * * If the defendants, or those under whom they hold, failed to appear and contest the survey, they cannot now be heard in this action to question its correctness": 18 Wal., 268–9. These were cases where the survey had been ordered into court, and notice given, and thereupon the survey had been confirmed by order of court. But the statute makes a survey which becomes final after publication, without application to order it into court, equally final and conclusive. It is still in the nature of a proceeding *in rem*, and all who object to the survey must apply within the time prescribed by the act, to have it ordered into court for judicial examination, or, in default thereof, they will, in like manner, be concluded, on the expiration of the time. In this case, the survey became final under the act, on the expiration of the time, and everybody is concluded. The United States on one side, and the confirmee on the other, were, in fact, parties to the record, and to the survey; and as to both, the Hancock survey became final, and, thereafter, the matter ceased to be *sub judice.*

In this case, the surveyor general, on the application of the confirmee, was, long subsequently, directed by the department at Washington to examine the record, and if still within the jurisdiction of the surveying department, to make a new survey; and thereupon a survey was made by Hansen, nearly *eight years* after the Hancock survey had become final. It will be observed that no survey was ordered, unless found to be still within the jurisdiction of the surveyor. But the secretary of the interior, and rightly, I think, rejected this survey by Hansen, on the ground that the Hancock survey had long before become final; and that there was no further jurisdiction over the matter, so that the action of Hansen was not voidable merely, but, necessarily, absolutely void. The then secretary of the interior properly held that the grant ceased to be *sub judice,* when the Hancock survey became final: and, on that theory, he issued a patent to the complainant, to an adjoining portion of

the same section, of which the land now in question is a part; which patent was in question in S. P. R. R. Co. v. Garcia, hereinafter cited. But his successor held that the grant was *sub judice*, during all the time the proceedings under the Hansen survey were pending, although those proceedings were void, for want of jurisdiction, and refused a patent to complainant for the *locus in quo*, and granted one to defendant, Dull, on that ground. Manifestly, the first decision was right, and the last wrong. The grant ceased to be *sub judice*, at the moment the Hancock survey became final. The same view maintained here, was taken by the supreme court of California, reversing the judgment of the court below, in S. P. R. R. Co. v. Garcia, before referred to, which was for a part of the same section, and adjoining the land now in question, and, therefore, similarly situated: 1 West Coast R., 587. The court, after a full discussion of the question, says: "The publication and approval of the Hancock survey, in the absence of any application to have it returned into the district court, had the same effect and validity in law, as if a patent for the land so surveyed had been issued by the United States. After that, the grant was in *no sense sub judice*."

"It was the duty of the surveyor general to transmit said survey to the general land office; and of that office to forthwith issue the patent for the land in accordance with said survey. The grant thereby became segregated from the lands lying outside said survey:" Id., 588. Such is the unanimous judgment of the supreme court of California, in bank, with respect to a part of this identical section, situated precisely like the part now in dispute; and I have no doubt of the correctness of the ruling. If these unauthorized and void acts of the claimant, and subordinate officers of the land office, can continue the grant in a *sub judice* condition, after a survey becomes final under the statute, then the same result would follow similar acts, years after the issue of a patent upon a confirmed claim, and the lands would never be finally segregated from the public domain.

The only other exception suggested, within which the land in question can fall, is, that defendant, Dull, at the date of the filing of the plat had initiated a pre-emption right, which he, afterward, in good faith, followed up till he obtained a patent. But, Dull was not living on the land at the time of the filing of the map by complainant. He had entered in 1867, and erected a house in good faith with the intention of securing a pre-emption right, and remained till June, 1868, about six months. The Hansen survey having been made, in the meantime, he supposed the Tejanta grant to be still *sub judice*, and, that the land was, consequently, not subject to pre-emption. For that reason he abandoned his land, and located elsewhere, and did not return to the land till four years afterward, after the Hansen survey had been decided to be void for want of jurisdiction by the secretary of the interior. He had not resided on the land for nearly three years when complainant's map was filed. At that time he had no vested right whatever in the land. The right he once initiated was lost by abandonment, when he left the land in conse-

quence of the Hansen survey. The fact that he was mistaken as to the legal effect of that proceeding cannot affect the question. That removal was an abandonment—no matter what the reasons were that operated upon his mind, and controlled his action. The act of abandonment, itself, irrespective of the reasons for it, terminated the right initiated, and not followed up and perfected. His subsequent entry four years afterward, and eighteen months subsequent to the filing of complainant's map, did not connect itself with his former residence, and continue or reinstate the right first initiated, and afterward lost by his own voluntary act. The right of complainant having attached, it was now too late to acquire a new right of pre-emption. The secretary of the interior, for the purpose of the patent, issued, very properly, regards his pre-emption right as based solely on the entry in 1872.

The land, then, was not within any exception of the act of congress, and the title vested in complainant upon the filing of its plat, and complainant became entitled to a patent upon the performance of the conditions of the grant, which have all been fully performed.

The only remaining question is, whether the defendant, Scheffelin, is protected as a *bona fide* purchaser for value, without notice of complainant's title; and I think he is not. The grant to complainant was made by a statute of the United Statue *in præsenti*, which could only be defeated by the failure to perform the conditions subsequent. But those conditions were fully performed, and the title became fully vested under the statutory grant, and only the mere ministerial duty remained, to issue the patent, as evidence of title to the complainant. The complainant became the owner of the land, having all the beneficial interest in it, and I think, also, the legal interest, for a title can pass by statutory grant, as well as by patent. There was, at most, left in the United States, the naked, dry, legal title held in trust for complainant, and a patent to any other party, if effective to pass the legal title, at all, would be a violation of that trust. But there was no power in the officers of the United States to execute a patent under the circumstances of this case, to Dull; and the patent is void on that ground. There is in this case, no right acquired under recording laws by which a subsequent *bona fide* purchaser may obtain a title by reason of a prior purchaser's failure to record his conveyance. So, also, it is not the case of the acquisition of the legal title by a party having a prior equity, equal to the equity of the complainant, to which the legal title when acquired, attaches itself, and the cases cited upon that point do not apply. There is no equity in the defendant, other than such as arises out of the transaction itself, by which he acquired the legal title, if, indeed, the legal title can be said to have passed. The grant to complainant, was by statute, of which all the world must take notice; and by virtue of the same statute, it became attached to the particular land, and became specific on the filing of the maps in the offices of the commissioners of the general land office, which, also, became a public record, pointed out by the stat-

ute itself, as the place to go for information as to the specific land to which the grant should become attached. The statute, and the map became the official record of the grant, and were open to inspection, and were notice to all the world of the extent of the grant. After the filing of the record, it was only necessary to read the statute, and compare it with the map on file, and the record of the public surveys, with reference to which the map was made, to ascertain that the land in question was embraced in the grant. There were no facts *extrinsic* to *or dehors* the record to be ascertained on parol, or other evidence, of which a purchaser from Dull, might be, innocently, ignorant. So, also, the proceedings for the confirmation of the Tajanta grant, were public judicial records, which disclosed on their face the fact that the survey of the grant had become final, and ceased to be *sub judice* in 1860, long before the filing of complainant's plat, and the issue of the patent in question. The rights of complainant, therefore, were fully disclosed by the statute and public records of the United States, of which everybody is bound in law to take notice, and, if the defendant, Scheffelin, did not, in fact, have actual notice, he had legal notice. He was bound to know these facts so disclosed by the statutes and the public records of the United States. So the officers of the land office were not misled by any false testimony *extrinsic* to, *or dehors* the record submitted for their determination as to the rights of the complainant. They acted on a known state of facts, disclosed by their own records, and, simply, erred in the legal conclusions drawn from those known facts. By that error they overstepped the bounds of their authority in refusing a patent to complainant, and issuing the one in question to Dull. The patent is either, absolutely, void, for want of power to execute it, and does not even pass the legal title; or else the dry legal title passed, subject to the trust in favor of complainant, and it should be conveyed to complainant.

In cases where questions of fact are to be determined by the land office upon parol or other evidence *extrinsic* to, *and dehors* the record, in order to ascertain whether a statutory grant has attached to a particular piece of land, I am not, now, prepared to say, that such determination of facts would not be conclusive; or if not, that a *bona fide* purchaser for a valid consideration from the grantee of the patent issued upon such a determination of facts, would not be protected. But that is not this case.

In Johnson v. Towsley, 13 Wal., 86, the supreme court says: "It is fully conceded that when those officers [officers of the land office] decide *controverted questions of fact* in the absence of fraud, or impositions or mistake, their decision on *those* questions are final. * * * But we are not prepared to concede that when, in the *application* of the facts as found by them, they, by *misconstruction* of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give relief." Again, "the secretary, or rather the assistant sec-

retary, as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a pre-emption of another tract of land which he had voluntarily abandoned, and it is clear that, but for this construction of the statute on that subject, Towsley would have received the patent which was awarded to Johnson:" Id., 87–8. This doctrine that relief may be granted, where injury has resulted from a misconstruction of the law applicable to the known facts, by the officers of the land department, has been repeatedly affirmed since, as in Shepley v. Cowan, 91 U. S., 340; Moore v. Robbins, 96 U. S., 535–6; and other cases. Now, that is precisely what was done in this case. Upon the known, undisputed and recognized state of facts disclosed by their own records, the secretary of the interior and commissioner of the land office erred in their construction of the law applicable to the case, holding that, upon the facts, and statutes under which the survey became final, the survey did not become final till the rejection of the Hansen survey, in 1872; whereas, under the law, it did become final, upon the completion of the publication of notice published of the Hancock survey in 1860; and they erred in further holding that the grant continued to be *sub judice* till 1872, whereas, under the law, properly construed, it ceased to be *sub judice* in 1860. But for this error of law upon the conceded facts, the patent would have been awarded to complainant, instead of to Dull. This brings the case exactly within the decisions cited. Besides, the case of Van Wyck v. Knevals, 106 U. S., 360, is exactly in point, in this case, and settles the question, if it were otherwise doubtful, but it is not.

There must be a decree for complainant, as prayed in the bill, with costs, and it is so ordered.

CIRCUIT COURT, DISTRICT OF COLORADO.

SPERRY ET AL. *v.* INSURANCE COMPANY OF NORTH AMERICA.

FIRE INSURANCE—CONSTRUCTION OF POLICY—KEEPING GIANT POWDER—FACTS MATERIAL TO RISK—PLEADING—AMENDMENT.—Keeping giant powder and other explosives in a building adjacent to the building insured, is not equivalent to keeping such articles within the insured premises. Whether the fact that such articles were kept in the adjacent building was material to the risk, and therefore a matter of which the insured was bound to notify the insurer, is a question for the jury, and, in an action on the policy, must be raised by the answer. The answer in this case having omitted to raise such question, *held*, that it was too late to do so by an amendment after trial.

ACTION on a policy of insurance. The opinion states the facts.

E. T. Wells, for the plaintiff.

V. D. Markham, for the defendant.

HALLETT, J. Action on a policy of insurance for one thousand dollars, issued by defendant to plaintiffs, of date October 24th, 1883, covering a stock of goods "on the grade floor of the two story frame

shingle roof building, situate on the north side of Main street, east of Center avenue in Garfield, Chaffee county, Colorado."

The goods were destroyed by fire October 30, 1883. Several defenses are set up in the answer.

1st. That the loss was caused not by fire but by an explosion of some kind for which the defendant is not liable by the terms of the policy. This defense is not supported by the evidence.

2nd. That a clause of the policy prohibited the keeping of gun powder, giant powder or nitro-glycerine in the premises where the goods were kept; "and defendant alleges that the plaintiffs, at the time of the alleged damage, and for a long time prior, had deposited and stored on said premises, and in said building, where the stock of goods insured was, large quantities of gunpowder, giant powder and nitro-glycerine—that is to say, one thousand pounds of each—without any consent of the defendant so to do expressed in the body of the policy, and without the knowledge and against the consent of the defendant."

On this point the evidence shows that a one-story building on an adjoining lot, and some three or four feet from that mentioned in the policy, was used by plaintiffs as a store-house. A covered way connected the two buildings at some point towards the rear; goods were taken into the store-house and put out, at times, through front doors which opened on the street; but in general, the store-house was used only in connection with the building mentioned in the policy, through the passage way at the rear.

Of the existence and use by plaintiffs of the building as a store-house, its situation, and connection with the main building, in which plaintiffs' business was carried on, defendant's agent had notice at and before the time of issuing the policy; but whether the agent also had notice that giant powder or dynamite was kept in the store-house is not clear. That substance was kept in the building open to view, and defendant's agent was in the room; nothing was said about it, and it may be going too far to assume that he saw it and knew what it was. However that may be, it is clear that the store-house was not any part of the premises covered by this policy or within the prohibition of the policy as to keeping explosive substances. The prohibitory clause reads as follows: "Gunpowder, fireworks, nitro-glycerine, phosphorus, naphtha, benzole, benzine, benzine varnish, camphine, spirit gas, gasoline, phosgene or burning fluid, or any similar inflammable fluid, are positively prohibited from being deposited, stored, kept or used in any building on which, or on the contents of which, there is any insurance under this policy, unless by special consent expressed in the body of the policy, naming each article specifically—otherwise, the insurance by this policy shall be void."

It refers only to the building in which the goods were stored on which insurance was given and does not in any way refer to the store-house or anything in it. In this clause plaintiffs were not limited in the use of the store-house or any other building, excepting

that in which the goods covered by the policy were kept. Therefore the defense that such articles were kept in the premises mentioned in the policy is not made out.

3rd. Another clause of the policy on which defendant relies, is as follows: "And if the assured shall, in such application, survey or plan, or in any statement or description, written or oral, make any misrepresentation as to the character, condition, situation, value, or ownership of said property, or as to the occupancy of the premises or the exposures thereto, or any other misrepresentation whatever, or fail to make known every fact material to the risk, including the amount of incumbrance on said property, if any, this policy shall be void. The procuring of insurance on said property for more than its cash value; or the having of other insurance thereon, or any part thereof, valid or invalid, prior or subsequent, not made known to this company and consented to hereon; or any change increasing the hazard, either within the premises or adjacent thereto, within the control of, or known to the assured, and not reported to this company, and agreed to by entry in due form in the body thereof—will render this policy null and void."

It is alleged that plaintiffs kept and stored "in the same building and on the same premises with the stock of goods insured," gunpowder, giant power and nitro-glycerine, in violation of this clause. As has been stated already, the giant powder was in the storehouse and not as alleged, "in the same building and on the same premises with the stock of goods insured." Therefore that defense is not made out.

4th. Referring to that part of the clause last mentioned which forbids any change increasing the hazard, it is averred that plaintiffs "did make a change, increasing the hazard within the premises and building in which was the stock of goods insured in said policy, by depositing and storing large quantities of giant powder and nitroglycerine on said premises and in said building after the issuance of said policy." This is answered by the statement already made that the giant powder was not kept "on said premises or in said building" as averred.

These matters are repeated in an amendment which adds nothing to what has been stated. In all the defenses, it is alleged that the giant powder was kept in or on the premises described in the policy, which, if true, would bar the action. But the fact is not as alleged; as fully explained, the prohibited article was kept not in or upon, but very near to the premises described in the policy.

The real question suggested by the evidence is whether the fact that giant powder was kept in the storehouse adjacent to the building mentioned in the policy, was material to the risk and therefore a matter of which plaintiffs were bound to notify defendant at the time of application for the policy.

That is a question which can be raised by answer only, and when thus presented is to be decided by the jury: Capacia v. Phœnix Ins. Co., 28 Cal., 628.

If it appeared to be wholly decisive of the case, perhaps the defendant would be allowed, even at this late day, to amend its pleadings in a way to avail of the defense. But the circumstances disclosed by the evidence, although suggestive of doubt, are by no means conclusive as to the fact. The warehouse was in use at the time application was made for the policy and defendant had knowledge of it; giant powder is an article usually kept in stores in mining towns, and it was a fair inference that plaintiffs were dealing in it. To store or keep it with the goods insured was forbidden, but nothing was said as to keeping it in the warehouse or elsewhere without the main building.

As the dangerous compound was excluded from the building mentioned in the policy, it is not quite reasonable to go beyond the language of the contract and say that plaintiffs were also forbidden to keep it in another place.

If more was intended than is stated in the policy, why was it omitted from that instrument? To have prohibited the storage in the warehouse of any of the articles referred to as hazardous, would have been easy enough, and the failure to do so, gives support to the argument that it was not intended. But the question is not presented in the record, and, therefore, not open to consideration except upon the matter of amendment. I am of the opinion that the defense to the action is not sustained, and judgment will be for plaintiffs.

SUPREME COURT OF COLORADO.

MURPHY v. HOBBS.

Filed November 18, 1884.

MALICIOUS PROSECUTION—MEASURE OF DAMAGES—DAMAGES AS PUNISHMENT.—Damages in an action for malicious prosecution are limited to such an amount as will compensate the plaintiff for his pecuniary loss, for injury to his person, and for his mental and physical suffering. Damages as a punishment to the defendant are not allowable.

THE SAME—ACTUAL AND IMPLIED MALICE—PROBABLE CAUSE—WANT OF.—In such action malice may be implied from a want of probable cause. Probable cause is such a state of facts known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon facts within his knowledge, to believe or entertain an honest and strong suspicion that the person accused is guilty. If probable cause for the arrest exists, the prosecutor is not liable, although he may have been influenced by improper motives. If a want of probable cause appears, evidence of the acts and conduct of the prosecutor, showing actual malice, is admissible, for the purpose of enhancing the compensatory damages.

APPEAL from a judgment of the district court for Weld county. The opinion states the facts.

William B. Mills, for the appellant.

Haynes, Dunning & Haynes, for the appellee.

HELM, J. This is a civil action brought to recover damages for malicious prosecution and false imprisonment. Plaintiff procured a verdict, and judgment was duly entered thereon. Defendant pros-

ecutes this appeal and assigns in support thereof numerous errors. The most important of these assignments is one which relates to the measure of damages adopted in the court below. Upon this subject the following instruction was there given: "That the measure of damages in an action for malicious prosecution is not confined alone to actual, pecuniary loss sustained by reason thereof; but if it is believed, from the evidence, that the arrest and imprisonment stated in the complaint were without probable cause, then the jury may award damages to plaintiff to indemnify him for the peril occasioned to him in regard to personal liberty, feelings and reputation, and *as a punishment to defendant* in such further sum as they shall deem just." By the assignment of error and argument challenging the correctness of this instruction, we are called upon to consider the following question, viz: Can damages *as a punishment* be recovered in cases like this?

The rule allowing, under certain circumstances in civil actions based upon torts, exemplary, punitive or vindictive damages, for the purpose of *punishing* the defendant, has taken deep root in law. It has the sanction of learned courts and law writers, among the latter, Mr. Sedgwick; and its abrogation should be favored only upon the most weighty considerations. But we find denying its correctness, Professor Greenleaf and several writers of the highest respectability.

As we shall presently see, the question is not conclusively *res judicata* in Colorado. We, therefore, feel at liberty to inquire into the reasons urged against the doctrine. Were this subject now presented to the various courts of the country, for the first time, we have little doubt as to what the verdict would be: the propriety of adhering exclusively to the rule of compensation appears, upon careful investigation, with striking clearness. But many of the courts, like that of Wisconsin, while expressing strong disapprobation of the doctrine "inherited," and declaring it "a sin against sound judicial principle," feel constrained to preserve it, on account of precedent in their respective states, and the "current of authority elsewhere": Brown v. Swinefield, 44 Wis., 282.

Perhaps the most impressive objection to allowing damages as a punishment in cases like the one at bar is that which relates to dual prosecutions for a single tort. Our state constitution declares that no one shall be twice put in jeopardy for the same offense. A second criminal prosecution for the same act after acquittal, or conviction and punishment therefor, is something which no English or American lawyer would defend for a moment. But here is an instance where practically, this wrong is inflicted. The fine awarded as a punishment in the civil action does not prevent indictment and prosecution in a criminal court. On the other hand it has been held, that evidence of punishment in a criminal suit is not admissible even in mitigation of exemplary damages in a civil action: Cook v. Ellis, 6 Hill, 466; Edwards v. Leavitt, 46 Vt., 126.

Courts attempt to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there used refers exclusively to criminal procedure and cannot include civil actions: Brown v. Swinefield, *supra*. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed, and when the people adopted the constitution, both understood the purpose of this clause to be the prevention of double prosecutions for the same offense. Yet under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution takes the form of a civil action in which he is called defendant. He is practically harassed with two prosecutions and subjected to two convictions. While no hypothesis, however ingenious, can cloud in his mind the palpable fact that for the same tort, he suffers two punishments.

An effort has been made to mitigate the undeniable hardship and injustice by declaring that juries in the second prosecution, whether it be civil or criminal in form, may consider the punishment already inflicted.

But both reason and authority conclusively show that this proposition is illusory; that the application of such a rule is impracticable; and that the attempt to apply it, while producing confusion, would not effectively accomplish the purpose intended.

A second weighty objection to the rule under discussion relates to procedure. It is doubtful if another instance can be found within the whole range of English or American jurisprudence where the distinctions between civil and criminal procedure are so completely ignored. Plaintiff sues for damages arising from the injury done to *himself*. His complaint or declaration is framed with a view to compensation for a purely private wrong; it need not be under oath, and does not inform defendant that he is to be tried for a public offense. The summons makes no mention of punishment; it simply commands defendant to appear and answer in damages for the private injury inflicted upon plaintiff. When the cause is called for trial, no issue upon a public criminal charge is fairly presented by the pleadings.

A trial and conviction are had, and punishment by fine is inflicted, without indictment or sworn information.

The rules of evidence peculiarly applicable in criminal prosecutions are rejected.

The doctrine of reasonable doubt is replaced by the rule controling in civil actions, and a mere preponderance in the weight of testimony warrants conviction; defendant is compelled to testify against himself, and such forced testimony may produce the verdict under which he is punished; depositions may be read against him, and thus the right of meeting adverse witnesses face to face, be denied.

The law fixes a maximum punishment for criminal offenses, and in this state the presiding judge determines the extent thereof, where a discretion is given; but, under the rule we are considering, the jury are entirely free from control, except through the Court's power—always unwillingly exercised—to set aside the verdict; they may, for an offense which is punishable under criminal statutes by one hundred dollars fine, at most, award as a punishment many times that sum.

And, finally, when the defendant has been punished in the civil action, he is denied the privilege of pleading such expiation in bar of a criminal prosecution for the same offense. He can hope for no executive clemency in the civil suit; and if imprisoned upon the second conviction under the authorities, *habeas corpus* does not lie to aid him.

The incongruities of this proceeding are not confined to the criminal branch of the law. Civil actions are instituted for the purpose of redressing private wrongs; it is the aim of civil jurisprudence to mete out as nearly exact justice as possible, between contending litigants; there ought to be no disposition to take from the defendant or give to the plaintiff more than equity and justice require.

Yet, under this rule of damages, these principles are forgotten, and judicial machinery is used for the avowed purpose of giving plaintiff that to which he has no shadow of right. He recovers full compensation for the injury to his person or property; for all direct and proximate losses occasioned by the tort; for the physical pain, if any inflicted; for his mental agony, lacerated feelings, wounded sensibilities; and then, in addition to the foregoing, he is allowed damages, which are awarded as a punishment of defendant and example to others.

Who will undertake to give a valid reason why plaintiff, after being fully paid for all the injury inflicted upon his property, body, reputation and feelings, should still be compensated above and beyond, for a wrong committed against the public at large. The idea is inconsistent with sound legal principles, and should never have found a lodgment in the law.

The reflecting lawyer is naturally curious to account for this "heresy" or "deformity" as it has been termed. Able and searching investigations made by both jurist and writer disclose the following facts concerning it, viz: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland, that it finds no real sanction in the writings of Blackstone, Hammond, Comyns or Rutherforth; that it was not recognized in the earliest English cases, that the supreme court of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan and Georgia, have rejected it in whole or in part; that of late other states have falteringly retained it because "committed" so to do; that a few years ago it was correctly said, "at last accounts the court of queen's bench was still sitting hopelessly involved in the meshes of what Mr. Justice Quain declared to be 'utterly inconsistent propositions' and that the rule is

comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases: See Professor Greenleaf's response to Mr. Sedgwick's criticism of the former's views on this subject: 2 Greenleaf's Ev., p. 235, *et seq*; also, the opinion of the court delivered by Mr. Justice Foster in Foy v. Parker, 53 N. H., 342, and other authorities cited at the end of this discussion.

Mr. Parsons, while with evident reluctance, sanctioning the rule, makes the following declaration. "We cannot believe that it was ever a principle of the ancient and genuine common law that damages should be punishment, or that the civil remedy for the wrong done should be punitive to the wrong doer as well as compensative to the sufferer:" 3 Parsons on Contracts, 6th ed., 171.

The words "smart money," and also the following adjectives have been used to designate this class of damages: *speculative, imaginary, presumptive, exemplary, vindictive* and *punitive or punitory*. The literal meaning of all but the last three is easily reconcilable with the idea of compensation; they were so used in the first place, and even as to the excepted ones, there are many cases wherein it is evident they were employed without any intentional reference to punishment. These words also came into use through the beneficent design of courts to distinguish between private wrongs with and those without an evil intent, and to extend the right of recovery in the former case to injuries excluded from computation in the latter.

Mr. Justice Foster concludes a discussion of the expression *smart money*, as used by Grotius and jurists contemporary with that author, in the following language:

"It is interesting as well as instructive to observe, that one hundred and twenty years ago the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not as now, money required by way of punishment, and to make the wrong-doer smart:" Jay v. Parker, *supra*.

So long as the jury are considering the material pecuniary injury, direct or approximate, shown by the evidence, and the physical pain, their inquiry relates to what are *termed* actual damages; but when authorized by a vicious intent of the wrong-doer, they turn to the realm of mental anguish, public indignity, wounded sensibility, etc., the damages awarded may more appropriately be described as *presumptive, speculative*, or *imaginary*. The injury in the latter case is no less actual or real than in the former, but it is less tangible; compensation therefor is more a matter of judgment, less a result of computation. A misapprehension seems sometimes to exist as to the word *compensatory* when used in this connection. Under the rule limiting them to compensatory damages, juries will, with proper instruction, recognize a broad distinction between a tort unaccompanied by malice, or circumstances of aggravation or disgrace, and one producing equal direct pecuniary damage, where either of these condi-

tions exist. In the former case they consider only the actual injury to the person or property, including expenses, loss of time, bodily pain, etc., occasioned by the wrongful act; in the latter, they allow such additional sum as in their judgment is warranted by the circumstances of contumely, anguish or oppression; but in both instances the damages are awarded as *compensation;* the additional sum is given to the individual as recompense for the mental suffering, or wounded sensibilities, as the case may be. It often happens that this constitues the principal element of the recovery. If upon a crowded thoroughfare one maliciously assaults me with blows and epithets, five dollars may fully compensate the injury inflicted to my person and clothing; but five hundred dollars may be utterly inadequate to requite the sense of insult, the personal indignity, the public disgrace and humiliation. The extra five hundred dollars exacted may operate indirectly as a punishment; it may constitute an example to others, and also deter my assailant himself from repetitions of the offense in future; in law, however, it is simply compensation for the private wrong; a kind of indemnity which probably no court has ever refused to allow when warranted by the circumstances.

But, under the doctrine of exemplary damages, as announced by the instruction given in this case, the jury are not required to stop with the five dollars for material injury, and five hundred dollars for lacerated feelings. They may turn to the domain of criminal law, and consider the public wrong; and they may add one thousand dollars more, as a punishment to my assailant. The arrangement is highly satisfactory to me, since I have the pleasure of pocketing the additional thousand dollars, to which I am not entitled. But, as we have already seen, it hardly comports with correct legal principles.

The case at bar furnishes a good illustration of the doctrine under discussion. The jury are told that, if they find certain facts to exist, they may award damage to plaintiff, for: 1st; The actual pecuniary loss sustained; 2d, The peril occasioned in regard to personal liberty; 3d, The injury to his person and liberty; 4th, Injury to his feelings and reputation; 5th, The punishment of defendant.

The first four items comprise all the injuries for which plaintiff ought to reover; they all rest upon the theory of compensation for private wrong, and are, therefore, in perfect harmony with the principles and procedure in civil actions; they furnish ample ground for discrimination by the jury, should they find the prosecution and imprisonment to have been malicious. Why not remit the punishment of defendant to a criminal forum?

The jury returned a verdict for two thousand seven hundred and eighty dollars. How much of this sum was given as a punishment? Perhaps one thousand dollars, perhaps more; yet, under our criminal code, five hundred dollars would have been the maximum. When defendant is on trial in the criminal court, he cannot plead

in bar, payment of this penalty; he must, if convicted, discharge the additional fine assessed, or go to jail, if such be the sentence. Whatever may be the technical distinctions, he is in fact twice prosecuted, twice convicted, and twice punished for the same offense. And one of these prosecutions, convictions and punishments is had without any regard for the leading principles obtaining in criminal procedure.

Concerning defendant's liability to indictment for false imprisonment, under our statute, see Slomer v. People, 25 Ill., 70.

We are not prepared to say, with Mr. Field, that the controversy of the books about compensatory and exemplary damages "is one which relates more to the use of terms than to practical results": Field on Damages, section 73. Nor with Judge Cole, of Iowa—for whose legal acumen and views we entertain profound respect—that the difference, on this subject, between Professor Greenleaf and Mr. Sedgwick, may be only a controversy as to the terminology of the law, rather than as to the extent of the right of recovery or the real measure of damages."

These remarks must be based upon the supposition that the jury would award as heavy damages under the liberal rule of compensation above stated, as they would with with the added element of punishment, a conjecture which, it seems to us, is hardly defensible from a legal standpoint. We deem no further argument necessary to show that the question is one of weighty importance; that it affects the fundamental distinctions between civil and criminal procedure; that it bears directly upon the legal rights, and in many cases, also, upon the constitutional rights of the citizen.

In some of the states, courts distinguish between cases where the tort is punishable as a crime, and those where it is malicious, but not so punishable, exemplary damages being denied in the former, but allowed in the latter: See Sutherland on Damagss, p. 738 and cases cited.

This distinction rests upon the constitutional and humane objections to dual prosecutions and punishments for the same offense; but grave doubts may justly exist as to the wisdom of preserving it. The impropriety of judicially recognizing as criminal, that, which is not so by statute or at common law, the incongruity and confusion arising from trial and punishment under the rules of evidence, pleading and practice controlling in civil actions; the injustice of denying defendant the benefit of principles and procedure maintained in criminal prosecutions; the manifest iniquity of awarding plaintiff something to which he is not entitled. These and other considerations may prove so powerful as ultimately to undermine everywhere, the distinction above mentioned.

It may in the end be considered safer and better in all cases, to keep the two forums separate and distinct; to let the public protect itself through legislation and the principles of the common law. It is not unlikely that courts will in the course of time generally condemn the practice of blending the interests of the individual with

those of society, using a purely private action to redress a public wrong.

The most difficult cases in which to exclude the rule of damages as a punishment, are those where its application rests upon gross negligence, and where no criminal prosecution can be sustained; there is often a feeling that complete justice cannot be done without punitive satisfaction. But those courts which adhere to the doctrine of exemplary damages in general, are by no means unanimous in applying it to this class of cases, and when so applied, the most guarded language is used and the most careful limitations are imposed; it is said that the negligence must be "flagrant and culpable;" so much so that malice may "well be inferred or imputed to defendant:" Field on Damages, section 84, and cases cited.

Why may not even this class of cases be safely limited to the rule of compensation? Is not this doctrine, as above explained, sufficient to meet all the reasonable demands of justice?

But it is sufficient for us to say that in the case at bar, the objections to double prosecutions and punishments for the same offense are decisive. As already suggested, the distinction above considered is not merely verbal. It makes but little difference what adjective or expression is used to designate the damages beyond those termed *actual*, which may be awarded by the jury for injury to the feelings when the wrong is accompanied by malice, provided, the instructions clearly indicate the proper limitation. But it is believed safer not to employ the words *exemplary*, *vindictive*, *punitory* or either of them; as there is danger of misapprehension growing out of their literal meaning, notwithstanding the accompanying explanations of the court.

It has been with no little reluctance that we have arrived at the foregoing conclusion as to the doctrine of punitive or exemplary damages.

The persuasive reasons and strong array of authorities in support of the rule, the corresponding convictions of a large part of the bench and bar of the state, and the confusion that may exist for a time, have impelled us to the most careful and conservative deliberation. But we feel that the doctrine of compensation as explained, is more in consonance with the reason, the logic, the science of the law; that it is more in harmony with the dictates of equity and justice; and that the tendency of the courts and writers is favorable to its exclusive adoption; more correctly speaking, *re-adoption*. We deem it wiser to accept and declare the rule now than to resist for a time, and ultimately be compelled to do so, when the confusion produced would be tenfold greater than at present is possible.

Upon these subjects embraced by the foregoing discussions, see the following authorities supporting or opposing the views adopted in this opinion: 2 Greenleaf's Evidence, 13 ed., text notes and cases, p. 235, *et seq*; 1 Sutherland on Damages, text notes and cases, p. 716, *et seq*; Field on Law of Damages, text notes and cases, p. 64, *et seq*; Sedgwick on Meas. of Damages, 6th ed., text notes and cases,

p. 552, *et seq*; Fay v. Parker, 53 N. H., 342; 3 Parsons on Contracts, text notes and cases, p. 169, *et seq*.

Several cases decided by these courts refer directly or indirectly to the subject of exemplary damages, viz: Kinney v. Williams, 1 Colo., 191; Nachtrieb v. Stoner, 1 Colo., 423; K. P. Ry. Co. v. Lundin, Admr., 3 Colo., 94; K. P. Ry. Co. v. Miller, 2 Colo., 442; Western Union Telegraph Co. v. Eyser, 2 Colo., 141; Wall et al. v. Cameron, 6 Colo., 275.

In none of these cases does there appear to have been a serious contest upon this subject by counsel. It is not considered at any length or fairly adjudicated in either of the opinions; though they contain remarks which seem to recognize the doctrine. In five of the cases the judgments below were reversed; four by this court and one by the supreme court of the United States: and with a single exception, the principal ground of reversal was error in submitting at all to the jury, this branch of the measure of damages. Therefore, for this reason, in four of those cases, it was not necessary to determine the question, since, if the rule were held to exist, it had no application.

In one of the remaining two, the reference to this class of damages was a casual remark by the judge who wrote the opinion, not necessarily required by any thing in the record. While in the sixth, the instruction considered, simply told the jury that if malice existed they were "not restricted to the mere *corporeal injury* of the party," which is in perfect keeping with the rule of compensation above announced.

But if it can be truthfully claimed that the views herein expressed are not in harmony with those cases or either of them. We feel constrained to hold that, to the extent of such conflict, those opinions should be modified.

In view of a retrial in the court below, we deem it necessary to consider a few other questions presented by the record. The term *probable cause*, as used in actions for malicious prosecution, has been defined as: "Such a state of facts known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonabry and without prejudice, upon facts within the party's knowledge, to believe or entertain an honest and strong suspicion that the person accused is guilty:" Hill on Torts, section 18, and cases cited.

Analyzing this definition, we discover the reason for the rule that in the cases like the one before us, malice may be implied from a want of probable cause. Persons of sufficient age and sound mind are presumed in law to act with ordinary prudence and discretion, and, as in many other cases where wrong and injury result from gross negligence, upon proof that there was no probable cause, the law supplies a criminal intent. One cannot procure the arrest and imprisonment of another, without any reasonable ground of suspicion, and then avoid liability for the disgrace and vexation produced upon the plea of innocent intent. If he is really free from wrongful motive, and yet no probable cause within the fore-

going definition exists, he should pay these damages for his indifference or carelessness concerning the rights of others. Counsel will observe that all the circumstances as they appeared to the prosecutor at the time, enter into the question; and that in determining whether or not probable cause existed, the jury, so far as possible, place themselves in the position of the prosecutor. This expression does not mean actual guilt, but such circumstances as warrant the prosecutor, acting as a man of reasonable caution and discretion, and free from malice or prejudice, in "entertaining an honest and strong suspicion that the person accused is guilty." See Field on Damages, sec. 690, and cases cited; Stone v. Crocker, 24 Pick., 81.

Adopting this view of the law, it follows that we must overrule counsel's remaining objection to the instruction already considered. So far as this objection is concerned, we think that this instruction, coupled with the other instructions given fairly states the law.

But while it is correct to say that a wrongful intent may be implied from the absence of probable cause, it does not follow that all testimony of actual malice must be excluded. It is true that if there be probable cause for the arrest, the prosecutor is not required to respond in damages, even though his mind may not be free from improper motive.

Yet acts of the prosecutor and circumstances connected with the transaction, affirmatively showing actual evil intent, may always be given in evidence. If a want of probable cause appear, the jury, in estimating damages, may properly consider the degree of malignity displayed by the prosecutor. If, through unreasonable cause, unnecessary abuse and oppression, the annoyance, contumely and sense of outrage inflicted, are enlarged, heavier damages should be allowed, under the rule of compensation, than if the malice were wholly implied from the absence of probable cause.

We are, therefore, of opinion that no error was committed in receiving testimony as to what took place prior to appearance before the justice. This evidence was not admitted as a ground of damages in itself; under the pleadings it could not be so received. But the insults, oppression, and duress thereby shown, continued through the sixth or seventh hours immediately preceding arrival at the justice's residence. They were closely connected with the proceedings before that officer, and bore directly upon the intent with which appellant acted in instituting, and in procuring the warrant and subsequent imprisonment.

The sixth instruction, relating to the disposal of mortgaged property, should not have been given; it is not supported by any evidence in the cause, and its effect might possibly have been misleading to the jury.

In view of the uncontradicted evidence in behalf of the plaintiff below now before us, we do not consider the verdict excessive, under a correct rule of damages it would not be disturbed on account of the sum awarded. But we cannot say that a portion thereof was not given for the purpose of punishing appellant.

The judgment is reversed and the cause remanded for a new trial.

STEPY ET AL. v. STARK ET AL.

Filed October 31, 1884.

LOCATION OF MINE—CERTIFICATE OF—REQUISITES AND FUNCTIONS OF.—The location certificate of a mine differs from ordinary documentary muniments of title in that it is not a title, nor proof of title, nor does it constitute or of itself establish the possessory right of a claimant to which it relates. It is purely a creature of statute; its purpose and functions are two fold; when duly recorded it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground, and is thus constructive notice of the claimant's possession. In addition the filing of such certificate is one of the statutory steps requisite to constitute a perfected mining location.

THE SAME—LOCATION, HOW MADE—CONTENTS OF CERTIFICATE.—In order to perfect a location of a quartz mine, four steps are necessary. *First*, the sinking of a discovery shaft upon the lode ten feet in depth, or deeper if necessary to disclose mineral in place; *Second*, the posting of a notice at the place of discovery, giving the name of the lode, the name of the locator and the date of discovery; *Third*, marking the surface boundaries of the claim by posts in the manner pointed out by statute; *Fourth*, making and recording a location certificate containing the name and description of the lode, the name of the locator and the date of the location. The statute does not require such certificate to contain a statement that the discovery shaft has been sunk the requisite depth nor that the discovery notice has been posted or boundary marked.

THE SAME—PROOF OF LOCATION—ORIGINAL AND AMENDED CERTIFICATE.—When the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of such certificate is proof of its own performance, and is *prima facie* evidence of all which the statute requires it to contain, and which are therein sufficiently set forth; and when the certificate, for any reason is deemed void, it is admissible in evidence, in a contest affecting the location, in connection with a valid amended certificate correcting the defects of the original.

THE SAME—EFFECT OF AMENDED CERTIFICATE—EVIDENCE OF.—Such amended certificate, under the statute, cannot create a right of possession or location in the premises claimed under the first location, which did not exist prior to the filing of such additional certificate; it can confer no additional rights, and is, therefore, evidence of none, as against any intervening or pre-existing rights of another. Except as against such intervening rights an additional certificate recorded after the commencement of an action, serves the same purpose, in its admission as evidence, as an original location certificate, and will relate back to the first location.

AN ERROR IN THE ADMISSION OR REJECTION OF TESTIMONY, IF WITHOUT PREJUDICE to the defeated party, is not ground for reversal.

WHEN THE EVIDENCE IS CONFLICTING THE VERDICT WILL NOT be disturbed.

INSTRUCTIONS—INFLUENCING VERDICT.—While a judge is not warranted in saying anything to the jury to influence their decision, or indicate to them what their verdict should be, or even to unduly hasten a verdict, he may charge them upon the great desirability, both to the litigants and to the public, of having them agree upon a verdict.

APPEAL from the district court of Chaffee county. The opinion states the facts.

Hartenstein & Sindlinger, for the appellants.

Rhett & Hobson, for the appellees.

STONE, J. This is a contest between two sets of claimants for the possession of a certain mining claim which appellees claim as the "Little Belle" lode, and appellants as the "Negro" lode. Appellees, the plaintiffs below, alleged right of possession by virtue of discovery, prior possession, location, and compliance with the necessary laws relating thereto. Appellants, as defendants, merely denied in their answer the several allegations of the plaintiffs' complaint.

The ground of defense upon the trial was chiefly that appellees had failed to comply with the laws in not doing sufficient work on the claim, previous to appellants' possession, to entitle them to hold it. Appellees established their discovery of mineral on the ground as

original locators in June, 1879, and their witnesses testified that a discovery shaft was sunk that year to a depth of over ten feet, that a location was made in accordance with law in July, and a certificate thereof filed in September of that year, that when they went to resume work on the mine the next year, appellants were in possession. The testimony of appellants was that they first came upon the ground in June, 1880, and found a small cut or excavation not more than four or five feet deep exposing a little mineral, and that the only stake they found was an old one at this excavation, containing the name of one of the appellants and the date, 1875. That they went to work in the same excavation and sunk to the depth of about fifteen feet; took out mineral, and located the claim by the name of the Negro lode, and filed location certificate in August following. The ground claimed by each side is shown to be practically if not identically the same, and the appellants seem to have claimed and located or rather re-located the mine, and asserted right thereto, on the ground that the discoverers and former occupants had failed to comply with the law in respect to the necessary work and staking, and had therefore either abandoned the claim or forfeited their right thereto; if they ever had acquired any right at all. The verdict and judgment below were in favor of the plaintiffs, upon the third trial of the case, and appellants seek to have the judgment reversed because the verdict, as they allege, is contrary to the weight of the evidence, that impropper evidence was admitted on the trial, that proper instructions prayed were erroneously refused by the court, and that the jury were improperly influenced by remarks made by the judge pending their deliberations, for the purpose of inducing them to agree upon a verdict.

Upon the matter of the admission of evidence which is assigned for error, the principal objection, as argued by counsel for appellants, appears to be made to the admission of appellees' amended certificate of location.

Both parties had made and recorded amended location certificates. The original location certificate of appellees was filed for record September 20, 1879, and their amended certificate on June 16th, 1881.

The original certificate of appellants was filed August 30th, 1880, and their amended certificate September 26th, 1881.

The original and amended certificates of appellees were offered in evidence together, and, over the objection of appellants, were admitted with the following remarks in the nature of instructions by the court to the jury, to-wit:

"Upon a proper identification of the certificates they will be admitted in evidence, and the jury will be instructed that the first certificate is in itself void, and it confers upon the plaintiffs no title; that if they find from the evidence that before the amended certificate was filed for record, defendants acquired rights in the premises, or an interest in the premises, then they shall disregard the second certificate, but if they find that defendants acquired no such inter-

est, then the second certificate will relate back under the law, to the plaintiff's (location), and will confer upon plaintiffs the rights which would have been acquired had the first been a proper location certificate."

Before the close of the evidence on the behalf of appellees, the court ordered their original location certificate withdrawn, giving the reason therefor in the following words, to-wit: "On a little reflection, I state this before plaintiffs close their case. I have concluded that the amended location certificate performs all the offices that the original could, and therefore, I am going to withdraw it from the jury, and leave the amended certificate before the jury with a proper instruction."

The original location certificate of appellants was also held void, and excluded, while their amended certificate was admitted in evidence.

The objection made by appellants to the admission in evidence of appellees' amended location certificate, is put upon the ground that this certificate was not filed for record until after the commencement of the suit, and in support of this objection, counsel invoke the rule that a plaintiff in ejectment must stand or fall on the right he had when he commenced his action, and cannot make or strengthen his case by any after acquired right or title. The question here raised is one of importance in this class of cases, and one that, so far as we can ascertain, has not before been passed upon by any court of last resort, so that we are left to determine it without the aid of adjudged precedent, but we think the rule contended for by appellants' counsel, as above stated, is inapplicable to a case like this.

The question rests chiefly, if not solely, upon what we are to consider as the nature, purpose and functions of such location certificate. Its objects and functions are peculiar, it differs from ordinary documentary muniments of title in that it is not a title, nor proof of title, nor does it constitute, or of itself establish the possessory right in issue, and to which it relates. It is purely a creature of the statute, and under the evident legislative intent, its purpose and functions are two-fold. When duly recorded it becomes notice to the world of the facts therein set forth, namely: A description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground; and is thus constructive notice of the claimant's possession. In addition to this purpose which it is to serve, it would seem that, by statute, such certificate is made one of the steps requisite to constitute a perfected mining location.

Under the law, four certain things are to be done in order to perfect a location. First: The sinking of a discovery shaft upon the lode ten feet in depth, or deeper if necessary, to disclose mineral in place. Second: The posting of a notice at the place of discovery, giving the name of the lode, the name of the locator, and the date of discovery. Third: Marking the surface boundaries of the claim by

posts, in the manner pointed out by statute, and Fourth: Making and recording a location certificate containing the name and description of the lodes, the name of the locator and the date of the location. It will be noted that the statute does not require that the certificate shall contain a statement that the discovery shaft has been sunk the requisite depth, or so as to disclose mineral, nor that the discovery noted has been posted, or boundary stakes set; which things are made the chief requirements on the part of a locator in order "to locate his claim" before filing the location certificate; although it is usual to include such statement in the certificate, when the performance of such work, posting and staking is a pre-existing fact; and it has been held by the United States circuit court of Colorado, that, though the locator of a mining claim may not have sunk his shaft to the discovery of mineral in place, prior to filing his location certificate, yet, if he shall, thereafter, so sink the shaft and disclose the lode, he will hold as against all who had not theretofore acquired an interest in the lode, the same as if he had uncovered it before the survey and filing the certificate, such discovery relating back to the location: Zollars and H. C. C. M. Co. v. Evans, 2 McCrary, 39.

When the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate; the record of the certificate being proof itself of its own performance as one of such steps, and in regular order the last step in perfecting the location. And the certificate when recorded is certainly competent evidence *prima facie*, of all which the statute requires such certificate to contain, and which are therein sufficiently set forth. And even when the certificate, for any of the reasons set forth in the statute, is deemed void, it has been held admissible in connection with a valid amended certificate correcting the defects of the original: Van Zandt v. Argentine M. Co., 2 McCrary, 159.

In support of this holding, two principal reasons may be mentioned. First: The original certificate showing the date of location and record; although fatally defective in matter of description or otherwise, may well be considered as an element tending to show good faith on the part of the locator in attempting to comply with the law in making his location. Second: The introduction of such original together with the amended, or, as it is termed in the statute, "additional" certificate, may afford a means of comparison in respect to description and surface boundary of the premises located; whether the first is identical with that described in the additional certificate, or whether it embraces the precise ground or any portion thereof claimed by either of the contesting parties otherwise than according to such original location.

The section of the statute under which the right to file an amended or additional location certificate is given, is as follows: "If at any time the locator of any mining claim heretofore or hereafter lo-

cated, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act: *Provided,* that such re-location does not interfere with the existing rights of others at the time of such re-location, and no such re-location or other record thereof shall preclude the claimant, or claimants, from proving any such title or titles, as he or they may have held under previous location."

The purpose of this additional certificate appears to be sufficiently expressed by the language of the act. It cannot create a right of possession or location in the premises claimed under the first location, which did not exist prior to the filing of such additional certificate; it can confer no additional right, and is, therefore, evidence of none, as against any intervening or pre-existing right of another. It follows that, except as against such intervening rights, an additional certificate serves the same purpose, in its admission as evidence, as that of an original location certificate, and will relate back to the first location.

The evident intent of the statute is that the additional certificate shall operate to cure defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have occupied if no such defect had occurred.

Such intent is in accord with the principle of all curative provisions of law. Without such result, this provision of the statute would be ineffectual to confer any additional or other benefit than the provisions of section 2,411, general statutes, for an entire re-location of a mine or for an abandoned claim.

From the foregoing view of the purpose and functions of a location certificate, original and additional, it does not appear that the admissibility as evidence of such additional certificate is affected by the circumstance that it was filed subsequent to the commencement of the suit, since it is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the controverting party.

Counsel for appellants argue that it is illogical and erroneous to hold that the amended certificate can relate back to the original, if the original be void, for, if void, it is dead, and the same as if it had never existed; but we are not so holding. What we say is, not that the second certificate relates to the first, in the sense in which the term relation is used to express a well known legal doctrine, but that it relates back to a right of location, acquiring by virtue of the pre-requisite acts of discovery, prior possession,

excavation, posting, marking boundaries, and an attempted compliance with the law respecting the filing of a location certificate.

It is further to be observed, that the rule in ejectment, that the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of that of his adversary, is held not to apply to possessory actions for mining claims, when neither party has, strictly speaking, any legal title, but when the prior possession of the plaintiff is pitted against the present possession of the defendant. "Practically, the real question involved in all such cases is, which, as against the other, has the better right to mine the land in question?" Richardson v. McNulty et al., 24 Cal., 339.

Each party must prove his claim to the premises in dispute and the better right must prevail: Lebanon M. Co. v. Con. Rep. M. Co., 6 Colo., 371; Golden Fleece Co. v. Cable Co., 12 Nev., 312.

The right to mineral lands, before a patent issues from the government, rests in possession of the claimant. To constitute such possession as will give this right, under location statutes, neither residence on the premises nor continuous actual occupation, nor that kind of possession for which appellants' counsel contend, denominated *possesio pedis,* is required: English v. Johnson, 17 Cal., 108.

The right of possession is the sole issue in the case at bar.

The appellees established their prior right by proof of discovery, prior possession, sinking a discovery shaft, disclosing mineral, in place, posting the proper notice, marking the surface boundaries, and attempting to complete the location by filing a location certificate. These acts were all done the year previous to the appellants taking possession of the same premises and attempting its relocation under another name. The original location certificate of appellees was recorded Sept. 20, 1879, and their amended certificate, June 16, 1881. The original certificate of appellants was recorded Aug. 30, 1880, and their amended one Sept. 26, 1881. It will thus be seen that the appellees were prior in possession and that their two location certificates were respectively prior to those of appellants. The original certificate of each party was held fatally defective and the amended certificates of both parties were recorded subsequent to the commencement of the action.

There was no error in receiving in evidence the original location certificate of appellees. If there was error in afterwards withdrawing it, of this the appellants cannot complain, since the only possible effect of such withdrawal was to the advantage of the complaining party, and the prejudice of the other side.

The error of the court, if in this case it was such, in rejecting the original certificate of appellants, was also without prejudice, for the reason that appellees by proof of prior possession and location, having established their right of possession at the time of appellants' entry, such subsequent entry and relocation by appellants in the absence of abandonment, forfeiture or otherwise intervening loss of right by appellees, conferred upon appellants no right as against appellees, and so their location certificates, being both subsequent

respectively in time to the corresponding ones of appellees, related to no superior right, and hence, while admissible in evidence, counted for nothing in appellants' favor.

The appelees' priority of possession and seniority of location certificates are undisputed; the issue was the right of possession. Under this issue, the appellants, who by their answer simply denied this right in the appellees, contested the same on the ground of an alleged want of compliance with the law on the part of appellees in the amount of work done in sinking the discovery shaft, posting discovery notice and in the necessary working of the surface boundaries of the claim. If then, the appellees established by the testimony their compliance with law in respect to these points in dispute, their prior right of location and superior right of possession thereby followed, and so continued to exist unimpaired down to the time of trial in this case. It is therefore clear that neither the original nor amended certificate of appellants could avail for any purpose as evidence, unless the appellants first established a superior right of location, for as we have before stated a location certificate can confer no right of location of itself, and can relate only to a right of location acquired previous to its filing.

We are not now contending against the admissibility of these certificates as evidence; we concede that the original in connection with the amended one might properly have gone to the jury; that in certain cases, error might be well assigned upon the exclusion of such certificate; but we are here giving reasons for our holding that, if there was possible error in the rejection of the original certificate in this instance, it was error with prejudice to the party complaining, and therefore no sufficient cause for reversal. The instructions given by the court, correctly stated the law applicable to the facts in controversy, and covered all the points in issue in the case. There was, therefore, no error in not giving the instructions prayed by appellants and which were refused by the court.

The testimony as to the amount of work done by appellees on the mine, previous to the relocation by appellants, is conflicting, between the witnesses on one side, and those upon the other; but as the jury were the sole judges of the credibility of the witnesses and the weight of testimony, we cannot say that the verdict was contrary to the weight of such testimony, and under the frequent decisions of this court there is no cause for reversal on this ground. The jury were warranted in finding upon the testimony, as they evidently did, that the right of possession was in appellees, by reason of discovery, priority of possession, and a prior location, such as to give them the better right to the premises in controversy.

The remarks of the district judge to the jury when they were called in before the court, after being out for sometime pending their deliberations upon this verdict, were, we think, not calculated to produce a hasty, indeliberate, or unfairly considered verdict. These remarks were of considerable length, and we do not consider

necessary to quote them in full, but in substance they reminded the jury of the disastrous effects to litigants and to the public of failures on the part of juries to agree upon verdicts at the end of protracted litigation; that this was the third trial of the case in hand, and that the efforts of the court would be to secure a verdict in this instance if within the bounds of possibility. To prevent any possible undue influence or misconception of the object of these remarks, the court added in conclusion: "These remarks, gentlemen, are not made for the purpose of influencing your judgment or biasing your minds. They are not made for the purpose of coercing you or influencing you, except, so far as they impress on your minds the importance of making every honest and conservative endeavor possible to arrive at a verdict; and you are not to pay any attention to them, save as they may serve that purpose. I don't suppose there is a single man upon the jury who is acting in any other than a conscientious manner. I don't think there is a man among you who would do so under the oath you have taken, but it is possible that further consideration of the evidence, and further discussion may lead you to arrive at a conscientious agreement. This is all I have to say. I am going to ask you to retire with the bailiff and further consider of your verdict."

While a judge is not warranted in saying anything to the jury to influence their decision, or indicate to them what their verdict should be (except upon the hypothesis laid down in the written instructions submitted) or even to unduly hasten a verdict, we can see nothing in the remarks made to the jury here that could have operated viciously; and one must presume that the judge had some good reason for addressing them as he did, to impress the importance of arriving at an agreement upon a verdict, if possible, upon the third trial of the case.

The other assignments of error arising upon the evidence do not appear to be well taken, and are not of sufficient importance to call for discussion.

The judgment will be affirmed.

BRUCKMAN *v.* TAUSSIG.

Filed 1884.

JURISDICTION OF COURTS WHEN PRESUMED—ACTION ON JUDGMENT OF COURT OF GENERAL JURISDICTION.—The jurisdiction of courts of general jurisdiction is presumed, and the judgments and decrees of such courts are in all cases of at least *prima facie* validity. In pleading such judgment or decree as a cause of action or as a defense, jurisdictional facts need not be stated. The same rules apply whether the judgment sued on is domestic, foreign, or of one of the sister states.

EXISTENCE OF FOREIGN COURT, HOW PROVED—EVIDENCE OF FOREIGN STATUTE.—The law establishing a court in another state and conferring general jurisdiction thereon, may be proved by a book purporting to contain the laws of such state, under section 337 of the civil code.

JUDGMENT OF SISTER STATE—ACTION ON—INTEREST ALLOWABLE.—Interest on a judgment of a sister state, as specified therein, is allowable in an action thereon in another state.

APPEAL from the county court of Lake county. The opinion states the facts.

Thomas George, for the appellant.

George H. Kohn, for the appellee.

STONE, J. Action upon a judgment of the circuit court of the eighth judicial circuit of the state of Missouri.

Errors are assigned because the complaint failed to state facts in support of the jurisdiction of the Missouri court; and because such facts were not proved at the trial; because the book purporting to contain the statutes of the state of Missouri was received in evidence without proper authentication, and because interest was allowed on the Missouri judgment.

The complaint alleges that plaintiff, the appellee here, recovered judgment against the defendant in the circuit court, at the city of St. Louis, in the state of Missouri, "a court of general jurisdiction," on the tenth day of May, 1880, for three hundred and ninety-nine dollars and eight cents, and that no part of the same has been paid.

The approved precedents of declarations upon judgments state the date or term of the court at which the judgment was recovered, the court in which, and the place where it was rendered, and the amount which, by the consideration of the court, the plaintiff has recovered: Freeman on Judgment, section 450.

It is an elementary rule that the jurisdiction of courts of general jurisdiction is to be presumed, and it follows that the judgments and decrees of such courts are, in all cases, of at least *prima facie* validity. In asserting such a judgment or decree as a cause of action or as a ground of defense, the pleader need state no jurisdictional facts. "It was long ago settled that, in pleading a judgment it is unnecessary to show by averment that the court had jurisdiction:" Ibid, sec. 452. Indeed, this doctrine is expressly embodied in our own statutes: Civil Code, 1883, sec. 69.

And the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic, foreign, or one of the sister states of this Union. If the court had no jurisdiction, that fact should be raised by defendant's plea: Ibid, sec. 453.

The transcript of the Missouri judgment received in evidence on the trial, was duly authenticated and proved all the jurisdictional facts necessary to be shown on the part of plaintiff below.

In respect to the volume from which was read in evidence the law establishing the said circuit court of Missouri, and conferring thereon general jurisdiction, the bill of exceptions recites that it was "a book purporting to contain the constitution and statutes of the state of Missouri;" and in the absence of any other or further description, we must presume it to have been, and that the court below found it to be such a book as comes within the provisions of our own statute, which declares that: "Printed copies in volumes, of statutes, codes, or other written law, of any territory, or any state, or foreign government, purporting or proven to have been

published by the authority thereof, * * * shall be admitted by courts and officers of this state on all occasions, as presumptive evidence of such laws:" Civil Code, 1883, sec. 387.

Interest was properly allowed by the court below on the judgment sued upon. The transcript shows that the Missouri court awarded interest at the legal rate on its judgment, and the amount of such judgment and accrued interest at the date of the judgment in the court below was certainly the proper amount due, and the correct measure of the latter judgment. In the case of Warren v. McCarthy, *et al.*, 25 Ill., 95, it is held, following the authority of Prince v. Lamb, Breese, 298, that interest may be recovered on a judgment of the court of another state, without any averment in the declaration that it is allowed by the statute of the state in which it was recovered, and even though the judgment of such other state does not award interest; that the law gives it as damages for the detention of the principal sum. None of the assignments of error by appellant appear to have any support, and the judgment of the court below will be affirmed.

Judgment affirmed.

DENVER, SOUTH PARK AND PACIFIC R. R. CO. *v.* CONWAY.

Filed December 2, 1884.

ACTION FOR NEGLIGENCE—VARIANCE BETWEEN ALLEGATIONS AND PROOF.—In an action to recover damages for a fire alleged to have been caused by a defective flue, evidence that such fire was caused by the entire want of a flue is not a fatal variance, when it appears that the party objecting was not misled as to the meaning of the averment.

CORPORATIONS—LIABILITY OF FOR TORTIOUS ACTS OF SERVANTS.—Corporations are liable for the acts of their agents and employees in the same manner, and to the same extent as private persons. Accordingly, the employees of a railroad corporation, who are engaged in service at its stations or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their position; and the corporation is liable for their tortious acts which are performed in the course of such service.

THE SAME—KNOWLEDGE OF SERVANT KNOWLEDGE OF CORPORATION.—Knowledge acquired by agents of corporations in the discharge of official duties, of facts material to the transactions in which they are engaged, or coming within their respective departments, is the knowledge of the corporation.

INSTRUCTIONS—DUTY OF COURT TO GIVE—EXTENT OF.—Courts are not required to state in their instructions to juries, the entire law upon any given subject, but only so much thereof as may be applicable and essential to the issue and facts of the case on trial. To this extent the charge must be correct and explicit, and if unexceptionable in these essentials it will not be ground for reversal that the instructions are not strictly correct as universal propositions of law.

THE INSTRUCTIONS OF THE LOWER COURT EXAMINED, and held to correctly state the law as applicable to the issues and the evidence.

NEGLIGENCE—ACTION FOR—INTEREST NOT ALLOWED.—In an action to recover damages for injury to property caused by negligence, interest on the value of the property injured or destroyed is not recoverable, as the same is not authorized by the statute.

APPEAL from the district court of Park county. The opinion states the facts.

Teller & Orahood, for the appellant.

John W. Horner, for the appellee.

BECK, C. J. The appeal is from a judgment rendered against the defendant below, the Denver, South Park and Pacific Railroad

Company, for damages to the property and person of the plaintiff, occasioned by the burning of a depot building belonging to the defendant, and the explosion of a quantity of giant cartridges therein contained.

The complaint as it remained after demurrer sustained thereto, contained three separate claims for damages alleged to have occurred to the plaintiff by reason of the negligence of the defendant.

It alleges that on the fourteenth day of August, 1880, the defendant owned and operated a railroad from Denver to, and through the town of Red Bluff, in Park county, Colorado. That it also owned and used a certain depot building in the latter place, which contained a defective flue. That a pipe from a stove in said building passed into and through this flue, rendering the building extremely unsafe and liable at any time to take fire.

The complaint further alleges that the plaintiff owned a certain saloon building, together with the contents thereof, which was situated about thirty-five feet distant from the defendant's depot building; that the plaintiff also occupied, as proprietor thereof, a certain hotel building, situated about forty-five feet from said depot building.

The acts of negligence complained of are, that the defendant, knowing that the flue in said building was in a very defective condition, which rendered the building extremely unsafe, and liable at any time to take fire; and well knowing that the property of the plaintiff was in close proximity thereto, carelessly, negligently and wrongfully, stored giant powder and explosive caps (the latter being used to explode the powder) in said building, and while said explosives were so stored therein, caused a fire to be made in the store having the defective flue, by reason whereof the building was burned, resulting in an explosion which destroyed the plaintiff's property, and seriously injured him personally. Damages are claimed for the loss of saloon building and contents, in the sum of one thousand and thirty-eight dollars; for chattels destroyed in the hotel, in the sum of sixty-three dollars; and for injuries to the plaintiff's person in the sum of five thousand dollars. Judgment is demanded for said several sums, together with interest thereon, from the fourteenth day of August, 1880 (the time of the fire), at the rate of ten per cent. per annum.

The answer of the railroad company denies all the allegations of the complaint, including specific denials of the causes which led to the burning of the building and the disasters which followed.

The cause was tried by a jury, who returned a verdict for the plaintiff of two thousand two hundred and fifty dollars, upon which the court ordered judgment.

The errors assigned and relied upon relate to instructions of the court to the jury, and to the allowance of interest upon the value of the property destroyed. The *first* and *second* errors assigned are upon the first instruction. That portion of the instruction assigned for error is in the following words: * * * "That if they believe from the evidence, that defendant had a depot building at Red Hill,

on and prior to August 14th, 1880, and stored therein prior to said August 14th, 1880, and from thence until August 14th, 1880, kept therein, stored, a large quantity of atlas powder, commonly known as giant cartridges; and that said depot building was near the property of the plaintiff, and during all the time said powder was therein, said depot building was in a defective condition and liable to take fire from a fire kept in a stove in said building, of which defendant had notice, and that, by reason of the carelessness and negligence of defendant, said building was burned, and the burning of said building caused said powder to explode, and, by fire or otherwise, destroy the property of the plaintiff, they should find for the plaintiff."

Counsel say: "Our objections to the instruction are that it was a departure from the issue in the case made by the pleadings and allowed the jury to find a verdict on a state of case not at all presented by the pleadings, and to wander about through the evidence for some defect in the building itself, not relied on in the complaint, and found a verdict upon matter wholly foreign to the real issue made in the case by the parties to it." Counsel insist, throughout their entire argument, that the specific allegation of the complaint as to the origin and cause of the fire, namely, a defective flue, was abandoned on the trial; that there was no evidence to support the allegation, and that the court by its instructions to the jury, permitted the plaintiff to depart from the issue presented by the pleadings and to vest the claim for damages upon a wholly different element of liability, viz., a defective condition of the depot building. This, they say, was a change of the cause of action after the introduction of the testimony, and was therefore prejudicial to the rights of the defendant. They characterize the action of the court as giving to the jury, by its instructions, a roving commission to wander about through the evidence and find a verdict upon matter wholly foreign to the case.

A patient examination of the voluminous record in the case has satisfied us that these charges are specious and technical. The sum total of these objections, is, that the jury were told if they believed from the evidence that the depot building was in a defective condition and liable to take fire from a fire kept in a stove in the building, and knowing the fact, the defendant stored a large quantity of giant cartridges therein, and that by the carelessness and negligence of the defendant the depot was burned, the powder exploded and the plaintiff damaged, they should find a verdict in his favor, instead of being told that to warrant a verdict for the plaintiff they must find that the fire originated from a *defective flue*.

The only foundation that we can discover for the objections so strenuously urged upon our attention, lies in the definition of the word "*flue*." The complaint declares *in haec verba*, "*that the depot building was extremely unsafe and liable at any time to take fire*," but in a previous sentence the cause of its unsafe condition is attributed to a "*defective flue*."

Now if there was any variance in the proof from the allegations of the complaint, it was that the *locus* or thing referred to in the complaint as *defective*, was not strictly speaking, a *flue*, but an aperture not protected by a flue, through which the stove pipe passed. Instead of there being a defective flue, in the technical sense of the term, the defective condition of the building was owing to the *absence* of a flue at the point referred to. But we think this point was described with reasonable certainty, and find nothing in the entire proceedings to indicate that anyone was misled by the misapplication of the term. In support of this conclusion we cite the fact that the witnesses of both parties, including the agents and officers of the defendant company, referred to and denominated the alleged defective point as a flue, in their testimony. The complaint states that the pipe from the stove passed into and through it, and that a fire was made and kept in the stove, thereby rendering the building unsafe. The testimony showed conclusively that the fire originated in the apartment of the building called the "office," that the ceiling over this room was composed of dressed boards of a single thickness, and that the pipe from the stove passed up through a hole in this board ceiling, and up through the roof. The only protection provided to prevent the pipe from coming in contact with the boards of the ceiling, was a small sheet of tin or zinc, through which the pipe was passed, and which was placed on the upper surface of the ceiling boards. The same provision existed at the point where the pipe passed through the roof.

The testimony further shows that on the night of the disaster a hot fire was made in the office stove in the presence of and with the knowledge of the defendant's station agent in charge of said station and building, who thereupon retired to bed in said office room. By reason of this fire and the so-called defective flue, the ceiling around the stovepipe was ignited, and fire communicated to the entire building, causing its total destruction, the explosion of the powder, and the damages to person and property sued for.

Now, while it must be conceded that the phraseology of the complaint is liable to verbal criticism in the particular mentioned, yet the meaning is so apparent that no prejudice could have resulted therefrom, since no one could have been misled by the term employed. The evidence, also, abundantly shows that the defect in the building complained of was of the most dangerous character, and was the proximate cause of the fire. It is not contended in argument that the fire originated at any other point, or through other means, and if it was, we discover no evidence to support such a theory. It would seem, then, that the objections which we have been considering are pure technicalities, which fairly fall within the class defined as "curious and nice exceptions tending to the overthrow or delay of justice," which it has been well said, a proper construction of the law always disallows. Courts do not sit as literary critics, and therefore mere verbal inaccuracies, unless clearly shown to have been misleading, are not ground of reversal.

Portions of the second and third instructions are assigned for error, as follows: "Second. If they believe, from the evidence, that on and prior to the fourteenth of August, 1880, the defendant had a depot at Red Hill, near plaintiff's property, that was in a defective condition and liable to take fire from a fire kept therein, and that knowing the premises, a few days prior to said fourteenth day of August, 1880, defendant stored in said building a large quantity of atlas powder, commonly known as giant cartridges, and kept the same therein, and while it was stored therein said building took fire through a lack of the care and diligence, above described, on the part of the defendant, by and through its agents and employees, and caused said powder to explode and destroy by fire, or otherwise, the property of the plaintiff, they should find for plaintiff."

"Third. And if the jury find, from the evidence, that the defendant stored and kept in the depot, at Red Hill, giant powder, or cartridges, or other inflammable and combustible materials, when said depot building was defective and unsafe for the storage and keeping of such materials; and that defendant was aware of such facts, or that it did not keep the same with the vigilance and care, and in the charge of such careful and proper servants, as a prudent man would have done with the same kind of substances, and, that by reason thereof, the said depot building was burned, and the said giant powder and other substances, exploded and destroyed the property of plaintiff by fire, or otherwise, they should find for the plaintiff."

The objections assigned to these instructions are, that there was no evidence produced by the plaintiff that said depot building was defective and liable to take fire from a fire kept therein; nor any evidence that it was unsafe for the storage and keeping of such materials as therein described; nor any evidence that the defendant was aware of such facts; that there was no allegation in the complaint nor any evidence produced on that trial that said defendant did not keep said depot with vigilance and care, and in charge of such careful and proper servants as a prudent man would have done, and that by reason thereof the building was burned, the powder exploded and the plaintiff's property destroyed.

It is also assigned for error that the court instructed the jury, that notice to defendant's agents was notice to the defendant, and that the acts of its agents and employees were the acts of the defendant.

The objections to these legal propositions are, that they are too broad, and consequently that they were calculated to mislead the jury; also, that there was no evidence to support them.

The foregoing objections embrace the *fourth*, *fifth*, sixth, seventh, *ninth* and fifteenth assignments of error.

We will first consider the objections to the legal propositions contained in the foregoing instructions.

Respecting the acts and responsibilities of corporations, the law is that artificial persons, like natural persons, are liable in damages for acts of negligence imputable to them, whereby injuries result to third persons. A corporation acts through its officers and employees,

who, in the exercise of their respective functions, and, to that extent, represent the corporation.

The rules and principles of law applicable to the relation of master and servant, apply equally to corporations and their agents, and damages resulting from the negligence of both classes of persons, is measured by the same rule.

If a servant is guilty of a wrongful act when engaged in his master's business and while acting within the general scope of his authority, the master is liable, although he did not authorize the particular act. It is no defense in such case that the servant disobeyed private instructions, or abused his authority. So a person who puts a servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is held responsible for damages resulting to third persons through the lack of judgment or discretion of the servant, while executing the trust, although he departed from the strict letter of his authority in the execution thereof.

The same rules obtain in respect to railroad companies. Accordingly it is laid down that the employees of such a corporation both of the higher and the subordinate class, who are engaged in service at its stations, or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their positions; and it is liable for their tortious acts which are performed in the course of such service: Rounds v. D. L. & W. R. Co., 64 N. Y., 129; Cohen v. Railroad Company, 69 N. Y., 170; Passenger Railway Company v. Donahue, 10 Pa. St., 119; Pierce on Railroads, 277.

Concerning the question of notice, the rule is the same in respect to corporations as to natural persons. As to the latter, the principle obtains that willful ignorance of a fact, is equivalent to actual knowledge of the fact.

The rule is well settled that notice to an agent in transactions in which he is employed, where it becomes his duty, by virtue of his employment, to act on such notice, is notice to the principal. The term *notice*, in such instance, is synonymous with the term *knowledge*.

It may, therefore, be said that knowledge acquired by agents of corporations in the discharge of official duties, of facts material to the transactions in which they are engaged, or coming within their respective departments of service, is the knowledge of the corporation: Ewell's Evans on Agents, p. 229; Angell and Ames on Corporations, sec. 305; Abbott's Digest Law of Corporations, pp. 543, 544. An illustration of the rule that notice to the agent in the transactions in which he is employed, and within the scope of the authority confided to him, is notice to the principal, is found in the case of a locomotive engineer, wherein it is held that if the fact be known to him that either the road or the machinery is defective, it is knowledge on the part of the company, and renders it responsible for the consequences: N. & C. R. R. Co. v. Elliott, 1 Cold., 611.

It will be observed that the rules above stated concerning the responsibilities of corporations growing out of the acts of their agents, and concerning notice to their agents, are more full and guarded upon these subjects than the legal propositions of the instructions upon the same subjects. This fact requires us to make an important rule of practice. It is this: That courts are not required to state, in their instructions to juries, the entire law upon any given subject, but only so much thereof as may be applicable and essential to the issues and facts of the case on trial. To this extent the charge must be correct and explicit, and if unexceptionable in these essentials it will not be ground of reversal that the instructions are not strictly correct as universal propositions of law: Proffatt on jury trial, secs. 311, 313; Wells' Questions of Law and Fact, secs. 393, 403.

The instructions were correct, therefore, if applicable to the case. But counsel affirms that they were neither applicable to the issues nor based upon the evidence.

What then, were the issues, and what was the effect of the evidence?

The complaint explicitly charged that the injuries and damages sustained by the plaintiff were occasioned by the wrongful and negligent acts of the defendant. It specified in what the wrong and negligence consisted, and likewise the nature and extent of the damages sustained.

The answer as explicitly denied that the defendant was guilty of wrong or negligence, denied that the fire and its consequences were the result of wrong or negligence on its part; and denied, *seriatim*, the specific acts of negligence alleged to have been sustained by the plaintiff. It further denied that the defendant had any notice or knowledge of the alleged negligent or wrongful acts.

So far, then, as the *issues* were concerned, the instructions were applicable under the rules and principles announced.

Upon looking into the evidence we learn that the depot building was a wooden structure, of the dimensions of about twenty-four feet by thirty-six feet, erected upon upright blocks of wood, which elevated the side nearest the railroad about eighteen inches above the ground, and the opposite side about three feet above the ground. The ends and sides of the building were composed of single boards placed upright against the frame timbers, the edges or cracks of the boards being battened with narrower strips of lumber. The roof was a steep gable, constructed of boards, which were battened like the ends and sides, and the exterior surface was covered with tarred paper, to protect the interior from snow and rain. The interior was divided into four rooms and a loft, the rooms being named respectively, "office," "waiting room," "warehouse" and "kitchen." These apartments, or some of them, including the office, were separated from the loft by a board ceiling, which has already been described, as has also the aperture therein through which the pipe of the office stove passed.

That this building was the property of the railroad company is not denied; that the company caused it to be constructed and equipped in manner described, was proven by the witnesses.

C. W. Fisher, superintendent of the defendant, stated upon the witness stand, that the building was constructed for the company upon contract; that it was his business to inspect the building and property of the company, and that on the completion of the depot he inspected it, found it all right and received it.

When asked about the condition of the defective flue in the office ceiling, he answered that he did not remember of giving special attention to the flue, he was under the impression that the flues were all right. He said it was his special duty to see that such things were safe, that he went there to examine and found them all right. He was unable to say, however, whether there was a flue in the office ceiling or not, at the time of his inspection, but admitted that the furnishing of flues for the building was not included in the contract. He then stated that an employee of the railroad company known as "foreman of buildings," by name of John Greenslit, was to look after the flues. Mr. Greenslit being called to the stand and asked if he knew anything about a flue in the office ceiling, answered that he did not. He said he had furnished but one flue, and that went into the waiting room; he had put none in the office.

The testimony shows there were three stoves in use in this building, but we have here the remarkable admission that but one flue was provided, and that was not for the office, where it seems, fire was necessary at all seasons, but for the waiting room.

The testimony further shows that from the completion of the building to the time of the fire, this depot station was in the general charge of one F. E. Colyer, as station agent and telegraph operator of the defendant. The only other employee of the defendant at that point, at and about the time of the fire, was one Charles Hilton, who appears to have been employed as an assistant to the agent, Colyer. Mr. Rundle, the defendant's superintendant of telegraphs, says he authorized Colyer to employ Hilton, for the business of checking tracking freight at the station. But the testimony shows that in the absence of Colyer, Hilton ran the station, excepting only the telegraph instrument. These two men, Colyer and Hilton, slept together in a bed in the office, and were sleeping there when the fire occurred. The weather was cool in the evenings, at that point, rendering it necessary to have fire in the office stove almost every night, although it was in the month of August. On the night of the thirteenth of August, there was a fire in the stove, and as these men were about to retire to bed, the stove was filled up with coal, more than the usual quantity being put in, according to the testimony of Colyer. They were awakened about twelve o'clock in the night, by the fire, which had been communicated to the ceiling, and had gained such headway that they could do nothing but escape from the building, which was soon destroyed.

Two or three weeks before this, the station agent was alarmed by

a fire on the ceiling at the same point. It appears that some chips had been left there by the carpenter when constructing the building, and that they were ignited by the heat of the stovepipe. This fire was extinguished by the agent, with the assistance of other persons, by means of a bucket of water, but no precautions were taken to prevent a recurrence, save to brush back the chips. The occurrence is mentioned by the witnesses as creating quite a "scare" at the time.

As to the contents of the building, on the night of the final conflagration, witnesses testified that there were about twenty cases of giant powder, or giant cartridges in the freight room, weighing fifty pounds to the case; also, a considerable quantity of coal oil in the immediate vicinity.

Testimony was introduced as to the explosive and dangerous nature of giant powder, and as to what agencies would cause it to explode.

The facts of the fire and explosion; the situation of the plaintiff and his property, and the effects produced by the disaster, were all proven.

In view of the issues and the testimony, then, we have no hesitation in pronouncing the instructions both correct and applicable to the case presented to the jury.

Concerning the unsafe condition of the building in respect to fire, the testimony was confined to the so-called defective flue, showing wherein it was defective; also, that the fire which destroyed the building originated at this point, and that it was communicated from the fire in the office stove, by means of the stovepipe, which passed through the defective flue. The reference in the instructions, then, to the unsafe condition of the building, and its liability to take fire from a fire kept therein, could not have been misunderstood by the jury.

Appellant's counsel think the previous fire without significance on the question of a defective flue. They say the ceiling did not ignite on the occasion, but only the chips against the stove-pipe. But the witness Colyer said, when asked if he saw where the fire was when he poured on the water, "Yes, sir, the chips and the ceiling were also burnt."

This testimony was received without objection, and we think it was proper matter for the consideration of the jury on the question of negligence. It showed that the special attention of the defendant's agents was called to the condition of this flue, or stove-pipe passage, before the storing of the explosive materials in the building. It was a notice to the defendant's agent, and through him to the defendant itself, not only of the condition of the flue, but of the degree of heat generated by the stove-pipe and the danger, great or small, of a fire originating at this point.

This agent being in charge of the company's property and business at this station, the rule applies that knowledge acquired by

agents of corporations of facts coming within their respective departments of service is the knowledge of the corporation.

On the question of notice, it further appeared that officers of the company whose special duty it was to inspect this building, and to see that necessary flues were provided and put in, neglected that duty. The agent in charge of the building knew from a personal inspection, and from the warning of a previous fire, that the so-called flue was defective and dangerous. Within the principles announced, then, all these agents were chargeable with knowledge of the dangerous condition of the building. This knowledge being acquired within the course of their several employments, it was their duty to communicate it to the company, and in law, the knowledge of these agents was the knowledge of the company. In the language of the instructions, notice to these agents was notice to the company.

This disposes of the objection that the "instructions sanction a notice to any brakeman or laborer in the service of the company." The notices proved were to the officers and employees who were duly authorized by virtue of their offices, and the scope of their employment, to represent the company in these identical matters, and not to be brakemen or laborers.

Lastly, under the rules of law before stated, the shipping of the giant cartridges to this depot; the depositing of them in the building, and the making of the fire in the office stove were each and all of them the acts of the defendant.

These, and the failure to provide a sufficient flue, being the acts complained of, and it being shown that they were all committed by agents of the company in the course of their employment, and within the scope of the authority confided to them, the court properly said of them in its instructions—"the acts of its agents and employees were the acts of the defendant."

The question whether the acts complained of constituted negligence, was a question for the jury to decide, and was so left. We think their finding was fully warranted.

The remaining errors assigned relate to the allowance of interest on the value of the property destroyed. The court instructed the jury that if they found a verdict for the plaintiff, they should assess his damages at the value of the property destroyed, with interest thereon, at the rate of ten per centum per annum from the time it was so destroyed.

Interest in this state is a creature of statute and regulated thereby. It is only recoverable, in the absence of contract, in the cases enumerated in the statute, and damages to property arising from the wrong or negligence of a defendant is not one of the enumerated cases.

The statute is not out and construed in Hawly v. Barker, 5 Colo., 118, where it was held that interest was not recoverable on the amount of a *verdict*, although a period of nearly two years had

elapsed from the date of its rendition up to the time of the entry of judgment thereon.

For adjudications upon similar statutory provisions see I. C. R. R. Co. v. Cobb *et al.*, 72 Ill., 148; City of Chicago v. Allcock, 86 Ill., 384; Atkinson v. A. & P. R. R. Co., 63 Mo., 367; Kenney v. H. & St. J. R. R., Id., 99. The instructions were erroneous in this particular, and since it is to be presumed that the jury obeyed them and computed interest, at the rate mentioned, on the value of the property destroyed by the explosion, from the date of its destruction to the date of verdict, the judgment must be reversed for this error. But it will not be necessary to remand the cause for a new trial on account of this single error. It is true that interest was only given upon the value of the property destroyed and not upon the damages assessed for personal injuries; also, that we have no means of ascertaining the amount of the sum upon which interest was allowed. But the plaintiff consents to remit from his judgment a sum equivalent to the interest on the total amount of his damages, which not only cures the error, but is more favorable to the defendant.

Interest upon the entire amount of damages from August 14, 1880, the date of the fire, to May 3, 1881, the date of the judgment, would amount to the sum of one hundred and fifty-one dollars. Deducting this sum from two thousand two hundred and fifty dollars, the amount of the judgment, leaves as the true amount for which judgment should be entered, the sum of two thousand and ninety-nine dollars.

It is therefore ordered that the judgment of the district court be reversed, and that judgment be entered herein in favor of the appellee for the sum of two thousand and ninety-nine dollars, and for costs in the district court as taxed. It is further ordered that appellee pay the costs in this court to be taxed.

SUPREME COURT OF OREGON.

NECKLIN *v.* NELSON ET AL.

Filed December 1, 1884.

BILL OF SALE ABSOLUTE IN FORM WHEN A CHATTEL MORTGAGE—RECORDING—NOTICE.—A bill of sale absolute in form is considered a chattel mortgage upon proof by parol that it was given to secure a debt, not only as to the parties to it, but also as to third parties who are affected with notice. Such bill of sale is entitled to be filed with the county clerk as a chattel mortgage, under section 46 of the code, page 522, and thereafter it imparts notice to third parties, although the clerk may omit to index the instrument.

CHATTEL MORTGAGE TO SECURE FUTURE ADVANCES—LIEN OF WHEN ATTACHES.—In the absence of fraud, a chattel mortgage to secure future advances is valid, whether such object be expressed in the mortgage or not. The lien of such mortgage attaches from the date of the advance, and not from the date of the mortgage.

APPEAL from the circuit court for Multnomah county. The opinion states the facts.

Alfred S. Frank, for the appellant.

P. L. Willis, for the respondent.

LORD, J. The plaintiff took from the defendant Nelson a bill of sale, intended to operate as a mortgage, of certain property belonging to him, and which the plaintiff left in his possession, and which the defendant, Betts' Spring Company, attached, after such bill of sale had been filed and recorded. Thereafter, the plaintiff commenced suit to foreclose, and the Betts' Spring Company answered, claiming the lien of said attachment was to be preferred to any lien or rights accruing under such bill of sale. After issue joined, the matter was referred to a referee, who, after taking the evidence, reported to the court his findings of fact and conclusions of law. These findings were set aside by the court below and a decree rendered, adjudging the lien of the plaintiff under such bill of sale to be prior to that acquired by the attachment, and from which decree the defendant, Betts' Spring Company, appeal to this court.

As ground of error, it is alleged: (1) That the bill of sale was not entitled to be entered of record as a mortgage, and must, therefore, be postponed to the lien of the attachment, and as a matter of law was fraudulent. (2) That the bill of sale was executed and delivered without consideration, and with the intent to defraud, delay, and hinder creditors. (3) That the amount of the consideration recited in the bill of sale was in excess of the amount due and owing the defendant Nelson by the plaintiff, and exceeded such indebtedness in the sum of seven hundred and fifty dollars. As a reply to the matter of false consideration, the plaintiff alleged that it was given to cover future advances; and further alleged, that previous to and up to the time of the execution and delivery to him of the bill of sale now in question, the defendant Nelson, more than a year prior to this, had executed and delivered to him, for a valuable consideration a bill of sale to secure this same debt, and which was duly filed in the clerk's office, and which, up to the time of the execution and delivery of the last bill of sale—the one now in dispute, covered nearly all of the same property. It is hardly necessary to cite authorities to show that a bill of sale absolute in its terms becomes a chattel mortgage upon proof by parol that it was made to secure a debt. It is the nature of the transaction at its inception which determines the character of the instrument. If it be in form a bill of sale, but the transaction was intended to secure a debt, it is a mortgage, and parol evidence is admissible to show the true nature of the transaction for this purpose. And it is not only a mortgage between the parties to it, but also as to third parties who are affected with notice: Jones on Chattel Mort., sec. 22, and n. The evidence shows that the bill of sale was given to secure a debt of two thousand two hundred and fifty dollars, and for future advances not to exceed seven hundred and fifty dollars, making a total of three thousand dollars, the amount of the consideration recited in the bill of sale. Without detailing the particulars, the evidence shows sub-

stantially this state of facts. For more than a year prior to the execution and delivery of the bill of sale in controversy, the plaintiff had been loaning and procuring others to loan on his credit to the defendant, Nelson, as he needed it, from time to time, money to carry on his business, taking therefor the notes of the said defendant, and during which time the plaintiff held a chattel mortgage for three thousand dollars, in the form of a bill of sale, but intended and filed as a chattel mortgage, on part of the property now in dispute. In the latter part of November, 1883, the plaintiff, being ill, placed the matter of his business with the defendant Nelson, in the hands of a Mr. White, as his agent, with instructions to take of the defendant Nelson, a new mortgage for the same sum, which should operate for the present as the former one had, as a security for the sum of two thousand two hundred and fifty dollars, then due, and such additional sums not to exceed in the aggregate the said sum of three thousand dollars, as might be necessary to prepare the mortgaged goods for market, and the proceeds of the sale of the goods, when marketed, were to be applied on the plaintiff's claim until it was paid, as he desired to collect his money. In pursuance of these instructions, a new mortgage, in the same form as the former one, and like the former, intended as a chattel mortgage, was, on the thirtieth day of Nov., 1883, duly executed by the defendant Nelson, on the property in question, and on the same day, presented by Mr. White, as the agent of plaintiff, to the county clerk of Multnomah county, in which county the property was located, and the clerk then endorsed thereon the time of receiving the same, and deposited the same in his office, and has ever since kept it there for the inspection of all persons interested. It is clear, as between the parties, the bill of sale was intended to operate as a mortgage. But did the filing of it in the clerk's office have the effect to convey notice to third parties? Upon this point the counsel for the defendant, Betts' Spring Co., contends that the instrument being in the form of a bill of sale, the record can only convey notice of a bill of sale, and as there was no sale in fact, the instrument was evidently false, and as a consequence thereof, legally fraudulent and void; and further, that the record, owing to the form of the instrument, does not convey notice at all. One statute provides that it shall be the duty of the county clerk, upon the presentation for that purpose, of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, upon the payment of his fees, to endorse thereon the time of receiving the same, and to deposit such instrument or copy in his office to be kept for the inspection of all persons interested: Code, p. 522, sec. 46.

This is all the provision in our law upon this subject. A bill of sale as such is not entitled to record, and a record so-called of a bill of sale is an absolute nullity. The instrument in question was entitled to record only as, and because it was a mortgage, and if the record is notice at all it is notice as a mortgage. Mr. Jones, in his

work on chattel mortgages, says: "A bill of sale, absolute upon its face, but executed as a security and intended to operate as a mortgage, is within the operation of a statute making void a mortgage not recorded, in case the property be not delivered to, and retained by the mortgagee:" Jones on chattel mortgages, sec. 275. In Khun v. Graves, 9 Iowa, 305, it is held that a bill of sale of personal property, in which there is no stipulation that the vendor shall retain the possession, is, if filed for record, notice to subsequent purchasers and to creditors, even when the property remains in the possession of the vendor. In Howell's Annotated Statutes of Michigan, it is said that sec. 6,193, which is almost identical with sec. 46, Or. Code, p. 522, was designed to provide a system applicable to every instrument or conveyance intended to operate as a mortgage of goods and chattels, and to this extent it supercedes and takes the place of section 6,190, which is of similar purport to subdivision 40, of section 763, Or. Code, p. 262. That under section 6,193, the question of good faith and want of any intent to defraud creditors of the mortgagor and purchasers in good faith cannot arise. And that as to them nothing short of a change of possession or filing of the instrument, as the section requires, can save it: Cooper v. Brock, 41 Mich., 491-2. And in that state it has been held that a bill of sale, or other conveyance of goods and chattels, although absolute in terms, if given as a security is a mortgage: Fuller v. Parish, 3 Mich., 211; Parsell v. Thayer, 39 Mich., 467; Hurd v. Brown, 37 Mich., 484. And unless filed as a mortgage or followed by an immediate change of possession, it will be void, as against creditors and subsequent purchasers: Hurd v. Brown, *supra*. The instrument was entitled to record according to its real character: Jones v. Morey, 14 Am. Dec., 513, and note of authorities. Being intended to operate as a mortgage, it was filed as such with the proper officer of the county, and filed by him in his office for the purpose of imparting the notice designed by the statute. A chattel mortgage is recorded by filing it in the office, and there is no law for recording any other instrument in that way. When, therefore, the clerk received it, and placed it on file in his office, it became the record of a chattel mortgage. This filing or registration was equivalent to change of possession of the property, or obviated the necessity of it. Although the law requires such instruments to be be indexed among chattel mortgages, it would seem that the omission of the clerk to do it would not invalidate such mortgage as to third parties for want of notice, as the index constitutes no part of the record: Board of Com. v. Babcock, 5 Or., 472.

The only remaining question is as to the validity of a chattel mortgage to secure future advances, which includes the last two grounds upon which error is claimed. Upon this subject Mr. Herman says: "In respect to the validity of mortgages for existing debts and future advances, there can be no doubt, if any principle of the law can be considered settled by the decisions of the courts, that a mortgage made to secure future liabilities and contingent debts, described

with reasonable certainty, in the absence of any fraudulent intention, is valid; and this, whether the matter of future advances appears on the face of the instrument or note, or is proved solely by the testimony of witnesses:" Herman on Chattel Mortgages, sec 53, p. 111, and authorities cited in note. The fact is, this whole subject has been considered by this court, and the principle decided covers the case at bar. In Hendrix v. Gore, 8 Or., 409, the court say: "The true principle to be deduced from all these cases seems to be, that when a mortgage is given in good faith to secure a present indebtedness and future advances, whether the object be expressed in the mortgage or not, it is valid to the extent of the lien therein expressly created. It is always better, however, that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is endangered by misrepresentation, but disarmed by a statement of the truth:" Shirras v. Craig, 7 Cranch, 34. The effect of the omission is to render the transaction more liable to suspicion, and to put the holder of the mortgage upon stricter proof of payment of the consideration, but the omission does not render the security invalid. The existence of the indebtedness as set up by the plaintiff in his complaint is undisputed. There is no evidence of fraud, or that the consideration was greatly in excess of any advances expected to be made. It seems, however, that counsel for the defendant, Betts' Spring Co., supposed that there must be some binding obligation to make future advances, which the defendant, Nelson, could have enforced against Necklin. But this is not so. Expectation to make future advances is sufficient, only with this difference from when the party is legally bound, namely: That the lien will only attach from the date of the advance and not from the date of the mortgage: The Bank Mort. Co's appeal, 36 Pa. St., 172; McClure v. Roman, 52 Pa. St., 460; Brown v. Keifer, 71 N. Y., 610,—101 U. S. R., 626; Commercial Bank v. Cunningham, 35 Am. Dec., 325. It is doubtless true, as suggested by the chief justice, that the defendant, "knowing that fraud and deceit abounded in these days, not much, if any, less than in the time of Twyne's case, cited by their counsel, honestly suspected some taint of fraud pervaded this transaction, whose true nature was not disclosed on its face and could be uncovered by judicial investigation." But it has turned out otherwise, and the decree of the court below must be affirmed.

SUPREME COURT OF CALIFORNIA.

No. 20,025.

EX PARTE HELBING.

Department One. Filed December 11, 1884.

WRONGFUL APPROPRIATION OF WATER — COMPLAINT FOR, WHEN SUFFICIENT.—A complaint which avers that the defendant, "with intent to injure and defraud, etc., without the knowledge of the owners, and with intent to evade payment for the water taken thereby, made connections and maintained the same with certain mains and service pipes of the Spring Valley Water Works, for the purpose of taking water therefrom for the supply of certain tanks and water works kept and maintained" by the defendant, sufficiently charges the offense created by section 499 of the penal code.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

R. P. Wright, for the petitioner.

Fox & Kellogg, contra.

THE COURT. The complaint in the police court charged the offense created by section 499 of the penal code. That section reads: "Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, or other instrument with any main, service pipe, or other pipe, or conduit or flume for conducting water, for the purpose of taking water from such main, service pipe, conduit or flume, without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor."

The complaint avers that Louis Helbing, "with intent to injure and defraud, etc., without the knowledge of the owners and with intent to evade payment for the water *taken thereby*, made connections and maintained the same with certain mains and service pipes of the said Spring Valley Water-Works, for the purpose of taking water therefrom for the supply of certain tanks and water-works kept and maintained by said Helbing, etc."

The words "without the knowledge of the owners" apply to all that follows, including the averments as to the taking of the water, and the intent. The complaint does not in terms charge that the connection was made by means of a pipe, or a tube, or *instrument*. If it had averred that the defendant connected an "instrument" for the purpose of taking water, it would be good. It avers a connection for that purpose, and such connection, if made at all, could be made only by means of some instrument. It is said a connection (for the purpose named) might be made without in fact any water being taken; but so might an instrument fail of its purpose. A complaint following the statute is admittedly sufficient. Here the statute was substantially followed.

The petitioner is remanded.

No. 8,337.

SALISBURY ET AL. *v.* SHIRLEY.

Department Two. Filed December 13, 1884.

JOINT LEASE--ACTION TO ENFORCE COVENANT—DEATH OF JOINT LESSOR—PARTIES—GUARDIAN AND WARD.—An action for the breach of a covenant in a joint lease, after the death of one of the joint lessors, must be brought in the name of the surviving lessors. Neither the executor nor administrator of the deceased lessor is a proper party. If such deceased lessor made the lease for himself, and also as guardian and trustee for his ward, such ward, after attaining majority, may join with the surviving lessors, in an action to enforce a covenant made for his benefit.

THE ASSIGNMENT OF THE TERM BY THE LESSEE CREATES A PRIVITY OF ESTATE between the assignee and the lessor.

COVENANTS TO PAY RENT AND TAXES—LIABILITY OF ASSIGNEE OF LESSEE.—Covenants in a lease to pay rent and taxes run with the land, and are binding upon and enforceable against the assignee of the lessee by virtue of the privity of estate existing between him and the lessor.

IN AN ASSESSMENT FOR TAXES THE ABBREVIATION "DOLLS." is equivalent to dollars.

THE JUDGMENT AWARDED THE PLAINTIFFS affirmed after a construction of the covenants sued on.

CROSS APPEALS from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs. The opinion states the facts.

Clement, Osment & Clement, for the plaintiffs.

Daniel Rogers, for the defendants.

THORNTON, J. The complaint did state facts sufficient to constitute a cause of action against defendant.

The liability of defendant arose out of the breach of the covenants of a lease executed by Mary Ann Frances Salisbury for herself, and as trustee and guardian of plaintiff, Joseph Hicks, and by Jotham Salisbury, to one William Shields, and by Shields assigned to the defendant. The term of the lease was for ten years and six months, commencing on the first day of March, 1859, and ending on the first day of September, 1869. The breach assigned was for non-payment of taxes by the defendant, assessed during the last six months of the term, in consequence of which the plaintiffs were compelled to pay them.

The foregoing matters are averred in the complaint, and it is also averred that the plaintiff, Joseph Hicks, ward of Mary Ann Frances Salisbury, became of the age of twenty-one years on the twenty-second of November, 1870, and that his guardian above mentioned died on the twenty-sixth of November, 1869.

It is further alleged that Shields entered into possession of the demised premises, and afterwards assigned the lease to the defendant, who immediately entered into possession of the premises and remained in possession thereof during the remainder of the term, and that during all the times mentioned in the complaint the plaintiffs were owners of the premises aforesaid, and tenants in common thereof. This action was commenced in December, 1870.

It is urged on demurrer that plaintiffs are improperly joined. We are of opinion that this position cannot be upheld. The lease was executed by Mary Ann Frances Salisbury for herself and as guardian

of Joseph Hicks, and also by Jotham Salisbury. It was a joint lease. Mary Ann Salisbury having died, Jotham Salisbury is a proper party plaintiff as surviving lessor: See Pomeroy's Rem., etc., secs. 188 and 226, and cases cited in notes. And, as such, can maintain this action. Under such circumstances, no right of action passes to the executor or administrator of the deceased lessor. Joseph Hicks, the ward, having attained his majority before the suit was brought, could maintain an action for the breach of any covenant in the lease made for his benefit.

Jotham Salisbury is a proper party, as the surviving lessor of Mary Ann Frances in her own right, and Joseph Hicks is also a proper party, as the successor of his deceased guardian, to a right of action growing out of the breach of a covenant in the lease made for his benefit. As Mary Ann Frances, in her own right, if she had survived, could have united with Jotham Salisbury and with Joseph Hicks when he had attained his majority, in bringing this action, we see no reason why, when Mary Ann Francis had died, the present plaintiffs could not join for the same purpose.

It is further contended, that, on the averments of the complaint, there is no privity of estate between either of the plaintiffs and the defendant Shirley. In this position counsel are at fault. The assignment of the term, by the lessee to the defendant, creates a privity of estate between defendant and the lessors. This is certainly true after the acceptance of the leasehold estate by defendant: Farmers' Bank v. Mutual Ass. Society, 4 Leigh, 84; Werdner v. Foster, 2 Penrose & Watts, 26; 5 Barr, 1. That defendant did accept the term assigned to him, clearly appears by the averments of the complaint, all of which are admitted, for the purpose of the demurrer, to be true. Inasmuch as the covenant sto pay rent and to pay taxes run with the land: Hannen v. Ewalt, 6 Harris, 11; Allen v. Culver, 3 Denio, 290, 301; Post v. Kearney, 2 Comstock, 394; we have no doubt that this action is properly brought against the assignee of the lessee, the defendant here, who is liable by virtue of privity of estate. The court below committed no error in overruling the demurrer to the complaint.

We think there is no doubt upon the findings that the taxes in controversy were assessed according to law. As to the recital under words, "Description of Property," see: City and County of San Francisco v. Phelan, 61 Cal., 617. The word "Dolls" will be readily comprehended as standing for "dollars." The employment of this abbreviation for dollars takes the case out of the rule referred to in People v. S. F. Savings Union, 31 Cal., 132, and People v. Hastings, 34 Id., 574. The description of the property assessed is sufficient.

The above disposes of the appeal of the defendant. As to him, there is no error, and the judgment is affirmed.

The plaintiffs also appeal from the judgment in so far as it fails to award them the entire sum demanded in the complaint, which is two thousand four hundred and twenty-three dollars and sixteen

cents, with interest (the amount of taxes paid by plaintiffs in consequence of defendant's failure to pay them).

The court below found the following covenants in the lease above mentioned as binding on the lessee:

"And the said party of the second part hereby covenants and agrees to and with the parties of the first part, to pay to them for the said demised premises the sum of two hundred and fifty dollars, subject to the considerations and covenants hereinafter agreed on, payable monthly (in advance) on the first day of each and every month during said term, together with all taxes, costs of assessments which may at any time during said term be levied or assessed on the premises leased or the improvements thereon." And—

"That should the amount of rent received by the lessee from said premises, after deducting said taxes and assessments, in any one year during the term of this lease, be insufficient to pay said monthly rental of two hundred and fifty dollars, then the said party of the second part shall not be liable to pay more for the rent of said premises, nor upon the covenants of this lease, than such amounts as he shall receive as the rents and profits of said property, and, until the completion of the improvements herein agreed to be made, the lessee shall pay such amount, not exceeding two hundred and fifty dollars, as shall be received by him."

These covenants also bind the defendant.

The court also found that the term of the above lease was for the period of ten years and six months from the first day of March, 1859, and that the term ended on the first day of September, 1859; that during the last six months of this term, extending from the first day of March, 1869, to the first day of the following September, the net amount of rents received by the defendant from the leased premises was two thousand nine hundred and thirty dollars, and the amount of taxes levied during the same period was two thousand four hundred and twenty-three dollars and twenty-six cents.

It does not appear from the findings that the defendant paid the rent during the last six months of the lease, but it seems to have been assumed by the court that the defendant did pay the rent monthly during the period mentioned. We say that is was so assumed by the court for the reason that in the sixth finding the amount of rent due for the period mentioned is deducted from the amount of rents received. There would have been no propriety in making this deduction unless such rent had been paid. The counsel make no point on this failure to find and we shall, therefore, treat it as a fact found that the rent of two hundred and fifty dollars per month during the time referred to was unpaid by defendant.

If the defendant had paid the taxes, he would, under the covenant above stated, have been entitled to deduct the amount from the amount of rents, received by him during the six months period above mentioned. Deducting from the rents received by him during that period, which amounted to two thousand nine hundred and thirty dollars, the amount of taxes, two thousand four hundred

and twenty-three dollars and twenty-six cents, which he was bound to pay, the remainder, five hundred and six dollars and seventy-four cents, would only have been due by him under the covenant for rent. The amount paid for rent during the six months was one thousand five hundred dollars. This exceeded the amount of rent, five hundred and six dollars and seventy-four cents, which he was bound to pay, by nine hundred and ninety-three dollars and twenty-six cents. If defendant had only paid the amount of rent, five hundred and six dollars and seventy-four cents, he was under obligation to pay, he would have had in his hands nine hundred and ninety-three dollars and twenty-six cents to apply to the amount two thousand four hundred and twenty-three dollars and twenty-six cents due for taxes, leaving the amount due on the taxes one thousand four hundred and thirty dollars, which sum only the plaintiffs were entitled to recover.

The court below arrived at the same amount as due to plaintiffs by a different mode of computation. It deducted from the amount, two thousand nine hundred and thirty dollars, of rents received the amount, one thousand five hundred dollars, of rents paid, leaving one thousand four hundred and thirty dollars to be applied to the payment of taxes. As the result reached is identical, whichever mode of reckoning is adopted, and is also correct, it is entirely immaterial by what mode such result was reached.

The other point made by the plaintiffs is unsustainable. On the findings, we cannot assume or presume that defendant received from his sub-lessees any amount for taxes during the six months period mentioned. If this court should assume or presume any such fact to exist, it would be trespassing on the exclusive province of the court *a qua*, viz.: That of finding facts and converting itself into a tribunal of original jurisdiction, in direct violation of law.

We find no reason to uphold the contentions of plaintiffs and the judgments as to them must therefore be affirmed; and it is so ordered.

SHARPSTEIN, J., and MYRICK, J., concurred.

No. 8.455.

ROLLER v. SUTTER STREET RAILROAD COMPANY.

Department One. Filed December 15, 1884.

STREET RAILROAD—NEGLIGENT KILLING OF CHILD IN STREET.—In an action against a street railroad company for killing a child of very tender years, as it was attempting to cross the street, the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the company in the management of the car, and that the person having care of the child took all proper precaution for its safety.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

cents, with interest (the amount of taxes paid by plaintiffs in consequence of defendant's failure to pay them).

The court below found the following covenants in the lease above mentioned as binding on the lessee:

"And the said party of the second part hereby covenants and agrees to and with the parties of the first part, to pay to them for the said demised premises the sum of two hundred and fifty dollars, subject to the considerations and covenants hereinafter agreed on, payable monthly (in advance) on the first day of each and every month during said term, together with all taxes, costs of assessments which may at any time during said term be levied or assessed on the premises leased or the improvements thereon." And—

"That should the amount of rent received by the lessee from said premises, after deducting said taxes and assessments, in any one year during the term of this lease, be insufficient to pay said monthly rental of two hundred and fifty dollars, then the said party of the second part shall not be liable to pay more for the rent of said premises, nor upon the covenants of this lease, than such amounts as he shall receive as the rents and profits of said property, and, until the completion of the improvements herein agreed to be made, the lessee shall pay such amount, not exceeding two hundred and fifty dollars, as shall be received by him."

These covenants also bind the defendant.

The court also found that the term of the above lease was for the period of ten years and six months from the first day of March, 1859, and that the term ended on the first day of September, 1859; that during the last six months of this term, extending from the first day of March, 1869, to the first day of the following September, the net amount of rents received by the defendant from the leased premises was two thousand nine hundred and thirty dollars, and the amount of taxes levied during the same period was two thousand four hundred and twenty-three dollars and twenty-six cents.

It does not appear from the findings that the defendant paid the rent during the last six months of the lease, but it seems to have been assumed by the court that the defendant did pay the rent monthly during the period mentioned. We say that is was so assumed by the court for the reason that in the sixth finding the amount of rent due for the period mentioned is deducted from the amount of rents received. There would have been no propriety in making this deduction unless such rent had been paid. The counsel make no point on this failure to find and we shall, therefore, treat it as a fact found that the rent of two hundred and fifty dollars per month during the time referred to was unpaid by defendant.

If the defendant had paid the taxes, he would, under the covenant above stated, have been entitled to deduct the amount from the amount of rents, received by him during the six months period above mentioned. Deducting from the rents received by him during that period, which amounted to two thousand nine hundred and thirty dollars, the amount of taxes, two thousand four hundred

No. 20,028.

PEOPLE v. VILLARINO.

Department One. Filed December 15, 1884.

ASSAULT WITH DEADLY WEAPON—SUFFICIENCY OF INFORMATION.—An information, charging the defendant with having feloniously assaulted one R. S., with a deadly weapon, to wit: a loaded pistol, with intent to kill and murder the said R. S., specifying the time and place, is a sufficient statement of the offense charged, if in other respects the information conforms to the requirements of sections 950, 951 and 952 of the penal code.

ARRAIGNMENT—DUTY OF COURT TO INSTRUCT AS TO RIGHT TO COUNSEL.—An arraignment is not void because the court, before the commencement of the proceedings of arraignment, omitted to inform the defendant of his right to counsel, or to assign counsel to defend him, if he was unable to employ one, if the court instructed the defendant concerning his right to counsel during the course of the arraignment.

OBJECTIONS TO INFORMATION, WHEN MUST BE TAKEN.—Any statutory objections to an information, or any defects apparent upon its face, cannot, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts constituting a public offense, which may be taken advantage of, at any time in the course of criminal proceedings.

APPEAL from a judgment of the superior court for Santa Clara county, entered upon a verdict convicting the defendant. The opinion states the facts.

John Lucas, for the appellant.

Attorney General, for the respondent.

MCKEE, J., I. The information laid against the defendant charged him with having feloniously assaulted one Raphael Soto with a deadly weapon, to wit: a loaded pistol, with intent to kill and murder him, the said Soto. This, in connection with the averments of time and place, which are properly pleaded, constituted a sufficient statement of the offense charged: People v. Jacobs, 29 Cal., 579; People v. Congleton, 44 Id., 93; People v. Lightner, 49 Id., 226; People v. Lewis, 61 Id., 366; and as, in other respects, the information conformed to the requirements of sections 950, 951 and 952, Penal Code, it was legally sufficient.

II. The arraignment was not void. All the proceedings necessary to constitute a valid arraignment were taken by the clerk of the court, under the direction of the court, and in accordance with the provisions of sections 988 and 989, Penal Code. But it is insisted that the arraignment was void, because, when the defendant, who was without counsel, was brought from prison to the bar of the court for arraignment, the court omitted to inform him of his right to counsel, or to assign counsel to defend him, if he was unable to employ one. Undoubtedly, that duty was imposed on the court by section 987, Penal Code, and the duty was not performed before the commencement of the proceedings of arraignment; but it was performed in the course of the arraignment. For the record shows that when the defendant, on his arraignment, answered "not guilty" to the question, asked by the clerk of the court, whether he pleaded guilty or not guilty, the court then asked him whether he had counsel, or wanted the assistance of one, and the defendant answered that he had no counsel, and was unable to employ any. The duty was therefore performed; and, although it was not performed

at the right time, yet that did not affect the validity of the arraignment, nor render it void; nor was the defendant thereby deprived of any substantial right, for the record shows that he appeared by counsel in all the subsequent proceedings.

The fact that the defendant, without counsel, on his arraignment, pleaded not guilty, did not deprive him of his statutory right to demur, or to move to set aside the information. Even after his plea was entered, he had the right, at any time before trial, to apply to the court for leave to withdraw his plea, for the purpose of demurring or moving to set aside the information: People v. McCreery, 41 Cal., 458. But he did not apply; and as his counsel went to trial on the plea entered by the defendant, it must be held that all irregularities in the proceedings before the arraignment and plea were waived. Any statutory objections to an information, or any defects apparent upon its face, cannot, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts which constitute a public offense, which may be taken advantage of at any time in the course of criminal proceedings: Section 1,012, Penal Code; People v. Swenson, 49 Cal., 388; People v. Turner, 39 Id., 370; People v. Burgess, 35 Id., 115; People v. Jim Tie, 32 Id., 60.

III. We find nothing in the challenged instructions, which the court of its own motion gave to the jury, prejudicial to the rights of the appellant.

Judgment and orders affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 9,699.

ESTUDILLO *v.* AGUIRRE.

Department One. Filed December 15, 1884.

PROMISSORY NOTE—FAILURE OF CONSIDERATION.—A promissory note given in part for a definite sum which was represented to have been allowed the payee by the probate court, for his services as guardian of the maker, is wanting in consideration to the extent of such sum, if the probate court never made such allowance.

APPEAL from an order of the superior court for Los Angeles county, granting the defendant a new trial. The opinion states the facts.

F. H. Howard and *J. R. Scott*, for the appellant.

Graves & Chapman, for the respondent.

THE COURT. The appeal is by plaintiff from an order granting a new trial. The promissory note sued herein was given, in part, for five hundred dollars, which plaintiff informed defendant had been allowed him by the probate court for his services as guardian of defendant. The plaintiff had been informed by his attorney that five hundred dollars had been so allowed for his services, and believed

t, but, in fact, the probate court had not made such
t the trial in the court below of the action now here,
thstanding defendant's objection that the same was
rial and incompetent, admitted evidence tending
ter, nature and extent of plaintiff's services as
is services were reasonably worth. The de-
the ruling.
rt for a definite sum which was represen-
ained and allowed by the probate court.
en plaintiff and defendant at which
upon as a proper compensation for
The note was given on the repre-
probate court had made the
been made, the consideration
undred dollars. We think

No. 8,369.

BRADY v. PAGE ET AL.

Department One. Filed December 15, 1884.

LITEM—ORDER APPOINTING—JUDGMENT ROLL.—An order appointing a *litem* for a minor defendant constitutes no part of the judgment roll.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

J. M. Nougues, for the appellants.

C. H. Parker, for the respondent.

THE COURT. The order of December 21, 1877, purporting to appoint a guardian *ad litem* for the minor defendant, constitutes no part of the judgment-roll: Emeric v. Alvarado, 1 W. C. Rep., 708. As the judgment-roll discloses no error and the appeal is from the judgment on the roll alone, the judgment is affirmed.

No. 8,368.

BRADY v. PAGE ET AL.

Department One. Filed December 15, 1884.

JUDGMENT affirmed on authority of Brady v. Page, *ante*.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The facts were similar to those in Brady v. Page, *ante*.

J. M. Nougues, for the appellants.

C. H. Parker, for the respondent.

THE COURT. On the authority of Brady v. Page, No. 8,369, *ante*, judgment affirmed.

No. 9,723.

HARRIS v. MORE ET AL.

Department Two. Filed December 15, 1884.

RECORD OF CONVICTION OF MURDER—EVIDENCE OF.—The record of conviction is admissible in evidence, for the purpose of showing that the person convicted was implicated in a murder.

APPEAL from a judgment of the superior court for Santa Barbara county, entered in favor of the defendants, and from an order denying the plaintiff a new trial.

W. C. Stratton, for the appellant.

Thomas McNulta, for the respondents.

THE COURT. We think the record of the conviction of Sprague of the murder of W. T. More was competent for the purpose of showing that Sprague was implicated in said murder, and that the court erred in excluding it for that purpose.

The evidence introduced, together with that offered and erroneously excluded, was sufficient to entitle the plaintiff to have the issues submitted to the jury, and the court erred in granting a nonsuit.

Judgment and order reversed.

No. 8.278.

HARLEY ET AL v. GOLDEN STATE AND MINERS' IRON WORKS.

Department Two. Filed December 16, 1884.

IMPLIED WARRANTY—SALE—CONTRACT OF SALE.—A mere contract of sale or agreement to sell does not imply a warranty. No warranty can be implied except in cases of sale.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

George A. Nourse, for the appellant.

Cary & Troutt, for the respondents.

MYRICK, J. The second cause of action stated in plaintiffs' complaint is evidently based on a warranty of the articles specified. Although there is not in the complaint a direct allegation of sale, yet from the language used, in connection with the allegation of warranty, the pleader must have intended to aver a sale with warranty. This is further apparent from the fact that, if no averment of sale was intended, there are not averments of an agreement by defendant to hold the plaintiffs harmless of any expenses they might be put to in and about the property, its transportation or fitting for use. The defendant would not be liable, unless there was a sale with warranty, or unless there was an agreement to hold harmless or to refund. Therefore, we conclude that the pleader in-

tended to aver a sale with warranty. The court found there was no sale. It follows, there was no warranty. "A warranty is an engagement by which a *seller* assures to a *buyer* the existence of some fact affecting the transaction:" Sec. 1,763, Civil Code. A mere contract of sale or agreement to sell does not imply a warranty: Sec. 1,764, Civil Code. Doubtless the defendant could have contracted, for a consideration, that the concentrators should prove to be of a certain quality, and able to perform certain work, independent of a sale; it could also have contracted to send the concentrators to plaintiffs, for experiment, and guaranteed their fitness, and agreed to refund all expenses; but such contracts do not appear in this case. There being, then, no sale found by the court, and there being no sufficient averments to show liability on the part of defendant without a sale with warranty, the court was not justified in rendering judgment against defendant for any of the items of expenses paid by plaintiffs. There must be a trial *de novo*.

Judgment and order reversed and cause remanded for a new trial.

SHARPSTEIN, J. and THORNTON, J., concurred.

No. 9,519.

PEOPLE EX REL. ETC., v. LARUE ET AL.

Department Two. Filed December 16, 1884.

DEMAND FOR CHANGE OF VENUE—AUTHORITY OF ATTORNEY TO MAKE.—An attorney has authority, at the time he appears for the defendants, to sign a demand for a change of the place of trial.

CHANGE OF VENUE—AFFIDAVIT OF MERITS, WHAT MUST STATE.—An affidavit of merits, for use on a motion for a change of the place of trial, must aver that the affiant has fully stated *the case* to his counsel; an averment that he had fully stated *his case*, and the facts constituting *his defense* in the action, is not sufficient.

APPEAL from an order of the superior court of the city and county of San Francisco, denying a motion for a change of the place of trial. The opinion states the facts.

J. F. Wendell, for the appellants.

T. C. Coogan, for the respondent.

THE COURT. Appeal from an order refusing to change the place of trial.

Both defendants filed a demurrer to the complaint, and filed a demand in writing signed by their attorney that the place of trial be had in the county where they resided. Notice of the motion for change of place of trial was given by both defendants and stated that the motion was based on the papers on file and the affidavit of Greenlaw. The affidavit of merits was the affidavit of defendant Greenlaw alone, and stated that "he has fully and fairly stated his case and the facts constituting his defense in the said action" to his attorney.

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Lloyd & Wood, for the appellants.

G. E. Harpham, for the respondent.

MYRICK, J. The defendant Levy, being indebted to a firm of stock rokers for moneys advanced by them in stock transactions, arranged ith another firm of stock brokers, Eppstein & Co., that the latter 'rm should take up the stocks, paying to the first firm the amount ue it, and carry the stocks for him; in this arrangement the de-'endant Baldwin was to guarantee on behalf of Levy. The guar-ntee of Baldwin was in the following terms:

"San Francisco, March 10, 1879.—M. Julius Levy in account with Eppstein & Co., commission stock brokers, No. 304 Pine street.

1879.		PURCHASE.	
March 10th,	1,250	Belcher, 6½	$ 8,125 00
March 10th,	250	Mexican, 40	10,000 00
		Com	45 30
		E. and O. Ex	$18,170 30

"I herewith guarantee the above account, to wit., eighteen thousand one hundred and seventy and thirty one-hundredths dollars ($18,170.30), in gold coin, against any loss for sixty days from date, and agree to make good any loss that may be sustained thereon, in reselling the above stock, balance to be paid with interest at 1¼ per cent. per month. E. J. BALDWIN."

The term of the guarantee was extended from time to time until July 25, 1879, transactions of sale and purchase of other stocks having been had in the meantime by the consent of Baldwin, and on that day the stocks then in hand were sold by Eppstein & Co., they claiming a balance due them of four thousand and twenty-three dollars and fifty-seven cents.

Two questions arise on this appeal, viz.: 1. During the time Eppstein & Co. were carrying the stocks, they paid assessments which had been levied thereon. Were they entitled to deduct the amounts so paid from the proceeds of sales? 2. As to Baldwin, when did interest begin to run—from the dates respectively of the payments made by Eppstein & Co., or from the time the balance was ascertained, viz., July 25, 1879, and at what rates?

We are of opinion that Eppstein & Co. had the legal right to protect the security in their hands by the payment of the assessments. Otherwise it might have been entirely lost by sale for assessments.

In guaranteeing the account, Baldwin, in terms, guaranteed interest at the rate of one and a quarter per cent. per month, only on the balance to be ascertained. The balance was ascertained July 25, 1879; therefore, from that day only is interest to be computed at that rate. But, as under section 1,917, Civil Code, on moneys lent, interest is payable at the rate of seven per cent. per annum, and as the transaction between Levy and his guarantor on one side, and Eppstein & Co. on the other, was one of moneys lent, interest is payable thereon at the statutory rate.

Some other points were presented, but there are none which affect the substantial rights of the appellant.

The judgment and order as to Baldwin are reversed, and the cause is remanded, with instructions to render judgment in favor of plaintiff and against the defendant Baldwin, on the following bases, viz: Credit the account sued on with the total amounts paid for stocks, assessments and commissions, viz: forty-one thousand seven hundred and eighty-four dollars and eighty four cents; debit with the amounts received on sales, viz: thirty-nine thousand six hundred and forty-five dollars; add to the credit side, at the proper dates, interest on the intermediate balances in favor of Eppstein & Co., at the rate of seven per cent. per annum to July 25, 1879; from that day the amount in favor of Eppstein & Co. will bear interest at the rate of one and a quarter per cent. per month until date of judgment hereby ordered.

SHARPSTEIN, J., and THORNTON, J., concurred.

No. 8,861.

TWOMEY ET AL *v.* PEOPLE'S ICE COMPANY.

Department One. Filed December 16, 1884.

CONSTRUCTION OF CONTRACT SUED ON—BREACH OF CONTRACT.—The plaintiffs and the defendant entered into a contract whereby the latter agreed to sell to the former ice, in such quantities as might be demanded, at a certain price. The plaintiffs agreed not to buy ice from any one else. During the continuance of the contract one of the plaintiffs bought ice from other parties. *Held*, that the same constituted a breach of the contract, and released the defendant from its obligation under the contract, although the ice was bought by such plaintiff for his individual use.

APPEAL from a judgment of the superior court for Merced county, entered in favor of the plaintiffs and from an order denying the defendant a new trial. The opinion states the facts.

Estee & Boalt, for the appellant.

Bennett & Wigginton, for the respondents.

THE COURT. The action is on the instrument following:

"MERCED CITY, Cal., February 17, 1879.

"We, the undersigned, agree to furnish ice to William Twomey and H. A. Bloss for the term of one year from date, at Merced, at the rate of five dollars per ton, they, William Twomey and H. A. Bloss, agreeing to pay for the ice on delivery, in gold coin of the United States; they, the said parties, to pay the C. P. R. R. Co. freight at the said Merced; the People's Ice Company agreeing to send or sell ice to the said parties, and them only, for the term of one year; the said parties agreeing to take ice from said People's Ice Co., and from no one else, for the term of one year.

"PEOPLE'S ICE CO.,
"J. S. THOMPSON, President.
"Per G. A. BELL."

We find it unnecessary to pass on the question as to the validity of the contract, or as to the authority of Bell to sign for the president or company.

By the terms of the alleged contract it was the duty of the defendant to furnish to plaintiffs such quantities of ice as should be demanded of it, when the same should be demanded, during the year. One inducement to defendant to enter into the contract was the promise by plaintiffs to purchase of no other person than defendant, during the year; and a breach of the contract by plaintiffs in that particular would release defendant from any further performance, after such breach.

The first demand (if it constituted a demand) for ice, made by plaintiffs upon defendant, was on June 2, 1879. Prior to that time, Bloss, one of plaintiffs, purchased from a third person (as is admitted by respondents) about six thousand pounds of ice.

Defendant's counsel asked the court below to charge the jury:

"You are instructed, that under the terms of the written paper, exhibit A, there is an obligation on the part of the plaintiffs to buy no ice from any person except the defendant; and if you find that the plaintiffs, or either of them, purchased ice any time between the seventeenth day of February, 1879, and the second day of June, 1879, from any person except the defendant, then the defendant is not liable in this action."

Respondents claim that six thousand pounds is so small a quantity of ice that the rule *de minimus* "nearly" applies; and claims further that the contract was made with *both* plaintiffs, and with reference to the business they were to conduct of furnishing ice to the public, and that, as the ice purchased by Bloss was used in his *hotel* which he was carrying on independently of Twomey, the purchase by him was no breach of the contract.

But the defendant was entitled to furnish all the ice which should be purchased by plaintiffs, or either of them, whether the same should be sold directly to consumers, or indirectly as part of the food or drink of the guests of the hotel of one of them.

Judgment and order reversed and cause remanded for a new trial.

at the right time, yet that did not affect the validity of the arraignment, nor render it void; nor was the defendant thereby deprived of any substantial right, for the record shows that he appeared by counsel in all the subsequent proceedings.

The fact that the defendant, without counsel, on his arraignment, pleaded not guilty, did not deprive him of his statutory right to demur, or to move to set aside the information. Even after his plea was entered, he had the right, at any time before trial, to apply to the court for leave to withdraw his plea, for the purpose of demurring or moving to set aside the information: People v. McCreery, 41 Cal., 458. But he did not apply; and as his counsel went to trial on the plea entered by the defendant, it must be held that all irregularities in the proceedings before the arraignment and plea were waived. Any statutory objections to an information, or any defects apparent upon its face, cannot, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts which constitute a public offense, which may be taken advantage of at any time in the course of criminal proceedings: Section 1,012, Penal Code; People v. Swenson, 49 Cal., 388; People v. Turner, 39 Id., 370; People v. Burgess, 35 Id., 115; People v. Jim Tie, 32 Id., 60.

III. We find nothing in the challenged instructions, which the court of its own motion gave to the jury, prejudicial to the rights of the appellant.

Judgment and orders affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 9,699.

ESTUDILLO *v.* AGUIRRE.

Department One. Filed December 15, 1884.

PROMISSORY NOTE—FAILURE OF CONSIDERATION.—A promissory note given in part for a definite sum which was represented to have been allowed the payee by the probate court, for his services as guardian of the maker, is wanting in consideration to the extent of such sum, if the probate court never made such allowance.

APPEAL from an order of the superior court for Los Angeles county, granting the defendant a new trial. The opinion states the facts.

F. H. Howard and *J. R. Scott*, for the appellant.

Graves & Chapman, for the respondent.

THE COURT. The appeal is by plaintiff from an order granting a new trial. The promissory note sued herein was given, in part, for five hundred dollars, which plaintiff informed defendant had been allowed him by the probate court for his services as guardian of defendant. The plaintiff had been informed by his attorney that five hundred dollars had been so allowed for his services, and believed

his informant, but, in fact, the probate court had not made such allowance. At the trial in the court below of the action now here, the court, notwithstanding defendant's objection that the same was irrelevant, immaterial and incompetent, admitted evidence tending to prove the character, nature and extent of plaintiff's services as guardian, and what his services were reasonably worth. The defendant duly excepted to the ruling.

The note was given in part for a definite sum which was represented to have been fixed, determined and allowed by the probate court. There was no settlement between plaintiff and defendant at which five hundred dollars was agreed upon as a proper compensation for plaintiff's services as guardian. The note was given on the representation (innocently made) that the probate court had made the allowance. As the allowance had not been made, the consideration of the note failed to the extent of five hundred dollars. We think the court properly granted the new trial.

Order affirmed.

No. 8,369.

BRADY v. PAGE ET AL.

Department One. Filed December 15, 1884.

GUARDIAN AD LITEM—ORDER APPOINTING—JUDGMENT ROLL.—An order appointing a guardian *ad litem* for a minor defendant constitutes no part of the judgment roll.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

J. M. Nougues, for the appellants.

C. H. Parker, for the respondent.

THE COURT. The order of December 21, 1877, purporting to appoint a guardian *ad litem* for the minor defendant, constitutes no part of the judgment-roll: Emeric v. Alvarado, 1 W. C. Rep., 708. As the judgment-roll discloses no error and the appeal is from the judgment on the roll alone, the judgment is affirmed.

No. 8,368.

BRADY v. PAGE ET AL.

Department One. Filed December 15, 1884.

JUDGMENT affirmed on authority of Brady v. Page, *ante*.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The facts were similar to those in Brady v. Page, *ante*.

J. M. Nougues, for the appellants.

C. H. Parker, for the respondent.

THE COURT. On the authority of Brady v. Page, No. 8,369, *ante*, judgment affirmed.

with reasonable certainty, in the absence of any fraudulent intention, is valid; and this, whether the matter of future advances appears on the face of the instrument or note, or is proved solely by the testimony of witnesses:" Herman on Chattel Mortgages, sec 53, p. 111, and authorities cited in note. The fact is, this whole subject has been considered by this court, and the principle decided covers the case at bar. In Hendrix v. Gore, 8 Or., 409, the court say: "The true principle to be deduced from all these cases seems to be, that when a mortgage is given in good faith to secure a present indebtedness and future advances, whether the object be expressed in the mortgage or not, it is valid to the extent of the lien therein expressly created. It is always better, however, that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is endangered by misrepresentation, but disarmed by a statement of the truth:" Shirras v. Craig, 7 Cranch, 34. The effect of the omission is to render the transaction more liable to suspicion, and to put the holder of the mortgage upon stricter proof of payment of the consideration, but the omission does not render the security invalid. The existence of the indebtedness as set up by the plaintiff in his complaint is undisputed. There is no evidence of fraud, or that the consideration was greatly in excess of any advances expected to be made. It seems, however, that counsel for the defendant, Betts' Spring Co., supposed that there must be some binding obligation to make future advances, which the defendant, Nelson, could have enforced against Necklin. But this is not so. Expectation to make future advances is sufficient, only with this difference from when the party is legally bound, namely: That the lien will only attach from the date of the advance and not from the date of the mortgage: The Bank Mort. Co's appeal, 36 Pa. St., 172; McClure v. Roman, 52 Pa. St., 460; Brown v. Keifer, 71 N. Y., 610,—101 U. S. R., 626; Commercial Bank v. Cunningham, 35 Am. Dec., 325. It is doubtless true, as suggested by the chief justice, that the defendant, "knowing that fraud and deceit abounded in these days, not much, if any, less than in the time of Twyne's case, cited by their counsel, honestly suspected some taint of fraud pervaded this transaction, whose true nature was not disclosed on its face and could be uncovered by judicial investigation." But it has turned out otherwise, and the decree of the court below must be affirmed.

SUPREME COURT OF CALIFORNIA.

No. 20,025.

EX PARTE HELBING.

Department One. Filed December 11, 1884.

WRONGFUL APPROPRIATION OF WATER — COMPLAINT FOR, WHEN SUFFICIENT.—A complaint which avers that the defendant, "with intent to injure and defraud, etc., without the knowledge of the owners, and with intent to evade payment for the water taken thereby, made connections and maintained the same with certain mains and service pipes of the Spring Valley Water Works, for the purpose of taking water therefrom for the supply of certain tanks and water works kept and maintained" by the defendant, sufficiently charges the offense created by section 499 of the penal code.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

R. P. Wright, for the petitioner.

Fox & Kellogg, contra.

THE COURT. The complaint in the police court charged the offense created by section 499 of the penal code. That section reads: "Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, or other instrument with any main, service pipe, or other pipe, or conduit or flume for conducting water, for the purpose of taking water from such main, service pipe, conduit or flume, without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor."

The complaint avers that Louis Helbing, "with intent to injure and defraud, etc., without the knowledge of the owners and with intent to evade payment for the water *taken thereby*, made connections and maintained the same with certain mains and service pipes of the said Spring Valley Water-Works, for the purpose of taking water therefrom for the supply of certain tanks and water-works kept and maintained by said Helbing, etc."

The words "without the knowledge of the owners" apply to all that follows, including the averments as to the taking of the water, and the intent. The complaint does not in terms charge that the connection was made by means of a pipe, or a tube, or *instrument*. If it had averred that the defendant connected an "instrument" for the purpose of taking water, it would be good. It avers a connection for that purpose, and such connection, if made at all, could be made only by means of some instrument. It is said a connection (for the purpose named) might be made without in fact any water being taken; but so might an instrument fail of its purpose. A complaint following the statute is admittedly sufficient. Here the statute was substantially followed.

The petitioner is remanded.

No. 8,337.

SALISBURY ET AL. *v.* SHIRLEY.

Department Two. Filed December 13, 1884.

JOINT LEASE--ACTION TO ENFORCE COVENANT—DEATH OF JOINT LESSOR—PARTIES—GUARDIAN AND WARD.—An action for the breach of a covenant in a joint lease, after the death of one of the joint lessors, must be brought in the name of the surviving lessors. Neither the executor nor administrator of the deceased lessor is a proper party. If such deceased lessor made the lease for himself, and also as guardian and trustee for his ward, such ward, after attaining majority, may join with the surviving lessors, in an action to enforce a covenant made for his benefit.

THE ASSIGNMENT OF THE TERM BY THE LESSEE CREATES A PRIVITY OF ESTATE between the assignee and the lessor.

COVENANTS TO PAY RENT AND TAXES—LIABILITY OF ASSIGNEE OF LESSEE.--Covenants in a lease to pay rent and taxes run with the land, and are binding upon and enforceable against the assignee of the lessee by virtue of the privity of estate existing between him and the lessor.

IN AN ASSESSMENT FOR TAXES THE ABBREVIATION "DOLLS." is equivalent to dollars.

THE JUDGMENT AWARDED THE PLAINTIFFS affirmed after a construction of the covenants sued on.

CROSS APPEALS from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs. The opinion states the facts.

Clement, Osment & Clement, for the plaintiffs.

Daniel Rogers, for the defendants.

THORNTON, J. The complaint did state facts sufficient to constitute a cause of action against defendant.

The liability of defendant arose out of the breach of the covenants of a lease executed by Mary Ann Frances Salisbury for herself, and as trustee and guardian of plaintiff, Joseph Hicks, and by Jotham Salisbury, to one William Shields, and by Shields assigned to the defendant. The term of the lease was for ten years and six months, commencing on the first day of March, 1859, and ending on the first day of September, 1869. The breach assigned was for non-payment of taxes by the defendant, assessed during the last six months of the term, in consequence of which the plaintiffs were compelled to pay them.

The foregoing matters are averred in the complaint, and it is also averred that the plaintiff, Joseph Hicks, ward of Mary Ann Frances Salisbury, became of the age of twenty-one years on the twenty-second of November, 1870, and that his guardian above mentioned died on the twenty-sixth of November, 1869.

It is further alleged that Shields entered into possession of the demised premises, and afterwards assigned the lease to the defendant, who immediately entered into possession of the premises and remained in possession thereof during the remainder of the term, and that during all the times mentioned in the complaint the plaintiffs were owners of the premises aforesaid, and tenants in common thereof. This action was commenced in December, 1870.

It is urged on demurrer that plaintiffs are improperly joined. We are of opinion that this position cannot be upheld. The lease was executed by Mary Ann Frances Salisbury for herself and as guardian

of Joseph Hicks, and also by Jotham Salisbury. It was a joint lease. Mary Ann Salisbury having died, Jotham Salisbury is a proper party plaintiff as surviving lessor: See Pomeroy's Rem., etc., secs. 188 and 226, and cases cited in notes. And, as such, can maintain this action. Under such circumstances, no right of action passes to the executor or administrator of the deceased lessor. Joseph Hicks, the ward, having attained his majority before the suit was brought, could maintain an action for the breach of any covenant in the lease made for his benefit.

Jotham Salisbury is a proper party, as the surviving lessor of Mary Ann Frances in her own right, and Joseph Hicks is also a proper party, as the successor of his deceased guardian, to a right of action growing out of the breach of a covenant in the lease made for his benefit. As Mary Ann Frances, in her own right, if she had survived, could have united with Jotham Salisbury and with Joseph Hicks when he had attained his majority, in bringing this action, we see no reason why, when Mary Ann Francis had died, the present plaintiffs could not join for the same purpose.

It is further contended, that, on the averments of the complaint, there is no privity of estate between either of the plaintiffs and the defendant Shirley. In this position counsel are at fault. The assignment of the term, by the lessee to the defendant, creates a privity of estate between defendant and the lessors. This is certainly true after the acceptance of the leasehold estate by defendant: Farmers' Bank v. Mutual Ass. Society, 4 Leigh, 84; Werdner v. Foster, 2 Penrose & Watts, 26; 5 Barr, 1. That defendant did accept the term assigned to him, clearly appears by the averments of the complaint, all of which are admitted, for the purpose of the demurrer, to be true. Inasmuch as the covenant sto pay rent and to pay taxes run with the land: Hannen v. Ewalt, 6 Harris, 11; Allen v. Culver, 3 Denio, 290, 301; Post v. Kearney, 2 Comstock, 394; we have no doubt that this action is properly brought against the assignee of the lessee, the defendant here, who is liable by virtue of privity of estate. The court below committed no error in overruling the demurrer to the complaint.

We think there is no doubt upon the findings that the taxes in controversy were assessed according to law. As to the recital under words, "Description of Property," see: City and County of San Francisco v. Phelan, 61 Cal., 617. The word "Dolls" will be readily comprehended as standing for "dollars." The employment of this abbreviation for dollars takes the case out of the rule referred to in People v. S. F. Savings Union, 31 Cal., 132, and People v. Hastings, 34 Id., 574. The description of the property assessed is sufficient.

The above disposes of the appeal of the defendant. As to him, there is no error, and the judgment is affirmed.

The plaintiffs also appeal from the judgment in so far as it fails to award them the entire sum demanded in the complaint, which is two thousand four hundred and twenty-three dollars and sixteen

cents, with interest (the amount of taxes paid by plaintiffs in consequence of defendant's failure to pay them).

The court below found the following covenants in the lease above mentioned as binding on the lessee:

"And the said party of the second part hereby covenants and agrees to and with the parties of the first part, to pay to them for the said demised premises the sum of two hundred and fifty dollars, subject to the considerations and covenants hereinafter agreed on, payable monthly (in advance) on the first day of each and every month during said term, together with all taxes, costs of assessments which may at any time during said term be levied or assessed on the premises leased or the improvements thereon." And—

"That should the amount of rent received by the lessee from said premises, after deducting said taxes and assessments, in any one year during the term of this lease, be insufficient to pay said monthly rental of two hundred and fifty dollars, then the said party of the second part shall not be liable to pay more for the rent of said premises, nor upon the covenants of this lease, than such amounts as he shall receive as the rents and profits of said property, and, until the completion of the improvements herein agreed to be made, the lessee shall pay such amount, not exceeding two hundred and fifty dollars, as shall be received by him."

These covenants also bind the defendant.

The court also found that the term of the above lease was for the period of ten years and six months from the first day of March, 1859, and that the term ended on the first day of September, 1859; that during the last six months of this term, extending from the first day of March, 1869, to the first day of the following September, the net amount of rents received by the defendant from the leased premises was two thousand nine hundred and thirty dollars, and the amount of taxes levied during the same period was two thousand four hundred and twenty-three dollars and twenty-six cents.

It does not appear from the findings that the defendant paid the rent during the last six months of the lease, but it seems to have been assumed by the court that the defendant did pay the rent monthly during the period mentioned. We say that is was so assumed by the court for the reason that in the sixth finding the amount of rent due for the period mentioned is deducted from the amount of rents received. There would have been no propriety in making this deduction unless such rent had been paid. The counsel make no point on this failure to find and we shall, therefore, treat it as a fact found that the rent of two hundred and fifty dollars per month during the time referred to was unpaid by defendant.

If the defendant had paid the taxes, he would, under the covenant above stated, have been entitled to deduct the amount from the amount of rents, received by him during the six months period above mentioned. Deducting from the rents received by him during that period, which amounted to two thousand nine hundred and thirty dollars, the amount of taxes, two thousand four hundred

and twenty-three dollars and twenty-six cents, which he was bound to pay, the remainder, five hundred and six dollars and seventy-four cents, would only have been due by him under the covenant for rent. The amount paid for rent during the six months was one thousand five hundred dollars. This exceeded the amount of rent, five hundred and six dollars and seventy-four cents, which he was bound to pay, by nine hundred and ninety-three dollars and twenty-six cents. If defendant had only paid the amount of rent, five hundred and six dollars and seventy-four cents, he was under obligation to pay, he would have had in his hands nine hundred and ninety-three dollars and twenty-six cents to apply to the amount two thousand four hundred and twenty-three dollars and twenty-six cents due for taxes, leaving the amount due on the taxes one thousand four hundred and thirty dollars, which sum only the plaintiffs were entitled to recover.

The court below arrived at the same amount as due to plaintiffs by a different mode of computation. It deducted from the amount, two thousand nine hundred and thirty dollars, of rents received the amount, one thousand five hundred dollars, of rents paid, leaving one thousand four hundred and thirty dollars to be applied to the payment of taxes. As the result reached is identical, whichever mode of reckoning is adopted, and is also correct, it is entirely immaterial by what mode such result was reached.

The other point made by the plaintiffs is unsustainable. On the findings, we cannot assume or presume that defendant received from his sub-lessees any amount for taxes during the six months period mentioned. If this court should assume or presume any such fact to exist, it would be trespassing on the exclusive province of the court *a qua*, viz.: That of finding facts and converting itself into a tribunal of original jurisdiction, in direct violation of law.

We find no reason to uphold the contentions of plaintiffs and the judgments as to them must therefore be affirmed; and it is so ordered.

SHARPSTEIN, J., and MYRICK, J., concurred.

No. 8,455.

ROLLER v. SUTTER STREET RAILROAD COMPANY.

Department One. Filed December 15, 1884.

STREET RAILROAD—NEGLIGENT KILLING OF CHILD IN STREET.—In an action against a street railroad company for killing a child of very tender years, as it was attempting to cross the street, the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the company in the management of the car, and that the person having care of the child took all proper precaution for its safety.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Freidenrich & Ackerman, for the appellant.

Pillsbury & Titus, for the respondent.

ROSS, J. Between two and three o'clock of the afternoon of Sunday, November 7, 1880, an infant child of the plaintiff, aged two years and seventeen days, was run over on Larkin street, in the city and county of San Francisco, by a dummy engine of the defendant, and so injured that death resulted from the injuries within a few days. The action is by the father for damages for the loss of his child. The points made on appeal relate only to the giving and refusal to give certain instructions to the jury by the court below.

The parents of the child, with whom lived also the mother of the plaintiff, resided on Larkin street. In rear of the residence was a yard inclosed by a fence, from which a door opened into an alleyway leading to Larkin street, the door being kept closed. The child was accustomed to play in the yard, and the testimony in the case shows that he was never permitted to go upon the street or sidewalk unattended. In the afternoon in question the father and mother went out for a walk, leaving the child in charge of his grandmother, who was engaged in the kitchen, from which a door and window afforded an outlook upon the yard. By some means not appearing, the door leading from the yard to the alleyway became unfastened and the child escaped through it into the alleyway and thence to Larkin street, and in attempting to cross the street, was run over by the dummy of the defendant.

We have examined the instructions requested and given with care and are of opinion that the jury was correctly instructed with respect to the law governing the case by the court below, except in respect to the measure of damages.

As is usually the case, there is much iteration and reiteration in the instructions, but the gist of them may be summed up in this extract, which we take from one of the last, and which embodies the law of the case: "The verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of defendant in the management of the dummy and car, and that the person in whose care the child was placed when his parents left the house, took all proper precautions for its safety."

Upon the question of the measure of damages, the instructions were, under the provisions of our statute, at least as favorable to the defendant as they ought to have been.

Judgment and order affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 20,028.

PEOPLE v. VILLARINO.

Department One. Filed December 15, 1884.

ASSAULT WITH DEADLY WEAPON—SUFFICIENCY OF INFORMATION.—An information, charging the defendant with having feloniously assaulted one R. S., with a deadly weapon, to wit: a loaded pistol, with intent to kill and murder the said R. S., specifying the time and place, is a sufficient statement of the offense charged, if in other respects the information conforms to the requirements of sections 950, 951 and 952 of the penal code.

ARRAIGNMENT—DUTY OF COURT TO INSTRUCT AS TO RIGHT TO COUNSEL.—An arraignment is not void because the court, before the commencement of the proceedings of arraignment, omitted to inform the defendant of his right to counsel, or to assign counsel to defend him, if he was unable to employ one, if the court instructed the defendant concerning his right to counsel during the course of the arraignment.

OBJECTIONS TO INFORMATION, WHEN MUST BE TAKEN.—Any statutory objections to an information, or any defects apparent upon its face, cannot, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts constituting a public offense, which may be taken advantage of, at any time in the course of criminal proceedings.

APPEAL from a judgment of the superior court for Santa Clara county, entered upon a verdict convicting the defendant. The opinion states the facts.

John Lucas, for the appellant.

Attorney General, for the respondent.

MCKEE, J., I. The information laid against the defendant charged him with having feloniously assaulted one Raphael Soto with a deadly weapon, to wit: a loaded pistol, with intent to kill and murder him, the said Soto. This, in connection with the averments of time and place, which are properly pleaded, constituted a sufficient statement of the offense charged: People v. Jacobs, 29 Cal., 579; People v. Congleton, 44 Id., 93; People v. Lightner, 49 Id., 226; People v. Lewis, 61 Id., 366; and as, in other respects, the information conformed to the requirements of sections 950, 951 and 952, Penal Code, it was legally sufficient.

II. The arraignment was not void. All the proceedings necessary to constitute a valid arraignment were taken by the clerk of the court, under the direction of the court, and in accordance with the provisions of sections 988 and 989, Penal Code. But it is insisted that the arraignment was void, because, when the defendant, who was without counsel, was brought from prison to the bar of the court for arraignment, the court omitted to inform him of his right to counsel, or to assign counsel to defend him, if he was unable to employ one. Undoubtedly, that duty was imposed on the court by section 987, Penal Code, and the duty was not performed before the commencement of the proceedings of arraignment; but it was performed in the course of the arraignment. For the record shows that when the defendant, on his arraignment, answered "not guilty" to the question, asked by the clerk of the court, whether he pleaded guilty or not guilty, the court then asked him whether he had counsel, or wanted the assistance of one, and the defendant answered that he had no counsel, and was unable to employ any. The duty was therefore performed; and, although it was not performed

at the right time, yet that did not affect the validity of the arraignment, nor render it void; nor was the defendant thereby deprived of any substantial right, for the record shows that he appeared by counsel in all the subsequent proceedings.

The fact that the defendant, without counsel, on his arraignment, pleaded not guilty, did not deprive him of his statutory right to demur, or to move to set aside the information. Even after his plea was entered, he had the right, at any time before trial, to apply to the court for leave to withdraw his plea, for the purpose of demurring or moving to set aside the information: People v. McCreery, 41 Cal., 458. But he did not apply; and as his counsel went to trial on the plea entered by the defendant, it must be held that all irregularities in the proceedings before the arraignment and plea were waived. Any statutory objections to an information, or any defects apparent upon its face, cannot, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts which constitute a public offense, which may be taken advantage of at any time in the course of criminal proceedings: Section 1,012, Penal Code; People v. Swenson, 49 Cal., 388; People v. Turner, 39 Id., 370; People v. Burgess, 35 Id., 115; People v. Jim Tie, 32 Id., 60.

III. We find nothing in the challenged instructions, which the court of its own motion gave to the jury, prejudicial to the rights of the appellant.

Judgment and orders affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 9,699.

ESTUDILLO *v.* AGUIRRE.

Department One. Filed December 15, 1884.

PROMISSORY NOTE—FAILURE OF CONSIDERATION.—A promissory note given in part for a definite sum which was represented to have been allowed the payee by the probate court, for his services as guardian of the maker, is wanting in consideration to the extent of such sum, if the probate court never made such allowance.

APPEAL from an order of the superior court for Los Angeles county, granting the defendant a new trial. The opinion states the facts.

F. H. Howard and *J. R. Scott*, for the appellant.

Graves & Chapman, for the respondent.

THE COURT. The appeal is by plaintiff from an order granting a new trial. The promissory note sued herein was given, in part, for five hundred dollars, which plaintiff informed defendant had been allowed him by the probate court for his services as guardian of defendant. The plaintiff had been informed by his attorney that five hundred dollars had been so allowed for his services, and believed

his informant, but, in fact, the probate court had not made such allowance. At the trial in the court below of the action now here, the court, notwithstanding defendant's objection that the same was irrelevant, immaterial and incompetent, admitted evidence tending to prove the character, nature and extent of plaintiff's services as guardian, and what his services were reasonably worth. The defendant duly excepted to the ruling.

The note was given in part for a definite sum which was represented to have been fixed, determined and allowed by the probate court. There was no settlement between plaintiff and defendant at which five hundred dollars was agreed upon as a proper compensation for plaintiff's services as guardian. The note was given on the representation (innocently made) that the probate court had made the allowance. As the allowance had not been made, the consideration of the note failed to the extent of five hundred dollars. We think the court properly granted the new trial.

Order affirmed.

No. 8,369.

BRADY v. PAGE ET AL.

Department One. Filed December 15, 1884.

GUARDIAN AD LITEM—ORDER APPOINTING—JUDGMENT ROLL.—An order appointing a guardian *ad litem* for a minor defendant constitutes no part of the judgment roll.

APPEAL from a judgment of the superior court for the city and county of San Francisco.

J. M. Nougues, for the appellants.

C. H. Parker, for the respondent.

THE COURT. The order of December 21, 1877, purporting to appoint a guardian *ad litem* for the minor defendant, constitutes no part of the judgment-roll: Emeric v. Alvarado, 1 W. C. Rep., 708. As the judgment-roll discloses no error and the appeal is from the judgment on the roll alone, the judgment is affirmed.

No. 8,368.

BRADY v. PAGE ET AL.

Department One. Filed December 15, 1884.

JUDGMENT affirmed on authority of Brady v. Page, *ante*.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The facts were similar to those in Brady v. Page, *ante*.

J. M. Nougues, for the appellants.

C. H. Parker, for the respondent.

THE COURT. On the authority of Brady v. Page, No. 8,369, *ante*, judgment affirmed.

CONTEMPT.

1. CONTEMPT, AFFIDAVIT FOR—VERIFICATION OF BY THIRD PERSON.—The affidavit charging a person with a contempt for refusing to obey an injunction decree, need not be verified by a party beneficially interested in the injunction proceedings; and although the court should refuse to act unless satisfied that the party making the affidavit was authorized to do so by the party beneficially interested, the presumption is that such party, by his attorney, presented the affidavit, and that fact is sufficient to show that the party making the affidavit was authorized. *Strait et al.* v. *Williams.* *Nev.* 480.

2. THE SAME—WHAT THE AFFIDAVIT MUST SHOW.—Such affidavit is sufficient to give the court jurisdiction of the contempt proceedings, if it states in substance the rendition of the judgment, that the same is in full force and effect and unreversed, and shows the violation thereof by the defendant. *Id.*

CONTRACT.

1. DAMAGES FOR BREACH OF CONTRACT—NEGLIGENCE—PREVENTION OF LOSS.—One who sues to recover damages for injuries in an action arising out of contract or tort, cannot recover if the injuries were consequent upon his own negligence which directly contributed to them. Everyone engaged in the performance of a contract is bound to do everything in his power to prevent loss to himself from a breach of the contract by the other party. If he cannot prevent it altogether, he must make reasonable exertions to render it as light as possible; and if, by his own negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss must fall upon him. *Winans* v. *Sierra Lumber Co.* *Cal.* 277.

2. PARTIAL BREACH OF CONTRACT—ESTOPPEL—PART PERFORMANCE OF CONTRACT.—A party to a contract is not estopped from asserting his claim for a partial breach of the contract by the other party, from the fact that at the time when a settlement was had between them for work done under the contract, no mention was made of such claim. If the contract was susceptible of more or less performance, and there was a partial breach thereof by one of the parties, the other has the right to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the partial breach. *Id.*

3. BREACH OF CONTRACT TO MANUFACTURE LUMBER—MEASURE OF DAMAGES.—The plaintiff and defendant entered into a contract whereby the plaintiff agreed to manufacture lumber, and the defendant agreed to purchase all that the plaintiff might manufacture, at a stipulated price, and to furnish him certain machinery for such purpose. The machinery furnished was inadequate, and by reason thereof the plaintiff was unable to manufacture as much lumber as he otherwise would have done. In an action to recover for the breach of such contract, *held*, that the measure of damages was the contract-price for the lumber which the plaintiff was so prevented from manufacturing, less the expense he would have incurred in manufacturing said lumber, over and above the amount necessarily expended, under the circumstances, in manufacturing the amount actually manufactured by him. *Id.*

4. STIPULATION IN BUILDING CONTRACT FOR ARBITRATION—CONSTRUCTION OF CONTRACT.—A stipulation in a contract for building a railroad, that in case any disputes or differences arise between the company and contractors "as to the construction or meaning of the agreement or specifications or sufficiency of the performance of any work to be done under it or price to be paid, the same shall be referred to the chief engineer of the company, who shall consider and decide the same, and his decision shall be final," is valid, and the decision of the engineer on any of such matters is binding on the parties, in the absence of fraud or mistake on the part of such officer. *Held*, however, that a dispute as to the amount of work done by the contractor was not included within such stipulation. *D. S. P. & P. R. R.* v. *Riley.* *Col.* 238.

5. CONSTRUCTION OF CONTRACT SUED ON—BREACH OF CONTRACT.—The plaintiffs and the defendant entered into a contract whereby the latter agreed to sell to the former ice, in such quantities as might be demanded, at a certain price. The plaintiffs agreed not to buy ice from anyone else. During the continuance of the contract one of the plaintiffs bought ice from other parties. *Held*, that the same constituted a breach of the contract, and released the defendant from its obligations under the contract, although the ice was bought by such plaintiff for his individual use. *Twomey et al.* v. *People's Ice Co.* *Cal.* 700.

6. CONTRACT—LIABILITY FOR ILLEGAL ACT—INFERENCES OF INTENTION.—A party is not bound for the consequences of an illegal act, from a mere suggestion in a conver-

sation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually. *Andrews* v. *Runyon*. *Cal.* 81.

7. JUDGMENT AND ORDER affirmed after construing the contract sued on. *Martin* v. *Hill et al.* *Cal.* 430.

See ASSIGNMENT, 1; COMMON CARRIERS, 1; GUARANTY; MASTER AND SERVANT.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1-3.

CORPORATIONS.

1. CONTRACT BETWEEN A DIRECTOR AND THE CORPORATION—LOAN ON EXCESSIVE INTEREST.—A director of a corporation cannot contract with his co-directors that, in consideration of a sum of money advanced by him he should receive the company's notes for a much larger amount, bearing an excessive rate of interest, although by oral contemporaneous agreement it was provided that of the excess beyond the amount loaned, the corporation should be required to pay only the sum which the lender might pay for taxes upon the property, with interest thereon. The corporation may satisfy such notes by paying the amount actually loaned, with interest thereon at the ordinary rates. *Sutter Street R. Co.* v. *Baum et al.* *Cal.* 291.

2. INCREASE OF CAPITAL STOCK—FICTITIOUS ISSUE—SPRING VALLEY WATER WORKS.—The Spring Valley Water Company is authorized to increase its capital stock and to sell the increased issue at the actual market value of the stock of the corporation, for the purpose of raising funds to extend and enlarge the capacity of the works of the corporation, so as to afford greater protection to the property of the inhabitants of the city and county of San Francisco, and to supply them with an abundance of water. Such increased issue is not "fictitious," within the meaning of article XII, section 11 of the constitution. *Stein* v. *Howard et al.* *Cal.* 43.

3. CORPORATION HOLDING STOCK OF ANOTHER CORPORATION—ULTRA VIRES.—It is not presumptively *ultra vires* for one corporation to hold or acquire the stock of another corporation. *Evans* v. *Bailey*. *Cal.* 427.

4. SUBSCRIPTION FOR STOCK—SHAREHOLDER—BOOKS OF COMPANY.—The books of a corporation are competent evidence to prove the number of shares which had been subscribed for and issued at the time an alleged indebtedness arose, and who were the shareholders. *Id.*

5. THE SAME—ARTICLES OF INCORPORATION.—The articles of incorporation of a company, dated in 1877, do not necessarily show who were the shareholders, or in what amounts respectively, during a subsequent period. *Id.*

6. PLEA IN BAR OR ABATEMENT.—In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff, but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered unless expressly pleaded in abatement. *Oregonian etc. R. R. Co.* v. *Oregon R. R. etc. Co.* *(U. S. Cir. Ct.)* *Or.* 548.

7. ESTOPPEL BY CONTRACT.—A party who contracts with a corporation, as such, is thereby estopped, in an action on such contract, to deny its corporate existence, or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action, the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived. *Id.*

8. PLEADING AN ESTOPPEL.—When the matter constituting the estoppel (the contract) does not appear in the previous pleadings, it must be set up by replication; but where the same does so appear, the estoppel must be raised by demurrer. *Id.*

9. CORPORATIONS—LIABILITY OF FOR TORTIOUS ACTS OF SERVANTS.—Corporations are liable for the acts of their agents and employés in the same manner and to the same extent as private persons. Accordingly, the employés of a railroad corporation, who are engaged in service at its stations or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their position; and the corporation is liable for their tortious acts which are performed in the course of such service. *Denver, S. P. and P. R. R. Co.* v. *Conway*. *Col.* 672.

10. THE SAME—KNOWLEDGE OF SERVANT KNOWLEDGE OF CORPORATION.—Knowledge acquired by agents of corporations in the discharge of official duties, of facts material to the transactions in which they are engaged, or coming within their respective departments, is the knowledge of the corporation. *Id.*

See INJUNCTIONS, 1; TAXATION, 2, 3, 14, 15; VENUE, 1.

COSTS.

See EJECTMENT, 1.

COTENANTS.

See TENANTS IN COMMON.

COUNTY COURT.

1. JURISDICTION OF COUNTY COURT—AMOUNT IN CONTROVERSY—AVERMENT OF.—A complaint in an action in the county court need not allege, in the very words of the statute, that the amount in controversy does not exceed two thousand dollars. It is sufficient if it affirmatively appears from the complaint that the value of the property in controversy, or the amount involved for which relief is sought, does not exceed that sum. *Hughes* v. *Brewer*. *Col.* 450.

See CERTIORARI, 5, 7, 9.

COUNTY GOVERNMENT ACT.

See BONDS, 1.

COVENANTS.

See LEASE, 3–6.

CRIMINAL LAW AND PRACTICE—IN GENERAL.

1. MOTION TO QUASH INDICTMENT—PATENT DEFECTS.—A motion to quash an indictment under the Compiled Laws, page 152, section 101, only lies for defects which are apparent upon the face of the record. *Cook* v. *Territory*. *Wy.* 340.
2. ARRAIGNMENT—DUTY OF COURT TO INSTRUCT AS TO RIGHT TO COUNSEL.—An arraignment is not void because the court, before the commencement of the proceedings of arraignment, omitted to imform the defendant of his right to counsel, or to assign counsel to defend him if he was unable to employ one, if the court instructed the defendant concerning his right to counsel during the course of arraignment. *People* v. *Villarino*. *Cal.* 693.
3. OBJECTIONS TO INFORMATION, WHEN MUST BE TAKEN.—Any statutory objections to an information, or any defects apparent upon its face, cannot, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts constituting a public offense, which may be taken advantage of at any time in the course of criminal proceedings. *Id.*
4. THE QUESTION WHETHER AN INDICTMENT DOES OR DOES NOT SUPPORT THE JUDGMENT can be raised in the appellate court for the first time. *Territory* v. *Young*. *Mont.* 468.
5. APPEAL FROM JUDGMENT—REVIEW OF EVIDENCE.—On an appeal from a judgment alone the appellate court will not examine the evidence as to its sufficiency to support the verdict. *Id.*
6. ADMISSIBILITY OF DEPOSITION TAKEN BEFORE COMMITTING MAGISTRATE—CONSTITUTIONAL LAW.—On the trial of a defendant for having in his possession dies, plates, etc., designed for and used in counterfeiting coins currrent in this state, the deposition of a witness taken before the committing magistrate is admissible in evidence, upon proof that such witness is absent from the state. Sections 686 and 869 of the penal code, authorizing such evidence, are not in conflict with the last clause of section 13, article 1 of the constitution of 1879. *People* v. *Oiler*. *Cal.* 383.
7. DRUNKENNESS AS BEARING ON INTENTION IN COMMISSION OF CRIME.—The effect of a prisoner's inebriated condition, as bearing upon the intention with which he committed a crime, is a question for the jury. *Cook* v. *Territory*. *Wy.* 340.
8. THE EVIDENCE IN A CRIMINAL CASE MUST CONVINCE TO A MORAL CERTAINTY before a conviction can be had. *Territory* v. *Adolphson*. *Mont.* 474.

See APPEAL, 7, 8, 10, 13, 14; ASSAULT WITH DEADLY WEAPON; BAIL; ESCAPE FROM STATE PRISON; FALSE PRETENSES; HABEAS CORPUS; JUSTICES' COURTS, 1; LARCENY; MURDER AND MANSLAUGHTER.

CUSTOM.

See NUISANCE, 5.

DAMAGES.

See MEASURE OF DAMAGES.

DEADLY WEAPON.

See ASSAULT WITH DEADLY WEAPON.

DEBTOR AND CREDITOR.

See FRAUD, 2; MORTGAGE, 2; PAYMENT; REDEMPTION.

DECISION.

See JUDGMENT.

DECREE.

See JUDGMENT.

DEEDS.

1. GRANT OF LAND—DESCRIPTION BY GENERAL NAME—EXCEPTION FROM GRANT.—A grant of a tract of land with well-known boundaries, designated and known by a general name, passes all the land within the tract so named or designated; and, upon the same principle, where in the grant of a tract of land by metes and bounds there is excepted therefrom a portion of the tract with well-known boundaries, designated by a general name by which it is known, the tract so designated does not pass by the grant. *Truett* v. *Adams*. *Cal.* 633.
2. DOUBTFUL DESCRIPTION OF PREMISES—INTERPRETATION OF.—In determining what land was intended to be conveyed, where the description in the deed is doubtful, it is the duty of the court to assume as nearly as possible the position of the contracting parties, and to question the circumstances of the transaction between them, and then to read and interpret the words which they used in the light of these circumstances. *Id.*
3. THE SAME—EVIDENCE OF ACTS AND DECLARATIONS OF PARTIES.—Where the location of premises intended to be conveyed can be ascertained from the terms used in the instrument of conveyance, neither the acts nor declarations of the parties are admissible to show their understanding of the description contained in the conveyance. But where the terms used to describe the premises meant to be conveyed are equivocal, ambiguous or insufficient, the subsequent acts of the parties while in interest showing the practical construction put upon the terms of the description by them, may be resorted to for the purpose of ascertaining their intention. And where it is proved that a line has been agreed upon, either expressly or by long acquiescence, as the dividing line between two tracts of land, courts will not disturb the line. *Id.*

See BOUNDARIES, 1; CONSIDERATION, 1, 2.

DELAY.

See EQUITY.

DELIVERY.

See RELEASE.

DEMAND.

See REPLEVIN.

DEMURRER.

1. DEMURRER TO SEPARATE ALLEGATIONS IN PLEADING.—Disconnected averments in a pleading cannot be separately demurred to. *Herefort* v. *Cramer*. *Cal.* 229.

2. THE DEMURRER TOO BROAD.—When a complaint states a cause of action, some part of which is barred and some not barred, a demurrer to the whole complaint on the ground that it does not state facts sufficient to constitute a cause of action, should be entirely overruled. *Clark* v. *Smith*. *Cal.* 91.
3. DEMURRER—MISJOINDER OF DEFENDANTS—IMMATERIAL ERROR.—Where certain persons are made defendants, in an action to foreclose a mortgage, on the ground that they claim some right or interest in the land subsequent to the lien created by the mortgage, and they demur because of their misjoinder, the action of court in overruling such demurrer, although erroneous, will not warrant a reversal, if the court finds that they had not acquired any rights in the mortgaged premises. *Watt* v. *Wright*. *Cal.* 622.
4. DEMURRER TO COMPLAINT—MISJOINDER OF DEFENDANTS.—A demurrer to a complaint on the ground of a misjoinder of parties defendant should be disregarded unless it specifies in what the misjoinder consists, and which of the defendants are misjoined. *Irwin et al.* v. *Wood et al.* *Col.* 212.
5. JOINDER OF DEFENDANTS SEVERALLY LIABLE—FORM OF JUDGMENT.—Under section 13 of the code of civil procedure several promisors under a written contract, who promise to do certain acts, "each for himself and not for the others," may be joined in an action for a breach of such contract. The judgment in such action should be entered against the defendants severally, in proportion to their respective liabilities. *Id.*
6. JOINDER OF DEFENDANTS—INCONSISTENT DEMURRERS.—A defendant having demurred to a complaint on the ground that his codefendant was improperly joined, cannot, after the complaint has been amended by omitting such party, demur thereto on the ground that he should have been joined.—*James* v. *Leport*. *Nev.* 584.
7. OVERRULING DEMURRER—TIME TO ANSWER.—During the term the court may limit the time in which the defendant may answer, after a demurrer to the complaint has been overruled, to two days. *DeWalt* v. *Hartzell*. *Col.* 572.
8. DEMURRER TO THE COMPLAINT HELD PROPERLY OVERRULED. *Samuels* v. *Younger and Wife*. *Cal.* 614.
9. DEMURRER HELD PROPERLY OVERRULED, and no error in refusing to set aside the judgment. *McCormick* v. *Fitzpatrick et al.* *Cal.* 614.

See APPEAL, 10; FRAUD, 3; JUDGMENT, 1

DEPOSIT.

See PLEDGE, 1, 2.

DEPOSITIONS.

See CRIMINAL LAW AND PRACTICE, 6.

DESCRIPTION.

See BOUNDARIES; DEEDS; GUARDIAN AND WARD, 1.

DESERTION.

See MARRIED WOMEN.

DEVISE.

See WILLS, 4, 5.

DIRECTORS.

See CORPORATIONS, 1.

DISCRETION.

See BAIL, 1, 3; DIVORCE, 1; EVIDENCE, 10; INJUNCTION, 2; JURY AND JURORS, 5; VENUE, 9, 12.

DISQUALIFICATION OF JUDGE.

See VENUE, 9, 12.

DISTRICT COURT.

See BAIL, 1.

DIVORCE.

1. DIVORCE—DIVISION OF PROPERTY—DISCRETION OF COURT.—After a divorce has been granted, the division of the property is left to the discretion of the trial court, and the exercise of such discretion will not be interfered with by the appellate court unless the same has been abused. *Lake v. Lake. Nev.* 159.

See ABATEMENT, 1; MARRIED WOMEN, 2; NEW TRIAL,

DRUNKENNESS.

See CRIMINAL LAW AND PRACTICE, 7.

DUPLICITY.

1. DUPLICITY IN PLEA IN EQUITY.—Duplicity and multifariousness in a plea, in a suit in equity, renders it bad.—*Sharon v. Hill* (*U. S. Cir. Ct.*) *Cal.* 199.

DYING DECLARATIONS.

See EVIDENCE, 3, 8.

EJECTMENT.

1. EJECTMENT.—The action of ejectment, as defined and regulated by the Oregon code of civil procedure (chap. IV., tit. 1), is a possessory action, and although the estate or interest of the parties in the premises may be ascertained by the verdict therein, yet the plaintiff can only have judgment for the possession wrongfully withheld from him with damages for such detention and costs; and the defendant can only have judgment for costs. *Goldsmith v. Smith et al.* (*U. S. Cir. Ct.*) *Or.* 7.

IDEM—BETWEEN TENANTS IN COMMON.—A cotenant cannot maintain the action against his cotenant unless the possession is actually and wrongfully withheld from him or his right thereto wholly denied. *Id.*

3. COTENANTS—ADVERSE CLAIM BY ONE AGAINST THE OTHER.—Where a cotenant is in possession and another cotenant claims an estate or interest in the premises held in common, adverse to him, his remedy is by a suit in equity for the purpose of determining such adverse claim as provided in sec. 500 of the Oregon code of civil procedure. *Id.*

ELECTION.

1. ELECTION OF OFFICERS—CONSTRUCTION OF CONSTITUTION.—Under the constitution all necessary state, county and township officers must be elected by the people of the locality immediately concerned. *State ex rel. Perry v. Commissioners of Eureka County. Nev.* 121.

2. THE SAME—ELECTION OF COUNTY ASSESSORS—EXTENSION OF TERM.—County assessors are necessary officers within the meaning of the constitution, and must be elected by the people. The legislature has no power to extend the terms of such officers beyond the time for which they were elected, except in cases of emergency. *Id.*

See JUSTICES' COURTS, 2.

EQUITY.

1. STALE DEMANDS—EQUITY MAY REFUSE TO ENTERTAIN.—A court of equity may refuse to entertain a suit, brought after unreasonable delay, although the defendant has not in his answer alleged that the claim is stale. A delay of more than twenty years in bringing this action held unreasonable. *Harris et al v. Hillegass, administratrix, etc. et al. Cal.* 355.

See CONSIDERATION, 1; DUPLICITY; TENDER, 2.

ESCAPE FROM STATE PRISON.

1. OVERT ATTEMPT TO ESCAPE FROM STATE PRISON—EVIDENCE OF PUNISHMENT AFTER CAPTURE—INDICTMENT—An indictment for an overt attempt to escape from the

state prison is sufficient, if it alleges that the defendant, while lawfully confined in state prison under a judgment of a competent court, for the crime of burglary, did make an overt attempt to escape therefrom; that he did unlawfully, forcibly and feloniously break out of the cell in said prison, in which he was confined, and out of the building in which said cell was and is. It is unnecessary to aver that a certified copy of the judgment against the defendant, for burglary, has been delivered to the warden of the state prison. At the trial of such indictment evidence of the punishment received by the defendant at the hands of the prison authorities after his recapture, is immaterial. *State v. Angelo. Nev.* 482.

ESTATES OF DECEASED PERSONS.

1. ESTATE OF DECEDENTS—DISTRIBUTION UNDER MEXICAN LAW—SALE OF LAND UNDER ORDER OF PROBATE COURT—ACT OF APRIL 22nd, 1850, CONSTRUED—STATUTE OF LIMITATIONS.—The estate of a person dying intestate, after the organization of the state government and before there was any legislation by the state regulating the administration, descent and distribution of estates, descended and was subject to the operation of the Mexican law in existence at the time of the cession of California to the United States. Under such law, on the death of an intestate his heirs succeeded immediately to the estate and became personally responsible for the debts of the deceased. No administration of such estate, in the common-law sense, was needed or could be had. It was not subject to the administration of the alcaldes' courts or court of first instance, nor to the operation of the probate law subsequently passed. An order of the probate court, made after the passage of the act of April 22nd, 1850, authorizing the persons appointed by the alcalde as administrators of such estate to sell the real estate of such intestate would be void for want of jurisdiction. That act had no application to the estates of persons who died before its passage. Section 1573 of the code of civil procedure, limiting the time within which an heir or his grantee can maintain an action for the recovery of real estate sold by an executor or administrator to three years, has no application to such void sale. *McNeil et al. v. First Congregational Society. Cal.* 421.
2. ESTATE OF DECEASED PERSON—CLAIM BARRED BY STATUTE OF LIMITATIONS—ALLOWANCE OF.—An administrator has no authority to allow a claim against the estate based on a loan which has become barred by the statute of limitations. *Doland v. Doland. Cal.* 611.

ESTOPPEL.

See ASSIGNMENT, 4; CONTRACT, 2; CORPORATIONS, 7, 8; NEGLIGENCE, 6; RELEASE, 2; WATER RIGHTS, 5.

EVIDENCE.

1. DECLARATIONS OF PARTY IN POSSESSION, WHEN ADMISSIBLE.—Declarations of the party in possession of personal property explanatory of his possession, or of the title he is claiming, may be given in evidence by himself, or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, or what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible. *Stone v. O'Brien. Col.* 243.
2. EFFECT OF INJURY—EVIDENCE OF BY NON-MEDICAL EXPERT.—A person, not a medical expert, who has been injured through the negligence of a railroad, may testify as to the consequences of the injuries received, as for example that he had lost a leg, with reference to the construction of an artificial leg used by him, and as to the effect upon the stump of a blow or jar. He may also state the consequences immediately following the injury upon other organs of his body. *Staud v. S. P. R. R. Co. Cal.* 78.
3. DYING DECLARATION—BELIEF IN IMPENDING DEATH—RES GESTÆ.—In a prosecution for murder, the statements of the deceased, made in the presence of the defendant shortly after the infliction of the mortal wound, and after he had expressed a belief that he was about to die, and had given directions for the settlement of his affairs, to the effect that the defendant was "the man who cut him with a knife, and that he had no cause for it whatever," are admissible in evidence as dying declarations, and also as part of the *res gestæ. People v. Abbott. Cal.* 132.

4. VOLUNTARY CONFESSION TO OFFICER.—In such case the voluntary confession of the defendant made to the arresting officer is admissible in evidence. *Id.*
5. CONDUCT, ACTS AND EXPRESSIONS OF PRISONER—EVIDENCE.—The conduct, acts and expressions of a person accused of crime, at the time of his arrest, are always admissible in evidence against him. *Id.*
6. FORMER CONVICTION OF A FELONY MAY BE SHOWN BY THE EXAMINATION of the witness or by the record of the judgment. *Id.*
7. UNLAWFUL KILLING—MALICE—BURDEN OF PROOF.—When an unlawful killing is proved, malice will be presumed, and the burden of proof is on the defendant to show the absence or want of malice. *Id.*
8. THE CREDIBILITY TO BE ATTACHED TO DYING DECLARATIONS is a matter for the jury. *Id.*
9. CODEFENDANT IN CRIMINAL PROSECUTION—EVIDENCE OF.—A defendant in a criminal case, both at the common law and under section 166, title 1, chapter 16, of the criminal code, is incompetent to testify for and on behalf of one jointly indicted with him, although the defendant offered as a witness is not on trial at the time. *State* v. *Drake.* *Or.* 574.
10. NEW TRIAL—EVIDENCE OF ACQUITTED CODEFENDANT—DISCRETION.—Whether a new trial will be granted on behalf of a defendant convicted in a criminal case because a codefendant tried at the same time and acquitted, or, upon severance, subsequently tried and acquitted, is a material witness for him, *quære.* Conceding, however that it would be a matter addressed to the sound judicial discretion of the court below, and in a proper case ought to be allowed, the record here does not show an abuse of such discretion. *Id.*
11. MARKET VALUE OF STOCK, HOW SHOWN—REPORTS OF SALES BY EXCHANGE BOARD.—The market value of shares of stock cannot be shown by evidence of the "report of sales" made by a stock exchange board, in the absence of evidence showing how such "reports of sales" were made up, where the information they contained was obtained, and whether the quotations of prices made were derived from actual sales or otherwise. *Vogt* v. *Cope et al.* *Cal.* 222.
12. EXISTENCE OF FOREIGN COURT, HOW PROVED—EVIDENCE OF FOREIGN STATUTE.—The law establishing a court in another state and conferring general jurisdiction thereon, may be proved by a book purporting to contain the laws of such state, under section 387 of the civil code. *Bruckman* v. *Taussig.* *Col.* 670.
13. WITNESS SWEARING FALSELY—EFFECT OF TESTIMONY—INSTRUCTION.—The court may instruct the jury that "if any witness has, in their opinion, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution." *People* v. *Righetti.* *Cal.* 606.
14. PAROL EVIDENCE—STATUTE OF FRAUDS—OBJECTION IN SUPREME COURT.—An objection to parol evidence of an agreement required to be in writing by the statute of frauds, cannot be made in the supreme court for the first time. *Sweetland* v. *Shattuck.* *Cal.* 223.
15. OBJECTION TO EVIDENCE—CANNOT BE MADE IN SUPREME COURT FOR FIRST TIME.—An objection to evidence cannot be made in the supreme court for the first time, which might have been removed by the party offering it had the objection been made in the lower court. *McKay* v. *Riley.* *Cal.* 47.
16. EVIDENCE HELD SUFFICIENT TO JUSTIFY THE VERDICT.—And no error found in the instructions or in the question asked the defendant. *People* v. *Carlton.* *Cal.* 108.
17. AN ERROR IN THE ADMISSION OR REJECTION OF TESTIMONY, IF WITHOUT PREJUDICE to the defeated party, is not ground for reversal. *Stepy* v. *Stark.* *Col.* 663.
18. WHEN THE EVIDENCE IS CONFLICTING THE VERDICT WILL NOT be disturbed. *Id.*
19. WHEN THE EVIDENCE IS CONFLICTING A VERDICT will not be disturbed. *Barth* v. *Jones.* *Col.* 214.

See BILL OF EXCEPTIONS, 2, 3; BOUNDARIES, 1; CHINESE RESTRICTION ACT; CONSIDERATION, 2; CORPORATIONS, 4, 5; CRIMINAL LAW AND PRACTICE 5, 6, 8; DEEDS, 3; ESCAPE FROM STATE PRISON; INSANE PERSONS; JUDGMENT, 5; JURY AND JURORS, 9; LARCENY, 5, 6; MALICIOUS PROSECUTION, 5; MINES AND MINING, 8, 9; MURDER AND MANSLAUGHTER, 7, 9; NEW TRIAL, 3, 4, 6; STATUTE of LIMITATIONS, 10; SWAMP LANDS, 16; VENDOR AND VENDEE; WILLS, 5.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTION.

See APPEAL, 15.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATOR USING ASSETS OF ESTATE MUST PAY INTEREST.—An administrator who uses the assets of the estate in his own business and for his own profit, may be charged interest thereon at the rate of seven per cent. per annum, with annual rests. *Estate of Merrifield.* *Cal.* 526.
2. EXECUTORS AND ADMINISTRATORS—APPEAL FROM DECREE OF DISTRIBUTION.—A decree of distribution of an estate will not be reviewed on an appeal by an executor or administrator, where he, *as such*, has no interest in the matter sought to be reviewed. *Id.*

See ESTATES OF DECEASED PERSONS.

EXPERTS.

See EVIDENCE, 2; INSANE PERSONS.

FALSE REPRESENTATIONS.

1. OBTAINING MONEY UNDER FALSE PRETENSES—INDICTMENT.—An indictment for obtaining money under false pretenses, charged that at a certain time and place the defendant J., with intent to defraud one K. of his property, did unlawfully, knowingly and designedly, falsely pretend and represent to him that certain bonds of a railroad were of the market value of $650, that any bank in San Francisco would lend that amount on them; that the road of said company, issuing said bonds, was in running order, and was paying expenses; and that K., believing said false pretenses and representations, was induced, by reason of the same, to loan and deliver to the said J., on the pledge of said bonds, the sum of $1,365. It further charged that said money was obtained by the defendant unlawfully, knowingly and designedly to defraud said K. The indictment then denied the truth of the false and fraudulent representations, charging that said bonds had not any market value; that no bank in San Francisco would loan any money thereon, and that the company issuing the bonds had no road that was in running order, or that was paying expenses, all of which facts the defendant knew. *Held*, that the indictment was sufficient, and a demurrer thereto should have been overruled. *People* v. *Jordan.* *Cal.* 138.

See FRAUD, 4, 5.

FEES.

See JURY AND JURORS, 12.

FINDINGS.

1. JUDGMENT AFFIRMED AND FINDINGS HELD TO HAVE BEEN WAIVED by consent in open court. *Schwegerle & Co.* v. *Mundell.* *Cal.* 525.
2. FINDINGS HELD SUFFICIENT TO SUSTAIN THE JUDGMENT. *Stout, Executor, etc.*, v. *Hastings.* *Cal.* 588.
3. FINDINGS HELD TOO INDEFINITE AND UNCERTAIN to sustain the judgment. *Paige* v. *Rocky Ford Canal and Irrigation Co.* *Cal.* 522.
4. CLERICAL ERROR IN CONCLUSIONS OF LAW—IMMATERIAL ERROR.—The use of the word "defendant" instead of "defendants," in the conclusions of law found by the court, is a mere clerical error and entitled to no regard. *Doolan et al.* v. *Cunningham, administrator, etc.* *Cal.* 613.

See BILL of EXCEPTIONS, 3; JUDGMENT, 4.

FINE.

See LARCENY, 4.

FIRE INSURANCE.

See INSURANCE, 1-6.

FORECLOSURE.

See MORTGAGE, 5-7; STATUTE OF LIMITATIONS, 8.

FRAUD.

1. MORTGAGE OF PERSONAL PROPERTY — POSSESSION BY MORTGAGOR — FRAUD.—A mortgage of the stock in trade of a merchant, by the terms of which the mortgagor is to remain in possession of the goods, to sell and dispose of the same as the owner, and remit the proceeds of the sales to the mortgagee, is a fraudulent transfer as against other creditors of the mortgagor. *Speigelberg et al.* v. *Hersch & Co. et al.* *N. M.* 129.

2. CONVEYANCE TO HINDER, DELAY AND DEFRAUD CREDITORS — PURCHASER WITH NOTICE—ATTACHMENT OF PROPERTY FRAUDULENTLY CONVEYED.—A conveyance of property made with intent to hinder, delay and defraud the creditors of the grantor is void, both as against the grantee and a subsequent purchaser with notice, although the latter may have paid a valuable consideration. The property so conveyed may be levied upon and sold at the instance of the creditors of the fraudulent grantor as if no conveyance had ever been made. *Bull* v. *Ford.* *Cal.* 527.

3. ALLEGATION OF FRAUDULENT INTENT—SPECIAL DEMURRER.—An allegation that a conveyance was made "with intent to hinder, delay and defraud the creditors" of the grantor is a sufficient averment of fraudulent intent to sustain a judgment. Whether the same would be sufficient if objected to by special demurrer, *quære.* *Id.*

4. FRAUDULENT REPRESENTATIONS—SALE—RIGHTS OF DEFRAUDED VENDEE.—One who has been induced by false and fraudulent representations to purchase a business and stock in trade need not upon discovery of the fraud take steps to rescind the contract. He may retain the property and prosecute his claim for damages either by an original action, or as a counterclaim to an action against him for the purchase price, brought by the party committing the fraud. If such contract of purchase was an entirety, the separate value of the stock, aside from the value of the goodwill of the business, need not be alleged in the answer. *Herefort* v. *Cramer.* *Col.* 229.

5. FRAUDULENT REPRESENTATIONS—SALE—MEASURE OF DAMAGES—PLEADINGS.—The measure of damage in an action for fraudulent representations in the sale of both real and personal property is the same. It is the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be. Such damages need not be separately pleaded. *Id.*

FUTURE ADVANCES.

See MORTGAGE, 4.

GEORGETOWN, CHARTER OF.

See CONSTITUTIONAL LAW.

GOODS SOLD AND DELIVERED.

1. ACTION FOR GOODS SOLD AND DELIVERED—EVIDENCE—VARIANCE.—A complaint for certain cattle sold and delivered is not sustained by evidence that such cattle were delivered to the defendant to be slaughtered and the meat sold on commission. *Evans v. Bailey et al.* *Cal.* 427.

GRAND JURY.

See JURY AND JURORS, 7.

GRANT.

See BOUNDARIES; DEEDS.

GUARANTY.

1. CONTRACT TO CARRY STOCK CONSTRUED—GUARANTY.—The defendant Levy, being indebted to a firm of stock brokers for moneys advanced by them in stock transactions, arranged with another firm of brokers, Eppstein & Co., that the latter firm should take up the stocks, paying to the first firm the amount due it, and carry the stocks for him. In this arrangement the defendant Baldwin executed the following guarantees:

"San Francisco, March 10, 1879—M. J. Levy in account with Eppstein & Co.

1879	PURCHASE	
March 10,	1,250 Belcher, 6½	$ 8,125 00
March 10,	250 Mexican, 40	10,000 00
	Com	45 30
E. and O. Ex.		$18,170 30

"I herewith guarantee the above account, to-wit, $18,170 30, in gold coin, against any loss for sixty days from date, and agree to make good any loss that may be sustained thereon, in reselling the above stock, balance to be paid with interest at 1¼ per cent. per month. E. J. BALDWIN."

The term of the guarantee was extended from time to time until July 25th, 1879, with the consent of the guarantor, at which date the stock was sold by E. & Co., they claiming a balance due them of $4,023 57. *Held*, that E. & Co. were entitled to protect the security in their hands by paying the assessments levied thereon, and to deduct the amounts so paid from the proceeds of sales; that the guarantor was liable for the balance due E. & Co. on July 25th, 1879, with interest thereon from such date at the rate of one and one-fourth per cent. per month. *Marshall* v. *Levy et al.* *Cal.* 698.

GUARDIAN AD LITEM.

See GUARDIAN AND WARD, 5; INFANTS, 2.

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—SALE OF MINOR'S REAL ESTATE, ORDER FOR—DESCRIPTION OF LAND IN.—An order of the probate court for the sale of real estate belonging to a minor, must describe the land to be sold with sufficient definiteness and certainty as to admit of its identification without reference to any extraneous matter; otherwise a sale based thereon is void. A description of such lands as "twenty and one-half acres of the rancho Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff and said minors were defendants," is insufficient. *Hill* v. *Wall.* *Cal.* 501.
2. SALE OF LAND BY GUARDIAN—STATUTE OF LIMITATIONS.—Section 1806 of the code of civil procedure prescribing three years next after the termination of the guardianship of a minor for a recovery by the minor or his grantee of real estate sold by his guardian, only applies to sales by guardians appointed by the probate courts of this state. *McNeil* v. *First Congregational Soc.* *Cal.* 421.
3. GUARDIAN AND WARD—SALE OF LAND BY GUARDIAN APPOINTED BY FOREIGN COURT.—One appointed guardian of a minor by the courts of a foreign state, has no authority, as such, to sell the lands of his ward situated in this state. *Id.*
4. THE SAME—NATURAL GUARDIAN—SALE OF LAND BY—LEGISLATIVE AUTHORIZATION.—The mother of Francis W. Paty had no power, as his natural guardian, to transfer his real property, nor did she derive power for that purpose from the act of the legislature of May 6th, 1861, authorizing his guardian to sell and convey certain real estate. *Id.*
5. GUARDIAN AD LITEM, ORDER APPOINTING—JUDGMENT ROLL.—An order appointing a guardian *ad litem* for a minor defendant constitutes no part of the judgment roll. *Brady* v. *Page et al.* *Cal.* 695.

See LEASE, 3.

HABEAS CORPUS.

1. HABEAS CORPUS—PRISONER DENIED SPEEDY TRIAL.—A prisoner who has not been brought to trial within the time required by section 8 of the *habeas corpus* act, may apply to be discharged on *habeas corpus*. *In re Garvey.* *Col.* 247.
2. THE SAME—DETENTION OF PRISONER FOR FIVE TERMS.—A prisoner who is held in custody for five successive terms of court without being tried, is entitled to be discharged on *habeas corpus*. *Id.*
3. PETITION FOR A DISCHARGE ON HABEAS CORPUS DENIED.—*Ex parte Finley on Habeas Corpus.* *Cal.* 192.

See BAIL, 4; CHINESE RESTRICTION ACT, 4-6.

HIGHWAY.

See STREETS AND HIGHWAYS.

HOLIDAY.

See JURY AND JURORS, 11.

HOMESTEAD.

1. FINDINGS—HOMESTEAD—RESIDENCE.—Finding that the defendants did not nor did either of them reside on the demanded premises at the time of filing their declaration of homestead held supported by the evidence. *Grange* v. *Gough et al.* *Cal.* 604.

HOMICIDE.

See MURDER AND MANSLAUGHTER.

HUSBAND AND WIFE.

1. COMMUNITY PROPERTY, PROOF OF—HUSBAND AND WIFE.—It is not necessary to prove that property is, in fact, the product of the joint efforts of the husband and wife in order that it may be declared community estate. If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise or descent, or by exchange of his individual property, or from the rents, issues or profits of his separate estate, it belongs to the community, although the wife rendered no assistance in its acquisition. *Lake* v. *Lake.* *Nev.* 159.
2. SEPARATE AND COMMUNITY PROPERTY—PROFITS—LABOR AND SKILL OF SPOUSES.—The profits of separate property which accrue mainly from the property rather than from the joint efforts of the husband and wife, or either of them, belong to the owner of the property, although the labor and skill of one or both of the spouses may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of both, they belong to the community. *Id.*
3. THE SAME—PROFITS RESULTING FROM HOTEL.—The profits resulting from the ordinary use of a hotel, the separate property of the husband, either from renting or carrying on the business himself, belong to the husband as his separate estate.—*Id.*
4. HUSBAND AND WIFE—SEPARATE PROPERTY—RENTS, ISSUES AND PROFITS.—All the property owned by a husband at the date of his marriage, as well as that subsequently purchased by him, and the rents, issues and profits thereof, up to March 7th, 1865, the date of the first statute governing the property rights of husband and wife, belongs to him as his separate property. Under such statute the rents, issues and profits of the separate estate of the husband did not become common property. *Id.*
5. PROPERTY ACQUIRED DURING COVERTURE — COMMUNITY PROPERTY. — Property acquired during coverture presumptively belongs to the community, and the burden is on the person asserting the contrary to overcome such presumption by proof, sufficiently clear and satisfactory to convince the court or jury of the correctness of his claim. *Id.*

See CHINESE RESTRICTION ACT, 7-9; MARRIED WOMEN, HUSBAND'S SEPARATE ESTATE. (Editorial). 193.

HYDRAULIC MINING.

See INJUNCTION, 1; NUISANCE, 1-7.

IDENTIFICATION OF PAPERS.

See APPEAL, 18.

IMPEACHMENT OF WITNESSES.

See WITNESSES, 1.

IMPRISONMENT.

See LARCENY, 4.

IMPROVEMENTS.

See MECHANIC'S LIEN, 3.

INDEX.

See APPEAL, 20.

INDIANS.

1. INDIAN COUNTRY—UMATILLA RESERVATION.—The Umatilla Indian reservation is a place within the geographical limits and general jurisdiction of the state of Oregon; but it is also a tract of country to which the Indian title is not extinguished, and which has been permanently set apart by treaty as a reservation for the sole and exclusive use of the Indians thereon, and is therefore "Indian country" within the meaning of that phrase, as used in the revised statutes. *United States* v. *Barnhart et al. (U. S. Cir. Ct.)* Or. 590.

2. INTERCOURSE WITH INDIAN TRIBES.—The United States has jurisdiction over the intercourse with tribal Indians, and Congress may prohibit and provide for the punishment of acts relating to or affecting such intercourse anywhere in the United States. *Id.*

3. JURISDICTION OF UNITED STATES COURTS OVER CRIMES COMMITTED ON THE RESERVATION.—The United States courts of the district of Oregon have jurisdiction over all crimes committed on the Umatilla reservation by a white man on the property or person of an Indian, and *vice-versa*, so far as the same have been defined by an act of congress. *Id.*

4. PLEA OF AUTREFOIS ACQUIT.—B. and A. were indicted in the United States court for the crime of manslaughter, committed in killing Indian William on the Umatilla reservation, and pleaded to the indictment a former acquittal, from which plea it appeared they had been indicted and tried in the state court for the murder of said Indian, and acquitted, to which plea there was a demurrer: *Held*, That the crime of which the defendants were acquitted in the state court was not the same as that charged in the indictment in the United States court, and therefore the plea was bad. *Id.*

5. INTRODUCTION OF LIQUORS INTO INDIAN RESERVATION—SEIZURE OF PROPERTY USED FOR.—Property in the possession of a person other than the owner, who is using it for the purpose of introducing spirituous liquors upon an Indian reservation, may be seized by the government agent in charge of such reservation, and delivered over to the proper officer, to be proceeded against for forfeiture. If such agent surrenders the property to the owner, upon demand, he does not thereby admit the illegality of the seizure. *Webb* v. *Nickerson.* Or. 485.

6. THE SAME—JUSTIFICATION OF SEIZURE, HOW ALLEGED.—In an action brought in a state court against the government agent, for a wrongful taking of such property, the agent may justify his seizure under section 2,140 of the United States revised statutes, although the state court had no jurisdiction of the offense for which the seizure was made. Such justification, however, to be available as a defense, must allege that the person introducing the spirituous liquors was either a white person or an Indian. *Id.*

INDICTMENT.

See CRIMINAL LAW AND PRACTICE, 1; ESCAPE FROM STATE PRISON; FALSE REPRESENTATIONS; MURDER AND MANSLAUGHTER, 4–6.

INFANTS.

1. MINORITY—PERIOD OF, WHEN TERMINATES—STATUTE OF LIMITATIONS—EJECTMENT.—A male person born on the eleventh day of April, 1855, becomes of age, under section 26 of the civil code, at the first minute of the eleventh day of April, 1876. His right of action for recovery of real estate in the adverse possession of another commences to run from such day, and expires after a period of five years, on the tenth day of April, 1881. *Ganahl et al.* v. *Soher et al.* *Cal.* 609.

2. INFANT'S POWER TO NOMINATE ATTORNEY—SERVICE OF SUMMONS ON INFANT—APPOINTMENT OF GUARDIAN AD LITEM.—An infant over the age of fourteen has not power to nominate an attorney, nor has the court authority to appoint a guardian *ad litem* to appear for such infant defendant until after summons has been served upon him. *McCloskey* v. *Sweeney.* *Cal.* 290.

INFORMATION.

See ASSAULT WITH DEADLY WEAPON; CRIMINAL LAW AND PRACTICE, 3; LARCENY, 1, 2; PLEADING AND PRACTICE, 2.

INFORMATION AND BELIEF.

See ASSIGNMENT, 5; MORTGAGE, 5; REMOVAL OF CAUSES, 4; STREETS AND HIGHWAYS, 6.

INJUNCTION.

1. HYDRAULIC MINING—ORDINARY BUSINESS OF CORPORATION—INJUNCTION.—It is no part of the general and ordinary business of a corporation to do unlawful acts, such as dumping mining debris, tailings and other refuse matter from a mine, into water courses which wash the debris and materials down upon and spread them over the land of another, rendering it valueless for agricultural or other purposes. The doing of such acts may be restrained by a temporary injunction, at the instance of the party injured, without notice to the corporation, although the effect of such injunction will be to prevent the successful carrying out of the business in which the corporation is engaged. *Hobbs* v. *Amador and Sacramento Canal Co. et al.* *Cal.* 523.
2. PRELIMINARY INJUNCTION, MODIFICATION OF—JUDICIAL DISCRETION.—The court that grants a preliminary injunction, may, in the exercise of its judicial discretion, modify the same at any time before the case terminates in a final judgment; and the order of modification will not be disturbed, unless there has been an abuse of discretion. *Id.*

See CONTEMPT; NUISANCE, 1; TAXATION, 16.

INSANE PERSONS.

1. INSANITY—OPINION OF NON-PROFESSIONAL WITNESS.—Upon the trial of an issue involving the sanity of a person, the opinion of a non-professional witness, based upon his own observations, is competent evidence, and is entitled to weight, according to the intelligence of the witness, his means of information and the character of the derangement. *Parkhurst v. Hosford* (*U. S. Cir. Ct.*) *Or.* 311.

INSOLVENCY.

1. INSOLVENCY—JUDGMENT AFFIRMED. *In re Laswell.* *Cal.* 221.

INSTRUCTIONS.

1. INSTRUCTIONS—REFUSAL TO GIVE ON ACCOUNT OF LENGTH.—The court cannot refuse to give instructions requested, on account of their length, when the same are handed in at the time prescribed by the court's rules. *Andrews* v. *Runyon.* *Cal.* 81.
2. INSTRUCTIONS—EVIDENCE.—Where the evidence warrants it, the court must give every instruction asked, which suggests a theory of the case not suggested by the instructions given. *People* v. *Wong Chow.* *Cal.* 131.
3. INSTRUCTIONS PARTLY CORRECT AND PARTLY INCORRECT.—A refusal to give instructions partly correct and partly incorrect is not ground for a reversal of the judgment. *Garlick* v. *Bowers.* *Cal.* 501.
4. INSTRUCTIONS ASKED FOR, WHICH HAVE ALREADY BEEN GIVEN in substance, may be refused. *People* v. *Righetti.* *Cal.* 380.
5. INSTRUCTIONS ASKED FOR, IF THE SAME HAVE ALREADY BEEN GIVEN in substance, may be refused. *Cook* v. *Territory.* *Wy.* 340.
6. AN INSTRUCTION, ALTHOUGH ERRONEOUS, IF NOT PREJUDICIAL TO THE DEFEATED PARTY, is not ground for reversal. *Winans* v. *Sierra Lumber Co.* *Cal.* 277.
7. INSTRUCTIONS GIVEN IN ABSENCE OF DEFENDANT.—Giving instructions to the jury, in a prosecution for murder, in the absence of the defendant, will not warrant a reversal, if subsequently, and while the defendant is present, the court directs the jury to disregard his former instructions, and then instructs them to the same effect as previously. *People* v. *Soto.* *Cal.* 46.
8. OBJECTIONS TO INSTRUCTIONS MUST BE MADE AT TRIAL.—Objections to instructions will not be considered by the appellate court, unless the same were made and saved at the trial in a proper bill of exceptions. *Territory* v. *Young.* *Mont.* 468.
9. INSTRUCTIONS GIVEN BY A COURT OF ITS OWN MOTION, to which no exceptions are taken, are not grounds for reversal. *Cook* v. *Territory.* *Wy.* 340.

10. INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION need not be marked. It is sufficient if it appear that the charge was given. *People* v. *Samuels*. *Cal.* 382.
11. INSTRUCTIONS—INFLUENCING VERDICT.—While a judge is not warranted in saying anything to the jury to influence their decision, or indicate to them what their verdict should be, or even to unduly hasten a verdict, he may charge them upon the great desirability, both to the litigants and to the public, of having them agree upon a verdict. *Stepy* v. *Stark*. *Cal.* 663.
12. INSTRUCTIONS—DUTY OF COURT TO GIVE—EXTENT OF.—Courts are not required to state in their instructions to juries, the entire law upon any given subject, but only so much thereof as may be applicable and essential to the issue and facts of the case on trial. To this extent the charge must be correct and explicit, and if unexceptionable in these essentials it will not be ground for reversal that the instructions are not strictly correct as universal propositions of law. *Denver S. P. and P. R. R. Co.* v. *Conway*. *Col.* 672.
13. THE INSTRUCTIONS OF THE LOWER COURT EXAMINED, and held to correctly state the law as applicable to the issues and the evidence. *Id.*

See EVIDENCE, 13; MURDER AND MANSLAUGHTER, 2, 3; NEGLIGENCE, 1, 5.

INSURANCE.

1. POLICY OF INSURANCE—APPLICATION FOR INSURANCE—PLEADING.—In an action to enforce a policy of insurance, the complaint need not allege the terms of the application for insurance, when such application was merely verbal. *Tischler* v. *California Farmers' Mutual Ins. Co.* *Cal.* 535.
2. FIRE INSURANCE—STIPULATION AGAINST GUNPOWDER—FIREWORKS.—The keeping of fireworks without the written consent of the insurer will not invalidate a policy of fire insurance, although the same provides that if gunpowder is kept on the premises without such written consent, the policy shall be void. *Id.*
3. FIRE INSURANCE—INCREASE OF RISK—ANSWER.—In an action on a policy of fire insurance, facts showing an increase of the risk, if relied on as a defense, must be set up in the answer. *Id.*
4. FIRE INSURANCE—INCREASE OF RISK—CONDITIONS—WAIVER.—A condition in a policy of fire insurance, that if the risk is increased the policy shall be void, enters into and forms part of the contract of insurance; and if the policy contains an express stipulation that such a condition shall not be waived, except by indorsement on the policy, it cannot be waived in any other way. *Gladding et al* v. *Ins. Ass'n.* *Cal.* 106.
5. THE SAME—EVIDENCE—FINDINGS.—The finding that the increase of risk in this case was not occasioned by the plaintiffs, or with their consent, reviewed, and held unsupported by the evidence. *Id.*
6. FIRE INSURANCE—CONSTRUCTION OF POLICY—KEEPING GIANT POWDER—FACTS MATERIAL TO RISK—PLEADING—AMENDMENT.—Keeping giant powder and other explosives in a building adjacent to the building insured, is not equivalent to keeping such articles within the insured premises. Whether the fact that such artic'es were kept in the adjacent building was material to the risk, and therefore a matter of which the insured was bound to notify the insurer, is a question for the jury, and, in an action on the policy, must be raised by the answer. The answer in this case having omitted to raise such question: *Held*, that it was too late to do so by an amendment after trial. *Sperry et al.* v. *Ins. Co. of North America (U. S. Cir. Ct.)* *Col.* 650.
7. ASSIGNMENT OF POLICY OF LIFE INSURANCE AS COLLATERAL—RIGHTS OF ASSIGNEE.—The assignment of a policy of life insurance as collateral security for advances to be and which were made by the assignee, vests the legal title to the policy in the latter. The interest of the owner of the policy only extends to what remains of it after such advances have been repaid. Until such repayment, the assignee cannot be made to surrender the policy. *Gilman* v. *Curtis*. Cal. 429.
8. FINDINGS HELD INDEFINITE, UNCERTAIN AND INCONSISTENT. *Id.*

INTENTION.

See BOUNDARIES, 1; CRIMINAL LAW AND PRACTICE, 7; FRAUD, 3.

INTEREST.

See EXECUTORS AND ADMINISTRATORS; JUDGMENT, 3; NEGLIGENCE, 13.

INTERPRETER.

1. REMOVAL OF INTERPRETER OF CRIMINAL COURTS OF SAN FRANCISCO.—An interpreter, appointed for the criminal courts of the city and county of San Francisco, under the act of March 8th, 1876, by the county judge, the mayor and the police judge of said city and county, may be removed from office, and another interpreter appointed in his place, after the adoption of the present constitution, by the votes of the mayor and superior judge, although the police judge votes against such removal. *People ex rel. Glover* v. *Becker*. *Cal.* 303.

INVENTION.

See PATENTS.

JUDGMENT.

1. ACTION ON JUDGMENT—DEFENSE OF NUL TIEL RECORD—DEMURRER.—A defense of *nul tiel record* to an action on a judgment is good, and a demurrer thereto should be overruled. *Reynolds* v. *Robertson*. *Cal.* 609.
2. JURISDICTION OF COURTS, WHEN PRESUMED—ACTION ON JUDGMENT OF COURT OF GENERAL JURISDICTION.—The jurisdiction of courts of general jurisdiction is presumed, and the judgments and decrees of such courts are in all cases of at least *prima facie* validity. In pleading such judgment or decree as a cause of action or as a defense, jurisdictional facts need not be stated. The same rules apply whether the judgment sued on is domestic, foreign, or of one of the sister states. *Bruckman* v. *Taussig*. *Col.* 670.
3. JUDGMENT OF SISTER STATE, ACTION ON—INTEREST ALLOWABLE.—Interest on a judgment of a sister state, as specified therein, is allowable in an action thereon in another state. *Id.*
4. FINDINGS—PRIOR JUDGMENT—DECISION OF COURT. Where a prior judgment is pleaded in bar of an action, a finding that on a certain day a court rendered "its decision" in favor of the defendants, is not a finding that a judgment was rendered. *Gray* v. *Noon et al.* *Cal.* 588.
5. WHEN THE EVIDENCE IS CONFLICTING THE JUDGMENT OF THE LOWER COURT will not be disturbed. *Oakland Bank of Savings* v. *Applegarth*. *Cal.* 605.

See APPEAL, 1, 2, 4, 10–12, 18; CERTIORARI, 1, 5, 7–10; CLAIM AND DELIVERY; CRIMINAL LAW AND PRACTICE, 4, 5; DEMURRER, 5; MORTGAGE, 5–7; SUMMONS, 1–3.

JUDGMENT ROLL.

See GUARDIAN AND WARD, 5.

JUDICIAL NOTICE.

See NUISANCE, 2.

JURISDICTION.

1. PROCEEDINGS IN INFERIOR COURTS—JURISDICTION MUST APPEAR OF RECORD.—In proceedings in inferior courts the facts conferring jurisdiction and the power to act in a given case must affirmatively appear upon the face of the record. *Tompkins* v. *Clackamas County*. *Or.* 598.

See ABATEMENT, 2; APPEAL, 7, 8, 11, 14; BANKRUPTCY, 1; CERTIORARI; CITIZENSHIP, 2, 3; CONTEMPT, 2; COUNTY COURT; CRIMINAL LAW AND PRACTICE, 4; ESTATES OF DECEASED PERSONS, 1; INDIANS, 2, 3; JUDGMENT, 2; JUSTICES' COURTS, 1; NEW TRIAL, 1; SUMMONS, 2.

JURY AND JURORS.

1. MISCONDUCT OF JURY—ACCEPTING HOSPITALITY FROM COUNSEL—IMPEACHMENT OF VERDICT.—Jurors are presumed to do their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that, during a trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor, at the expense of the district attorney; that one of them partook of a dinner at the house of the

same officer, under circumstances which rendered the act of invitation necessary; and a supper at the hotel of his associate counsel, under like circumstances. Such acts, however improper or indiscreet, could not, in themselves, have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict of conviction. *People* v. *Lyle*. *Cal.* 349.

2. MISCONDUCT, OF JURY, WHEN WILL AUTHORIZE A NEW TRIAL.—To warrant setting aside a verdict, and granting a new trial for irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed. *Id.*

3. CHALLENGE—IMPLIED BIAS—CONSCIENTIOUS SCRUPLES—TRIAL OF CHALLENGE.—Where a juror is challenged by the prosecution for implied bias, upon the ground that his testimony given during the examination as to his qualifications to act as a trial juror, shows that he has conscientious scruples against inflicting the death penalty, and the facts are denied by the defendant, the court may decide the challenge without a re-examination of the juror, if the defendant offers no testimony. *People* v. *Abbott*. *Cal.* 132.

4. DEATH PENALTY—CONSCIENTIOUS SCRUPLES—JUROR.—Neither a person who testifies that in a clear case of willful and deliberate murder, he would be, as a juror, in favor of imprisonment for life and opposed to hanging; nor one who has, to a "certain extent," conscientious scruples against finding a man guilty of a crime for which he would be hung, should be permitted or compelled to serve as a juror in a prosecution for murder. *Id.*

5. TRIAL JURORS—SUMMONING UNDER OPEN VENIRE—DISCRETION OF COURT.—The necessity of selecting additional trial jurors under an open venire is a matter within the discretion of the lower court. *State* v. *Angelo*. *Nev.* 482.

6. JUROR'S OATH—FORM OF—WHEN SUFFICIENT.—An oath administered to trial jurors as follows: "You, and each of you, do solemnly swear that you will well and truly try this cause, and a true verdict render according to the law and the evidence. So help you God," is substantially sufficient. *Id.*

7. IRREGULARITIES IN FORMATION OF GRAND JURIES.—The validity of an indictment for irregularities in the organization of the grand jury, not apparent upon the face of the record, can only be called in question by challenge or plea in abatement. A motion to quash the indictment does not lie. *Cook* v. *Territory*. *Wy.* 340.

8. SEPARATION OF JURORS DURING TRIAL.—A separation of one trial juror from his fellows during the progress of a trial for murder, for the purpose of speaking with a third person about a matter entirely disconnected with the trial, will not warrant a reversal. *Id.*

9. AFFIDAVITS OF JURORS AND BAILIFF—ADMISSIBILITY OF.—The affidavits of jurors and the bailiff having the jury in charge are admissible in support of the verdict. *Id.*

10. JUROR NOT ON ASSESSMENT ROLL—NEW TRIAL—ARREST OF JUDGMENT.—The fact that a juror in a criminal prosecution is not assessed upon the assessment roll of the county is not, after verdict, a ground for a new trial or for an arrest of judgment. *People* v. *Samuels*. *Cal.* 382.

11. DISCHARGE OF JURY ON LEGAL HOLIDAY—CONSTRUCTION OF CONSTITUTION.—Section 5, article VI, of the constitution does not prohibit all business in the superior court on a legal holiday or non-judicial day, except the issuing of injunctions and writ of prohibition. Such section is prohibitory of legislation establishing terms of court during which only judicial business can be transacted, but leaves the legislature at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays. Under section 134 of the code of civil procedure, and section 1142 of the penal code, a jury may be discharged on the twenty-second of February. *People* v. *Soto*. *Cal.* 46.

12. PAYMENT OF JURY FEES—SETTLEMENT OF BILL OF EXCEPTIONS.—After a judgment of nonsuit, in a civil action tried by a jury, the court may, by virtue of section 17 of the act of March 28th, 1868, refuse to settle the plaintiff's bill of exceptions, until the plaintiff has paid the jury fees. The settlement of a bill of exceptions is a proceeding in the action within the meaning of such section. *Lukes* v. *Logan, Superior Judge*. *Cal.* 218.

See BILL OF EXCEPTIONS, 1; INSTRUCTIONS.

JUSTICES' COURTS.

1. JUSTICE'S COURT OF SAN JOSE—CRIMINAL JURISDICTION OF.—The justice's court of the city of San Jose, organized under the charter of 1874, has jurisdiction to try and determine a criminal action for one of the public offenses enumerated in section 115 of the code of civil procedure, charged to have been committed within the corporate limits of said city, until the organization of the police court for said city, and the election of the police judge thereof, under the general law of April 1st, 1880, relative to courts of justice. *In re Carrillo. Cal.* 104

2. JUSTICES OF THE PEACE—TERM OF OFFICE OF—ELECTION.—The act of 1880, amending section 110 of the code of civil procedure, fixing the term of office of justices of the peace at two years from the first day of January next succeeding their election, is constitutional. Such officers are to be elected in the year 1884. *Bailey* v. *Supervisors of San Joaquin County. Cal.* 185.

See CERTIORARI, 2, 5, 7.

LABORER.

See CHINESE RESTRICTION ACT, 1, 7-9, 11, 12.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—HOLDING OVER—NOTICE TO INCREASE RENT.—A tenant of demised premises, holding over after the expiration of his term, is presumed in law to hold over as tenant at the same rent he had previously paid, if no new agreement is made. But if he has notice from the landlord that if he retains possession he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to pay such increased rent. *Reitteman* v. *Brandenburg. Col.* 246.

See LEASE.

LARCENY.

1. LARCENY—INFORMATION—ALLEGATION OF OWNERSHIP.—An information for larceny which alleges that "the property taken was the personal property in the possession of Frederick Schwartz, and that the same was taken from the person and against the will of him, the said Schwartz," sufficiently describes the ownership of the property. *People* v. *Hicks. Cal.* 420.

2. LARCENY—VALUE OF PROPERTY, HOW STATED—INFORMATION.—An information for larceny need not allege that the value of the property stolen was "in current coin of the United States." *People* v. *Righetti. Col.* 606.

3. LARCENY IN SECOND DEGREE—PETIT LARCENY—VERDICT.—A verdict finding the defendant guilty of larceny in the "second degree," is equivalent, under section 486 of the penal code, to a verdict for petit larceny. *Id.*

4. PETIT LARCENY—PUNISHMENT FOR—FINE AND IMPRISONMENT.—A judgment upon a conviction for petit larceny may provide for a punishment by fine or imprisment, or both. If both are ordered, the judgment may direct that the defendant be further imprisoned until such fine be paid, in conformity with section 1205 of the penal code. *Id.*

5. LARCENY—EVIDENCE OF SIMILAR OFFENSE NOT ADMISSIBLE.—On a trial for larceny, evidence tending to show that the defendant had in his possession property taken by other thefts at the same time, is inadmissible. *People* v. *Cunningham. Cal.* 506.

6. SHORT-HAND REPORTER'S NOTES ON TESTIMONY TAKEN ON PRELIMINARY EXAMINATION.—On such trial the reporter's notes in short-hand of the testimony of a witness taken on the preliminary examination of the defendant, are not admissible, although the witness may have died before the trial, and the correctness of such notes are proved by the reporter. *Id.*

7. WRONGFUL APPROPRIATION OF WATER—COMPLAINT FOR, WHEN SUFFICIENT.—A complaint which avers that the defendant, "with intent to injure and defraud, etc., without knowledge of the owners, and with intent to evade payment for the water taken thereby, made connections and maintained the same with certain mains and service-pipes of the Spring Valley Water Works, for the purpose of taking water therefrom for the supply of certain tanks and water-works kept and maintained" by the defendant, sufficiently charges the offense created by section 499 of the penal code. *Ex parte Helbing. Cal.* 687.

LEASE.

1. LESSOR AND LESSEE—ABANDONMENT OF LEASE—RECOVERY OF AMOUNT.—A lessee, under a contract of lease, by the terms of which possession of the premises is to be given him at a future day, who pays the rent in advance, may recover back the same, if, after demand, the lessor refuses to deliver the possession, and the parties thereupon abandon the lease by mutual consent. *Barth et al.* v. *Jones et al.* Cal. 214.
2. LEASE — CONTRACT IN WRITING — ALTERATION OF BY PAROL AGREEMENT. — The terms and provisions of a written lease cannot be altered by an unexecuted oral agreement between the lessor and lessee. *Ehrenbirg et al.* v. *Peters et al.* Cal. 426.
3. JOINT LEASE—ACTION TO ENFORCE COVENANT—DEATH OF JOINT LESSOR—PARTIES—GUARDIAN AND WARD.—An action for the breach of a covenant in a joint lease, after the death of one of the joint lessors, must be brought in the name of the surviving lessors. Neither the executor nor administrator of the deceased lessor is a proper party. If such deceased lessor made the lease for himself, and also as guardian and trustee for his ward, such ward, after attaining majority, may join with the surviving lessors, in an action to enforce a covenant made for his benefit. *Salisbury et al.* v. *Shirley.* Cal. 688.
4. THE ASSIGNMENT OF THE TERM BY THE LESSEE CREATES A PRIVITY OF ESTATE between the assignee and the lessor. *Id.*
5. COVENANTS TO PAY RENT AND TAXES—LIABILITY OF ASSIGNEE OF LESSEE.—Covenants in a lease to pay rent and taxes run with the land, and are binding upon and enforceable against the assignee of the lessee by virtue of the privity of estate existing between him and the lessor. *Id.*
6. THE JUDGMENT AWARDED THE PLAINTIFFS affirmed after a construction of the covenants sued on. *Id.*

See LANDLORD AND TENANT.

LICENSE.

See NUISANCE, 9.

LIENS.

See ASSIGNMENT, 2; ATTACHMENT, 2; MECHANICS' LIENS; MORTGAGE; REDEMPTION, 1, 2; STATUTE OF FRAUDS, 4.

LIFE INSURANCE.

See INSURANCE, 7, 8.

LOAN.

See CORPORATIONS, 1; STATUTE OF LIMITATIONS, 9.

LOCATION.

See MINES AND MINING, 4–9; PUBLIC LANDS, 1–6.

LODE.

See MINES AND MINING.

MAINTENANCE.

See ASSIGNMENT, 6.

MALICE.

See EVIDENCE, 7; MALICIOUS PROSECUTION; MURDER AND MANSLAUGHTER, 1.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—QUESTION FOR COURT.—In an action for malicious prosecution, whether the facts as found by the jury constitute probable cause or the contrary, is a question for the court. *Eastin* v. *Bank of Stockton.* Cal. 436.

2. THE SAME—MEASURE OF DAMAGES—REASONABLE EXPENSES.—In such action the plaintiff, if successful, is not entitled to recover all that he paid out and expended in the defense of the former suit, but only so much thereof as was reasonably laid out and expended. *Id.*

3. ACTION FOR MALICIOUS PROSECUTION OF CIVIL ACTION.—In this state an action can be maintained for the malicious prosecution of a civil action in which no process other than the summons was issued. *Id.*

4. MALICIOUS PROSECUTION—MEASURE OF DAMAGES—DAMAGES AS PUNISHMENT.—Damages in an action for malicious prosecution are limited to such an amount as will compensate the plaintiff for his pecuniary loss, for injury to his person, and for his mental and physical suffering. Damages as a punishment to the defendant are not allowable. *Murphy* v. *Hobbs*. *Col.* 653.

5. THE SAME—ACTUAL AND IMPLIED MALICE—PROBABLE CAUSE—WANT OF.—In such action malice may be implied from a want of probable cause. Probable cause is such a state of facts known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon facts within his knowledge, to believe or entertain an honest and strong suspicion that the person accused is guilty. If probable cause for the arrest exists the prosecutor is not liable, although he may have been influenced by improper motives. If a want of probable cause appears, evidence of the acts and conduct of the prosecutor, showing actual malice, is admissible, for the purpose of enhancing the compensatory damages. *Id.*

MANSLAUGHTER.

See MURDER AND MANSLAUGHTER.

MARRIAGE CONTRACT.

See ABATEMENT, 1.

MARRIED WOMEN.

1. MARRIED WOMAN, WHEN MAY SUE ALONE—DESERTION.—A married woman may sue alone to recover for personal injuries sustained by her through the negligence of the defendants, when she is living separate and apart from her husband, by reason of his desertion of her. *Andrews* v. *Runyon et al.* *Cal.* 81.

2. DESERTION—OFFER TO RETURN AND REFUSAL—HUSBAND AND WIFE.—A wife's desertion of her husband is cured if she, before the expiration of the statutory period required to make the desertion a cause of divorce, and when in the vicinity of her husband's home, offered to go back and resume the performance of her marital duties, and he refuses to receive her. Under such circumstances an actual physical return is not necessary. From the date of his refusal the husband is deemed to have deserted the wife. *Id.*

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. MASTER AND SERVANT—RIGHTS OF SERVANT DISCHARGED BEFORE END OF TERM.—A servant who is employed for a definite period and discharged before the expiration thereof, without fault on his part, may either treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach; or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term. *Saxonia M. and R. Co.* v. *Cook*. *Cal.* 453.

2. THE SAME—MEASURE OF DAMAGES—WHEN SERVANT MUST SECURE OTHER LABOR.—The measure of damages in the latter class of cases is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. The servant cannot recover the wages accruing for the balance of the term as a matter of course. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received,

or that might have been received, for such labor, must be deducted from the amount of the damage occasioned by the breach of contract of employment. The burden of showing that such other labor was or might have been obtained, is on the defendant. *Id.*

3. THE SAME—BREACH OF CONTRACT—HOW ALLEGED—WRONGFUL DISCHARGE.—In an action to recover damages for breach of a contract, by the terms of which the defendant agreed to employ the plaintiff for a certain term, and at stipulated wages, an averment that "the defendant neglects and refuses to keep and perform its said agreement, to the damage of the plaintiff," is not a sufficient allegation of the breach of contract. If the breach consisted in a wrongful discharge of the plaintiff before the end of the term of employment, such wrongful discharge, as a breach of the contract, should be averred as the fact constituting the cause of action. *Id.*

See CORPORATIONS, 9, 10; NEGLIGENCE, 3, 8, 9.

MEASURE OF DAMAGES.

See CONTRACT, 1, 3; EJECTMENT, 1; FRAUD, 5; MALICIOUS PROSECUTION, 2, 4; MASTER AND SERVANT; NUISANCE, 10, 11; SALE, 1; TELEGRAPH COMPANIES, 1, 2; WARRANTY, 1.

MECHANICS' LIENS.

1. MINING CLAIM, DEFINITION OF—MECHANIC'S LIEN.—A "mining claim," as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. Independent of acts of congress, providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of *such* lands to which the right of exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, usages or customs. It is not applicable to land, the title to which is held under a Spanish or Mexican grant, although such land is mineral in character, consequently a statute, creating a mechanic's lien, under certain circumstances, on "mining claims," is not applicable to mineral land held under a Spanish or Mexican grant. *Williams* v. *Santa Clara M. Co.* *Cal.* 616.

2. MORTGAGE—MECHANIC'S LIEN, PRIORITY OF.—The lien of a recorded mortgage or of a deed of trust given as security for a debt takes priority over a subsequent mechanic's lien, under section 1186 of the code of civil procedure. *Id.*

3. NOTICE NOT TO BE RESPONSIBLE FOR IMPROVEMENT.—Section 1192 of the code of civil procedure requiring the "owner or person having or claiming an interest" in lands on which an improvement is erected, within three days after he has obtained knowledge of the intended improvement, to give notice that he will not be responsible for the same, and providing that, in default of such notice, his interest shall be subject to the lien for such improvement, filed in accordance with the provisions of the code, does not apply to nor affect the interest of a prior mortgagee under a recorded mortgage. *Id.*

MEXICAN GRANT.

See PUBLIC LANDS, 3, 4, 6.

MEXICAN LAW.

See ESTATES OF DECEASED PERSONS, 1.

MINES AND MINING.

1. PATENT OF MINERAL LANDS FROM THE UNITED STATES—RIGHTS OF PATENTEE—INTERFERENCE BY A STRANGER.—Where defendants have obtained a patent of mineral land from the United States government, after all the preliminary steps required by statute had been duly taken, including the sixty days' publication of notice, and where no adverse claim was filed by the complainants during such publication, but after the publication of notice had been completed, the complainants objected before the local land office, and before the general land department, to

defendants' right to a patent, and after hearings on said objections the defendants, title was sustained and a patent issued to them. *Held*, that the complainants, not being connected with nor having any interest in the title, cannot object to the patent on the ground of any alleged wrong which the patentees may have perpetrated against the government. *Wright et al* v. *Dubois et al.* (*U. S. Cir. Ct.*) *Col.* 153.

2. THE SAME.—The government, as a land-owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can complain. Publication of notice is a process bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the lands. Thereafter the only right or privilege remaining to any third parties is that of protest or objection, filed with the land department and cognizable only there; if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy. *Id.*

3. LODE SITUATE WITHIN PLACER MINE—RIGHT TO POSSESSION OF.—As against a mere intruder, the grantees under a placer patent are entitled to the possession of a lode situated within the placer grant, although at the time of the application for such patent the applicants knew of the existence of such lode. *Iron Silver M. Co.* v. *Reynolds et al.* (*U. S. Cir. Ct.*) *Col.* 449.

4. MINING LAWS—LOCATION OF PLACER CLAIM—STATUTES AFFECTING.—The provisions of section 2324 of the United States revised statutes, requiring a mining location to be distinctly marked on the ground so that its boundaries may be readily traced, that a record of the claim should be made, and that annual work to the value of one hundred dollars should be done thereon, apply both to placer and to lode locations. A state statute or a rule of miners which attempts to dispense with such requirements is void. *Sweet* v. *Ronk et al.* *Col.* 116.

5. POSSESSION OF CLAIM—SUBSEQUENT LOCATION.—Mere possession of a mining claim, without a valid location, is not sufficient to hold such claim as against a subsequent location made in accordance with law. *Id.*

6. LOCATION OF MINE—CERTIFICATE OF—REQUISITES AND FUNCTIONS OF.—The location certificate of a mine differs from ordinary documentary muniments of title in that it is not a title, nor proof of title, nor does it constitute or of itself establish the possessory right of a claimant to which it relates. It is purely a creature of statute; its purpose and functions are two-fold; when duly recorded it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground, and is thus constructive notice of the claimant's possession. In addition the filing of such certificate is one of the statutory steps requisite to constitute a perfected mining location. *Stepy et al.* v. *Stark et al.* *Col.* 663.

7. THE SAME—LOCATION, HOW MADE—CONTENTS OF CERTIFICATE.—In order to perfect a location of a quartz mine, four steps are necessary. *First*, the sinking of a discovery shaft upon the lode ten feet in depth, or deeper if necessary to disclose mineral in place; *Second*, the posting of a notice at the place of discovery, giving the name of the lode, the name of the locator and the date of discovery; *Third*, marking the surface boundaries of the claim by posts in the manner pointed out by statute; *Fourth*, making and recording a location certificate containing the name and description of the lode, the name of the locator and the date of the location. The statute does not require such certificate to contain a statement that the discovery shaft has been sunk the requisite depth nor that the discovery notice has been posted or boundary marked. *Id.*

8. THE SAME—PROOF OF LOCATION—ORIGINAL AND AMENDED CERTIFICATE.—When the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the locating certificate, must, when contested, be established by proof outside of such certificate. The record of such certificate is proof of its own performance, and is *prima facie* evidence of all which the statute requires it to contain, and which are therein sufficiently set forth; and when the certificate for any reason is deemed void, it is admissible in evidence, in a contest affecting the location, in connection with a valid amended certificate correcting the defects of the original. *Id.*

9. THE SAME—EFFECT OF AMENDED CERTIFICATE—EVIDENCE OF.—Such amended certificate, under the statute, cannot create a right of possession or location in the premises claimed under the first location, which did not exist prior to the filing of such ad-

ditional certificate; it can confer no additional rights, and is, therefore, evidence of none, as against any intervening or pre-existing rights of another. Except as against such intervening rights an additional certificate recorded after the commencement of an action, serves the same purpose, in its admission as evidence, as an original location certificate, and will relate back to the first location. *Id.*

See INJUNCTION, 1.

MINING CLAIM.

See MECHANIC'S LIENS, 1.

MINORITY.

See INFANTS, 1.

MISDEMEANORS.

See APPEAL, 8.

MORTGAGE.

1. CHATTEL MORTGAGE—ACKNOWLEDGMENT OF—POSSESSION OF MORTGAGOR.—The failure to properly acknowledge a chattel mortgage is fatal to its validity while the property mortgaged remains in possession of the mortgagor. *Wilcox et al.* v. *Jackson.* *Col.* 326.
2. THE SAME—CHANGE OF POSSESSION—ATTACHING CREDITORS.—A chattel mortgage of the stock in trade of a merchant, although followed by an actual change in possession, is invalid as against subsequent attaching creditors of the mortgagor, without notice actual or constructive of the mortgage, unless such change in possession is accompanied by the assumption on the part of the mortgagee of the usual *indicia* of ownership. And the mere employment of another clerk is not sufficient notice of a change of ownership to put creditors and purchaser upon inquiry. *Id.*
3. BILL OF SALE ABSOLUTE IN FORM WHEN A CHATTEL MORTGAGE—RECORDING—NOTICE.—A bill of sale absolute in form is considered a chattel mortgage upon proof by parol that it was given to secure a debt, not only as to the parties to it, but also as to third parties who are affected with notice. Such bill of sale is entitled to be filed with the county clerk as a chattel mortgage, under section 46 of the code, page 522; and thereafter it imparts notice to third parties, although the clerk may omit to index the instrument. *Necklin* v. *Nelson et al.* *Or.* 682.
4. CHATTEL MORTGAGE TO SECURE FUTURE ADVANCES—LIEN OF, WHEN ATTACHES.—In the absence of fraud, a chattel mortgage to secure future advances is valid, whether such object be expressed in the mortgage or not. The lien of such mortgage attaches from the date of the advance, and not from the date of the mortgage. *Id.*
5. FORECLOSURE OF MORTGAGE—PERSONAL JUDGMENT AGAINST GRANTEE OF MORTGAGOR—PLEADINGS.—In a complaint to foreclose a mortgage, an allegation that the grantee of the mortgagor covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain a personal judgment against him, although such allegation is made upon information and belief. *Pellier* v. *Gillespie.* *Cal.* 500.
6. FORECLOSURE OF MORTGAGE—DECREE, WHAT TO EMBRACE.—A decree in an action to foreclose a mortgage cannot direct a sale of a greater interest than that mortgaged. Thus, where the mortgage merely covered certain lands and improvements owned by the mortgagor at the time of the execution of the mortgage, the decree must be limited to such property, and cannot embrace property of the mortgagor subsequently acquired. *Marshall* v. *Livermore S. V. W. Co.* *Cal.* 631.
7. FORECLOSURE OF SEPARATE MORTGAGES—DECREE—SALE.—The decree in an action for the foreclosure of two mortgages, each being on separate parcels of land, must provide that each parcel should be sold to satisfy the sum for which it was separately mortgaged. *Home and Loan Associates* v. *Wilkins.* *Cal.* 108.

See DEMURRER, 3; FRAUD, 1; MECHANICS' LIENS, 2, 3; TAXATION, 17.

MUNICIPAL COURT OF APPEALS.

See CERTIORARI, 2.

MURDER AND MANSLAUGHTER.

1. MURDER AND MANSLAUGHTER—MALICE, WHEN INFERRED.—The distinction between murder and manslaughter lies in the presence or absence of malice. The existence of malice, like any other fact, may be logically inferred by the jury from all the facts and circumstances of the case, legally proved, the weapon used, the action of the defendant at the time of the killing, and his previous acts and conduct. *People* v. *Samuels*. *Cal.* 382.

2. MURDER—DEFENDANT'S GOOD CHARACTER.—If the jury believe the defendant guilty of murder, they must so find, notwithstanding his good character. *Id.*

3. CRIMINAL LAW—MURDER—SELF-DEFENSE—FEAR OF ASSAULT—INSTRUCTIONS.—An instruction given in a prosecution for murder, at the request of the people, that "the bare fear of an assault upon the defendant will not justify homicide, nor the fear that deceased was about to commit a felony, unless defendant believed there was imminent danger thereof," is no ground for reversal. Such instruction was more favorable to the defendant than he was entitled to, as it omitted the element of the reasonableness of the belief. *Id.*

4. JUSTIFICATION OF HOMICIDE—BURDEN OF PROOF—INSTRUCTIONS.—In a prosecution for murder, where, from all the circumstances surrounding the homicide, as detailed in evidence by the prosecution, nothing is disclosed in any way tending to excuse or justify the homicide, it is incumbent upon the defendant to show such justification or excuse, if any there be. If he neglect to offer any evidence in justification, an instruction which omits to charge concerning the law of self-defense is not error. *Cook* v. *Territory*. *Wy.* 340.

5. INDICTMENT FOR MURDER—VERDICT, SUFFICIENCY OF.—Under an indictment framed in but one count, which charges murder in the first degree, a verdict is sufficient which finds the defendant guilty as charged in the indictment. *Id.*

6. CRIMINAL LAW—CONCLUSION OF INDICTMENT.—Under the Montana statute, if the substantive averments in an indictment for murder are good and sufficiently describe the crime, the formal concluding words are immaterial. *Id.*

7. CRIMINAL LAW—MURDER—INDICTMENT—POSSESSION OF WEAPON.—An indictment for murder need not allege that the weapon with which the homicide was committed was had or held by the defendant at the time of the alleged killing. *Territory* v. *Young*. *Mont.* 468.

8. DUTY OF PROSECUTION TO CALL WITNESS PRESENT AT KILLING—MURDER.—The prosecution in a trial for murder must call every person who was present and witnessed the alleged homicide, if it is within their power, and a failure so to do is ground for reversal. *Territory* v. *Hanna*. *Mont.* 471.

9. CRIMINAL LAW—MURDER—EVIDENCE—REASONABLE DOUBT.—The evidence of the only witness who testified to the act of killing, or connected the defendant with the homicide, reviewed and held so contradictory and improbable as not to exclude every reasonable doubt of the defendant's guilt. *Territory* v. *Adolphson*. *Mont.* 474.

10. RECORD OF CONVICTION OF MURDER, EVIDENCE OF.—The record of conviction is admissible in evidence, for the purpose of showing that the person convicted was implicated in a murder. *Harris* v. *More et al.* *Cal.* 696.

See BAIL, 1; EVIDENCE, 3, 7; INDIANS, 4; INSTRUCTIONS, 7; JURY AND JURORS, 8.

NAVIGABLE STREAMS.

See NUISANCE, 1-7.

NEGLIGENCE.

1. CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.—'In an action to recover damages for personal injuries, caused by the alleged negligence of the defendants, when the defense relied on is contributory negligence on the part of the plaintiff, and the evidence is such that the question of contributory negligence is properly submitted to the jury, it is error for the court to remark to the jury that he does not see how the facts alleged to constitute contributory negligence were unreasonable, "or something which an ordinary man would not do." *Andrews* v. *Runyon*. *Cal.* 81.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WANT OF CARE.—In an action to recover damages for negligence, the plaintiff cannot recover if he contributed to the disaster by his own negligence, or want of ordinary care and caution, to such an extent that

but for such negligence or want of care on his part, the accident would not have happened. *Colorado Central R. R. Co.* v. *Martin. Col.* 563.

3. THE SAME—RAILROAD COMPANY—MASTER AND SERVANT.—The plaintiff in error, in anticipation of an attack upon its train by robbers, provided breech-loading shot-guns and ammunition for their defense. These guns were placed by the superintendent of the company in charge of the train baggage-master, with instructions to keep the guns unloaded and wrapped up in a blanket, except when passing over that portion of the road where an attack was apprehended. Upon reaching a certain station on the road the guns were to be unpacked and charged, ready for use; and after passing the same on the return of the train, the cartridges were to be withdrawn and the guns again wrapped up, and, upon reaching the headquarters of the company, the package was to be delivered to the station baggage-master, to be kept over night, and upon the return of the train he was to replace the package. The plaintiff, a conductor on the train, who had entire command thereof, and knew of the foregoing regulations, was injured by the accidental discharge of one of the guns when the same were being replaced on the train by the station baggage-master. *Held*, that, whether the company was guilty of negligence in not providing gun-racks or other suitable means for transporting the guns, was a question for the jury; that the plaintiff, as conductor of the train, was charged with the duty of seeing that the instructions of the superintendent were observed; and that the injury resulted from the negligence of a fellow-servant, for which the company was not liable. *Id.*

4. CARRIERS OF PASSENGERS—NEGLIGENCE—COLLISION—PARTIES.—When a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another vehicle, the party injured may recover from the proprietors of either or of both. Where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turn out that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other. *Tompkins* v. *Clay-street Hill R. R. Co. et al. Cal.* 537.

5. THE SAME—PROOF OF NEGLIGENCE—INSTRUCTIONS.—A passenger by one carrier, in an action against a different carrier to recover for an injury occasioned by a collision between such carriers, must prove negligence on the part of the defendant. As against such latter carriers there is no presumption of negligence arising from the fact of the injury. The defendant is entitled to an instruction in conformity with this rule; and a general instruction to the effect that the plaintiff must make out his case by a preponderance of evidence is not equivalent thereto. *Id.*

6. THE SAME—RELEASE OF ONE CARRIER—ESTOPPEL.—Such passenger, if he receives compensation from one carrier, in consideration of which he discharges and releases it from all liability on account of the injury, is estopped from denying the liability of such carrier, and he cannot afterward maintain an action against the other carrier for the same injury. *Id.*

7. STREET RAILROAD—NEGLIGENT KILLING OF CHILD IN STREET.—In an action against a street railroad company for killing a child of very tender years, as it was attempting to cross the street, the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the company in the management of the car, and that the person having care of the child took all proper precaution for its safety. *Roller* v. *Sutter-street R. R. Co. Cal.* 691.

8. NEGLIGENCE—WORK DANGEROUS IN ITSELF—MASTER AND SERVANT.—A railroad company, whenever it calls upon an employé to perform work under dangerous conditions, is bound to provide him with the ordinary means of protection, and its failure to do so is negligence, unless the right to have such means of protection furnished has been waived by the employé. *O'Rorke* v. *U. P. R. R. Co. (U. S. Cir. Ct.) Col.* 203.

9. THE SAME—ASSUMPTION OF RISK BY EMPLOYE.—Where an employé has been accustomed to do such work day after day for several months, knowing the same to be dangerous, but without making complaint or demanding the ordinary means of protection, it must be presumed that he assumed the risks of his employment, and if he is injured therein the company is not liable. *Id.*

10. EXPULSION OF PASSENGER—DUTY OF EXPELLED PASSENGER—CARE AND CAUTION REQUIRED OF.—A passenger expelled from a railroad car is not required to use the utmost care and caution to avoid injury; it is sufficient if he uses such prudent care as is reasonable under the circumstances. Whether it was prudent for a passenger, after his expulsion from a car, during which he received an injury, to walk to a place other than the nearest dwelling-house, is a question for the jury. Under section 487

of the civil code, the passenger expelled is under no duty to go to the nearest dwelling-house. *Bland* v. *S. P. R. R. Co.* *Cal.* 78.

11. OWNER OF BUILDING—NEGLIGENCE—INJURY FROM AWNING.—An owner of a building who erects an awning thereon over a public street, or who allows an awning erected by a prior owner to remain, under a license so to do from the city authorities, on condition that the same be securely fastened, is liable to anyone who, without fault, is injured through the owner's neglect to keep the awning in repair. Such liability exists, although at the time of the injury the building was occupied by a tenant. *Jessen* v. *Sweigert.* *Cal.* 586.

12. ACTION FOR NEGLIGENCE—VARIANCE BETWEEN ALLEGATIONS AND PROOF.—In an action to recover damages for a fire alleged to have been caused by a defective flue, evidence that such fire was caused by the entire want of a flue is not a fatal variance, when it appears that the party objecting was not misled as to the meaning of the averment. *Denver, South Park & Pacific R. R. Co.* v. *Conway.* *Col.* 682.

13. NEGLIGENCE, ACTION FOR—INTEREST NOT ALLOWED.—In an action to recover damages for injury to property caused by negligence, interest on the value of the property injured or destroyed is not recoverable, as the same is not authorized by the statute. *Id.*

See CONTRACT, 1; MARRIED WOMEN, 1; TELEGRAPH COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTE—FAILURE OF CONSIDERATION.—A promissory note given in part for a definite sum which was represented to have been allowed the payee by the probate court for his services as guardian of the maker, is wanting in consideration to the extent of such sum, if the probate court never made such allowance. *Estudillo* v. *Aguirre.* *Cal.* 694.

NEW TRIAL.

1. MOTION FOR NEW TRIAL, JURISDICTION OF COURT OVER.—The jurisdiction of a court to hear and determine a motion for a new trial lies dormant until it is called into exercise by the final submission of the motion, in a legal manner, upon a bill of exceptions, statement of the case, or other papers designated in the notice of motion. And it may be called into exercise by the submission of the motion itself, or by a motion to deny or dismiss the motion for want of prosecution, upon the ground that the party moving for the new trial has failed or neglected to serve or file within legal time the statement or other paper upon which he proposed to move; and when thus called into exercise, and the court, in the exercise of its jurisdiction, has heard and decided the motion, its order is final and conclusive; and it is not erroneous to dismiss or deny a motion afterward made to set it aside. Such order is reviewable only on appeal. But it is otherwise if such order has been inadvertently or prematurely made. *Odd Fellows' Savings Bank* v. *Deuprey.* *Cal.* 533.

2. NEW TRIAL—GROUND FOR AFFECTING ONE PARTY ONLY.—An objection, good as a ground for a new trial on the part of one party only, if not raised by him, cannot be relied on by another party. *Beach* v. *Hodgdon.* *Cal.* 610.

3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.—An order refusing a new trial on the ground of newly-discovered evidence, will not be reversed if the newly-discovered evidence is merely cumulative, and every material fact stated in the moving party's affidavits is contradicted by counter affidavits. *Kelleher* v. *Kenney et al.* *Cal.* 432.

4. NEWLY-DISCOVERED EVIDENCE OF FACT KNOWN AT TRIAL—EVIDENCE FOR IMPEACHING WITNESS.—Newly-discovered evidence of a fact, known at the trial, as to a matter about which one of the witnesses testified, is no ground for a new trial, when no diligence is shown for not using the fact as evidence, or when such evidence would tend to impeach a witness. *People* v. *Lyle.* *Cal.* 349.

5. NEW TRIAL—ORDER GRANTING WILL NOT BE PRESUMED ERRONEOUS.—The appellate court will not presume error nor an abuse of discretion in the action of the lower court in granting a new trial. *Johnston, executor,* v. *Hancock et al.* *Cal.* 418.

6. CONFLICT OF EVIDENCE—VERDICT—NEW TRIAL.—A verdict rendered upon substantially conflicting evidence cannot be disturbed and a new trial granted, except for errors of law occurring at the trial. *Winans* v. *Sierra Lumber Co.* *Cal.* 277.

7. STATEMENT ON MOTION FOR NEW TRIAL—TRANSCRIPT—WHAT MUST SHOW.—Papers purporting to be a statement on a motion for a new trial will not be considered by the appellate court when the transcript fails to show that either a motion for a new

trial was filed in the lower court, or that a notice thereof was served upon the adverse party, as required by section 287 of the code of civil procedure. *First National Bank of Helena* v. *McAndrews. Mont.* 478.

8. DIVORCE—NEW TRIAL OF PORTION OF ISSUES.—In an action for a divorce and a division of the community property, the lower court has power to order a new trial of the issues relating to the character and disposition of the property alone, if material error occurred in the trial of and affecting that branch of the case only, without ordering a retrial of all the issues presented by the pleadings. *Lake* v. *Lake. Nev.* 159.

See APPEAL, 22; EVIDENCE, 10; JURY AND JURORS, 2, 10.

NOTICE.

1. NOTICE OF PRIOR EQUITY.—A purchaser of real property for a valuable consideration is not affected by notice of a prior adverse equity received from a stranger or person not interested in the property; nor will mere rumors or hearsay concerning such equity and communicated by such person be sufficient to put him on inquiry and charge him with knowledge of the facts that he might have thereby learned. *Parkhurst* v. *Hosford* (*U. S. Cir. Ct.*) *Or.* 311.

See ASSIGNMENT, 1-2; ATTACHMENT, 2; INJUNCTION, 1; LANDLORD AND TENANT: MECHANICS' LIENS, 3; MORTGAGE, 2-3; NUISANCE, 2; PUBLIC LANDS, 5.

NOTICE OF APPEAL.

See APPEALS, 9-11, 13.

NUISANCE.

1. HYDRAULIC MINING—PUBLIC NUISANCE TO NAVIGABLE STREAM—RIGHT OF PUBLIC TO ENJOIN.—The record of the case shows that the Gold Run Ditch and Mining Company has been since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the North Fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty millions cubic yards of material composed mostly of sand, gravel, small stones, cobbles and bowlders, mixed with small particles of gold—is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses and will continue to use, under a vertical pressure of several hundred feet, discharging water through "little giants" and "monitors," and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to wit, of bowlders, cobbles, gravel and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land. Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluents, but mostly in the American, and upon lands adjacent to both rivers. The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet, and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from six to twelve feet. In consequence, the beds of the two rivers have shallowed and their channels widened so that the depths of the rivers have greatly lessened and their liability to overflow has been materially

increased, causing the frequent floods to extend their area and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining debris. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier debris, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land—probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And from the same cause the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to wit, by boats drawing nine or ten feet of water, has been, since the year 1862, unnavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits that said rivers will be turned from their channels, cutting new waterways, injuring or destroying immense tracts of land and probably will result in greatly impairing the navigation of the Sacramento river. *Held*, that such acts of the defendant constituted a public nuisance, which might be enjoined in an action in the name of the people of the state, although other mining companies, acting separately and independently of each other, contributed in producing such nuisance. *People* v. *Gold Run Ditch and Mining Co.* *Cal.* 511.

2. COURTS WILL TAKE JUDICIAL NOTICE OF THE NAVIGABILITY OF THE SACRAMENTO RIVER. *Id.*

3. THE SAME—NUISANCE UPON NAVIGABLE STREAM.—Navigable streams are public highways, in which the people of the state have controlling and paramount rights, and all unauthorized intrusions upon the same for purposes unconnected with the rights of navigation or passage are nuisances. *Id.*

4. THE SAME—JOINDER OF PARTIES CONTRIBUTING TO NUISANCE.—In an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally. *Id.*

5. PUBLIC NUISANCE—RIGHT TO CONTINUE CANNOT BE ACQUIRED BY CUSTOM.—The right of private individuals or corporations to make use of the waters of navigable streams as a place of deposit for their mining debris, so as to destroy the navigability of such streams, cannot be acquired by custom. *Id.*

6. THE SAME—CANNOT BE ACQUIRED BY PRESCRIPTION.—The right to continue a public nuisance cannot be acquired by prescription. Against such nuisance, however long continued, the state is bound to protect the people; and for that purpose the attorney-general has the power to institute a proceeding in equity in the name of the people to compel the discontinuance of the acts which constitute the nuisance. *Id.*

7. HYDRAULIC MINING—INJUNCTION SUBJECT TO CONDITIONS.—The plaintiff being entitled, upon the facts found, to a perpetual injunction to compel the discontinuance of the acts complained of, as stated in the preceding opinion, the court cannot make the injunction subject to the condition that "the defendant may at any time, as it may be advised, apply to the court to have the decree and restraining order modified, or vacated, and set aside. And whenever, upon such showing, it shall appear that sufficient means have been provided to impound, detain and hold back such tailings at any point on said American river above Alder creek, and that such means are sufficient to detain all bowlders, cobble-stones, gravel and the heavier sand, then said defendant shall be entitled to have said decree vacated and set aside." *Id.*

8. RIGHTS OF PERSONS TO USE AND ENJOYMENT OF PROPERTY.—Any person may use his own property in such lawful manner as to him may seem fit, having reference always to the right of others to use their property. But a person cannot use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his property. *Tuebner et al.* v. *California Street Railroad Co.* *Cal.* 529.

9. THE SAME—NUISANCE—STREET RAILROAD—LICENSE, WHEN NOT A JUSTIFICATION.—The defendant corporation operated a street railroad along a street in that portion of San Francisco usually devoted to dwelling purposes, and, for the purpose of using steam as a motive power in propelling its cars by means of a cable, constructed

a building on a lot adjoining the plaintiff's premises, for use in connection with its street railroad, as a car and engine-house. Such use produced a loud and continuous noise; caused the plaintiff's house to be constantly shaken and jarred; cracked the plastering in his rooms, and covered his premises and furniture with soot. *Held*, that such acts of the defendant constituted a nuisance for which it was liable, although the municipality of San Francisco had granted it a franchise to operate its road, and all its structures and machinery were necessary to that end, and were properly constructed. *Id.*

10. ABATEMENT OF PENDING ACTION—DAMAGES.—In an action to recover damages for injuries caused by such nuisance, the fact that the defendant has, since the commencement of the action, remedied the evil complained of, does not interfere with plaintiff's right to recover for injuries sustained before the commencement of the action. *Id.*

11. MEASURE OF DAMAGES—VALUE OF INJURY.—In such action the plaintiff need not prove his injury by value; it is for the jury to determine a reasonable sum as proper compensation. *Id.*

NUL TIEL RECORD.

See JUDGMENT, 1.

OATH.

See JURY AND JURORS, 6.

OCCUPATION.

See POSSESSION.

ORDERS.

See APPEAL, 2-6, 18; CERTIORARI, 10; NEW TRIAL, 5.

OWNERSHIP.

See LARCENY, 1; STREETS AND HIGHWAYS, 6.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

See APPEAL, 1, 6, 11; LEASE, 3; MARRIED WOMEN: NEGLIGENCE, 4; NUISANCE, 1, 3; STREETS AND HIGHWAYS, 4, 5; SWAMP LANDS, 8, 9; TRUSTS.

PARTITION.

See STATUTE OF LIMITATIONS.

PARTNERSHIP.

1. PARTNERSHIP, HOW CREATED—ESSENTIAL ELEMENTS OF.—A partnership is a contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. *Cogswell* v. *Wilson*. *Or.* 489.

2. THE SAME—AGREEMENT TO SHARE PROFITS AND LOSS.—To constitute a partnership *inter se* mere community of interest is not sufficient; there must be an agreement to share in the profits and loss. Such agreement must provide for an interest in the profits as profits, and not for a mere division of the gross earnings, and such profits must be shared as the result of the adventure or enterprise, and not simply as a measure of compensation. *Id.*

3. THE SAME—BREACH OF PARTNERSHIP AGREEMENT—DISSOLUTION OF PARTNERSHIP.—The existence of a partnership does not depend upon the fact that each of the partners has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, the partnership continues until legally dissolved. *Id.*

4. THE EVIDENCE REVIEWED, and held that a partnership existed between the defendant and the plaintiff's vendor. *Id.*
5. PARTNERSHIP LANDS—SALE OF BY ONE PARTNER TO BONA FIDE PURCHASER.—The equitable interest of a partner in land purchased by his copartner is discharged by a transfer of the legal title by the latter to a purchaser for value and without notice. *McNeil* v. *First Congregational Soc.* *Cal.* 421.
6. ACTION BETWEEN PARTNERS TO RECOVER ASCERTAINED BALANCE—PLEADINGS.—An action may be maintained by one partner against his copartner for the balance found due upon a settlement of the partnership affairs. In such action no express promise to pay such balance need be shown; it is sufficient if the sum has been ascertained and agreed upon by the act of both partners. But an averment of the settlement by the plaintiff is material, and without it his complaint is fatally defective. An averment that at the time of dissolution there was in the hands of the defendant "clear profits," amounting to a sum stated, is not equivalent to an allegation of settlement. *Bean* v. *Gregg.* *Col.* 241.
7. ASSIGNMENT OF FIRM PROPERTY BY ONE PARTNER FOR BENEFIT OF CREDITORS.—A voluntary assignment of all the firm property, made by one partner in favor of a creditor, without the knowledge or assent of his partner, and against his previously expressed wishes, is invalid. *Wilcox* v. *Jackson.* *Col.* 326.

PATENTS.

1. PROCESS AN INVENTION DISTINCT FROM MECHANISM PRODUCING THE PROCESS.—A process by which a new result is obtained is a different thing from the mechanism by which it is carried out, and is a distinct, severable and independent patentable invention. *Scrivner et al.* v. *Oakland Gas Co. (U. S. Cir. Ct.)* *Cal.* 197.
2. REISSUE ENLARGING THE PATENT AFTER LONG DELAY VOID.—The original patent was for the mechanism by which a new and useful result was produced. The patent, after eleven years delay, was reissued in such form as to embrace a claim for the process as well as for the mechanical means by which the process was carried out. *Held,* that the reissued patent for the process is void. *Id.*

PAYMENT.

1. APPROPRIATION OF PAYMENTS—DEBTOR AND CREDITOR—GENERAL PAYMENT.—A debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. Where money is paid generally on an account without any appropriation it should be applied to the first items in the account. And in an action to recover a balance due on a running account, the debtor cannot be heard to dispute the validity of the items so paid. *Mackey* v. *Fullerton et al.* *Col.* 569.

See ASSIGNMENT, 1; CERTIORARI, 8.

PETIT LARCENY.

See LARCENY, 3, 4.

PLACE OF TRIAL.

See VENUE.

PLACER MINE.

See MINES AND MINING, 3, 4.

PLEADING AND PRACTICE.

1. PARTIAL DEFENSES AT COMMON LAW AND UNDER CODE, HOW PLEADED.—At common law every plea must go to the whole cause of action, and be an entire answer thereto on the record. The same rule prevails under the code, except that matter may be set up by way of answer which constitutes only a partial defense; but in such case it must be pleaded as a partial defense and not assume to answer the entire cause of action. *Webb* v. *Nickerson.* *Or.* 485.

2. DENIAL OF KNOWLEDGE OR INFORMATION.—A defendant is not bound to inform himself concerning the truth of an allegation, of which he never had any knowledge, before answering the same; and a denial of any knowledge or information thereof is a sufficient denial, and will not be stricken out as sham, unless it plainly appears that the same is false. *Oregonian Railway Company, Limited,* v. *Oregon Railway and Navigation Company. (U. S. Cir. Ct.) Or.* 548.

3. FRIVOLOUS PLEADINGS.—A frivolous answer or defense is one which contains nothing that affects the plaintiff's case, and may be stricken out on motion; but a motion to strike out for frivolousness is not well taken if the matter included in it is material, if true. *Id.*

4. CAUSE OF ACTION—STATEMENT OF DAMAGES.—An action for damages must rest upon facts showing a right on the part of the plaintiff to require the performance on the part of the defendant of some legal duty, a failure to perform such duty, and that the damages sought resulted therefrom. The complaint in this action *held* not to state facts in compliance with this rule. *Brandenburg* v. *Miles. Col.* 336.

5. ERRONEOUS ORDER CONSOLIDATING ACTIONS, WHEN NOT GROUND FOR REVERSAL.—An erroneous order consolidating certain actions is not ground for reversal, if it appears from the findings that the appellant is not entitled to a judgment. *Bouyer* v. *Dunn. Cal.* 352.

6. EQUITY RULE 69—BURDEN OF PROOF.—Where the time of taking testimony has expired under equity rule 69, and the case is heard on the bill, plea and replication to the plea, without evidence to support the plea, the plea will be overruled for want of evidence. The burden of proof is on the party pleading the facts relied on to oust the jurisdiction. *Sharon* v. *Hill (U. S. Cir. Ct.) Cal.* 199.

7. AMENDED COMPLAINT—SERVICE OF ON DEFENDANTS.—Where a plaintiff amends his complaint in matter of substance, he must serve his amended pleading upon all the defendants, including those in default. *Miliken* v. *Houghton. Cal.* 221.

8. RECORD HELD TO DISCLOSE NO MATERIAL ERROR. *Board of Education* v. *Franklin et als. Cal.* 608.

See AFFIDAVIT OF MERITS; ASSIGNMENT, 5; BANKRUPTCY; BILL OF EXCEPTIONS; CERTIORARI; CLAIM AND DELIVERY; CONTEMPT; CORPORATIONS, 6-8; COUNTY COURT; DEMURRER; EJECTMENT; FINDINGS; FRAUD, 3; GOODS SOLD AND DELIVERED; INDIANS, 6; INSTRUCTIONS; INSURANCE, 1, 3, 6; JUDGMENT, 1-3; JURY AND JURORS, 12; MARRIED WOMEN; MASTER AND SERVANT, 3; MORTGAGE, 5; PARTNERSHIP, 6; RELEASE, 2; STATUTE OF FRAUDS, 4; SWAMP LANDS, 8, 9, 16; VENUE.

PLEDGE.

1. PLEDGE OF CERTIFICATES OF STOCK BY DEPOSITARY—RIGHTS OF OWNER AND PLEDGEE.—The real owner of certificates of stock, who indorses and delivers the same to a third person for safe keeping, cannot recover such certificate from the pledgee of the depositary, until the demand for which they were given in pledge is satisfied. *Ambrose* v. *Evans. Cal.* 297.

2. THE SAME—SALE OF CERTIFICATES BY PLEDGEE, PENDING ACTION FOR POSSESSION.—If, pending an action to recover possession of such certificates, the pledgee sells the same for more than enough to satisfy his demand, the owner is not entitled to a judgment for such excess, because it did not constitute any part of his cause of action. *Id.*

3. PLEDGOR AND PLEDGEE—ACTION TO RECOVER DEBT SECURED.—A pledgee may maintain an action to recover the debt secured, without first exhausting the subject of the pledge. *Ehrlich* v. *Ewald. Cal.* 380.

See GUARANTY; INSURANCE, 7.

POLICE COMMISSIONERS.

1. THE POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO are not elective officers. *People ex rel. Hoy* v. *Alvord et al. Cal.* 78.

POLICE JUDGE.

See CONSTITUTIONAL LAW.

POSSESSION

1. POSSESSION OF LAND—PRESUMPTIONS ARISING FROM—OCCUPANT.—One lawfully in possession of land may maintain an action for any interference with the possession

thereof. And the actual occupant will be presumed to be lawfully in possession unless the contrary appears on the trial. *Simpson* v. *Williams*. *Nev.* 580.

See EJECTMENT, 1-3; EVIDENCE, 1; FRAUD, 1; LANDLORD AND TENANT: LEASE, 1; MECHANICS' LIENS, 1; MINES AND MINING, 3, 5; MORTGAGE, 1, 2; REPLEVIN; TENANTS IN COMMON.

PRACTICE.

See PLEADING AND PRACTICE.

PRELIMINARY EXAMINATION.

See LARCENY, 6.

PRE-EMPTION.

See PUBLIC LANDS, 1, 6.

PRESCRIPTION.

See NUISANCE, 6.

PRESUMPTIONS.

See BILL OF EXCEPTIONS, 3; CONTEMPT, 1; NEGLIGENCE, 5; POSSESSION; STATUTE OF LIMITATIONS, 9.

PRINCIPAL AND AGENT.

1. AGENT WHEN PERSONALLY LIABLE ON WRITTEN CONTRACT EXECUTED IN HIS OWN NAME.—Where an agent, in executing a written instrument, does not attempt to bind his principal, and in terms imposes an obligation on himself, he incurs by such act a personal liability, even though he described himself as an agent. *Murphy* v. *Helmrich*. *Cal.* 301.
2. PRINCIPAL AND AGENT—SECRET INSTRUCTIONS—GENERAL AGENT.—The power of a general agent cannot be restricted by secret instructions of his principal, so as to affect a party dealing with such agent without notice of the secret instructions. *Saxonia Min., etc., Co.* v. *Cook*. *Col.* 453.

See CORPORATIONS, 9, 10; MASTER AND SERVANT.

PRIORITY.

See MECHANICS' LIENS, 2.

PRIVITY OF ESTATE.

See LEASE, 4, 5.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 1, 5.

PROBATE COURTS.

See ESTATES OF DECEASED PERSONS.

PROBATE SALES.

See GUARDIAN AND WARD, 1-4.

PROHIBITION.

1. WRIT OF PROHIBITION—FUNCTIONS OF—JUDICIAL AND MINISTERIAL POWER.—Under the constitution the only office of the writ of prohibition is to prevent courts or other officers from going beyond their jurisdiction in the execution of judicial power. The legislature cannot enlarge or extend the office of such writ, so as to include ministerial functions. *Hobart* v. *Tillson, Tax Collector, etc.* *Cal.* 629.

2. THE SAME—TAX COLLECTOR—PROHIBITION DOES NOT LIE AGAINST.—A tax collector is a ministerial officer, and as such he cannot be restrained by prohibition from executing the functions of his office. *Id.*

3. PETITION FOR WRIT OF PROHIBITION DENIED, for the reason that the relief asked had already been granted on appeal. *People ex rel. Barnes et al.* v. *District Court, etc., et al.* *Col.* 276.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PUBLIC LANDS.

1. PRE-EMPTION OF PUBLIC LAND—PRIORITY OF LOCATION—RELATION OF TITLE.—The right of a pre-emptor of public land relates back to the date of the first proceeding taken by him for its acquisition under the pre-emption laws, and takes priority over a title acquired through a subsequent location under the soldiers' additional homestead act. *Cothrin* v. *Taber et al.* *Cal.* 295.

2. ACT OF CONGRESS GRANTING LAND TO THE SOUTHERN PACIFIC R. R.—CONSTRUCTION OF.—The act of congress of March 3rd, 1871, in effect provided that "*there be* and *hereby is* granted to the Southern Pacific Railroad Company of California * * for the purpose of aiding in the construction of said railroad * * * every alternate section of public land, not mineral, designated by odd numbers * * * whenever on the line thereof, the United States having full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office." *Held*, that such act constituted a present grant, that could only be defeated by failure to perform the conditions subsequent therein, and upon proper proceedings to take advantage of such failure: that the general right to the land, subject to the exceptions found in the act, vested at the date of the passage of the act, on March 3rd, 1871, and attached to the specific land at the moment of the filing of the plat in the office of the commissioner of the general land office. Thenceforth it was not in the power of any officers of the government, by any action of theirs, to divest, or in any way limit, or modify, the rights of the company so vested. *Southern Pacific Railroad Co.* v. *Dull et al.* (*U. S. Cir. Ct.*) *Cal.* 639.

3. THE SAME—WHEN GRANT ATTACHED—MEXICAN GRANT.—Such congressional grant attached to lands lying within the exterior limits of a Mexican grant, but outside of the limits thereof as finally surveyed, if prior to the date of filing such plat in the office of the commissioner of the general land office, the Mexican grant had been finally located. *Id.*

4. THE SAME—CONFIRMATION OF MEXICAN GRANT UNDER ACT OF JUNE 14TH, 1860.—Under the act of congress of June 14th, 1860, proceedings for the confirmation of a Mexican grant are in the nature of proceedings *in rem*; under such act the location of a Mexican grant becomes final, after the publication by the surveyor-general of the notice provided for therein, in the absence of any application to have the plat and survey returned to the district court for examination. A survey so made final by publication has the same effect as a patent, and thereafter is in no sense *sub judice*; the jurisdiction of the commissioner of the general land office is thereupon exhausted as to everything but the ministerial duty of issuing a patent, and any further acts of his, such as ordering a re-survey, are void. All lands outside of the survey, thus made final, become public lands of the United States, and subject to any other disposition under the law. *Id.*

5. STATUTORY GRANTS—PUBLIC RECORD—NOTICE.—All the world must take notice of statutory grants of land clearly defined on the face of the statute, and other public records, indicated by the statute. *Id.*

6. THE SAME—CASE IN JUDGMENT.—The defendant entered upon land within the exterior limits of a Mexican grant, with the intention of securing a pre-emption right, but subsequently abandoned his location under the mistaken supposition that such land was *sub judice*, and located elsewhere; four years afterward, and eighteen months subsequent to the filing of complainant's map, he returned to his original location. *Held*, that such return did not connect itself with his former residence, and continue or reinstate the right first initiated, and that the right of the complainant having attached, it was too late to acquire a new right of pre-emption; and a patent issued to him, based upon such subsequent location, was either void, or

held in trust for complainant, and the patentee could convey no title to a purchaser for value without actual notice, in fact, of complainant's title. *Id.*

See MINES AND MINING.

PUBLIC OFFICERS.

1. SECRETARY OF STATE BECOMING GOVERNOR—SALARY AND DURATION OF TERM OF.—Under section 8 of article V of the constitution, upon the removal of the governor from office, or upon his death, resignation or inability to discharge the duties thereof, the secretary of state becomes governor, and, consequently, entitled to the salary appertaining to the office, and continues as such for the remainder of the term of the outgoing governor, although in the meantime he may cease to be secretary of state. *Chadwick* v. *Earhart, Secretary of State.* *Or.* 601.

See ASSIGNMENT, 3. 4; ELECTION; JUSTICES' COURT; POLICE COMMISSIONERS; STATE INDUSTRIAL SCHOOL.

PUBLIC POLICY.

See ASSIGNMENT, 3, 4.

RAILROADS.

1. EXPULSION OF PASSENGER FROM CAR—CONFLICT OF EVIDENCE—VERDICT.—As to the fact whether the plaintiff was rightfully expelled from the train of the defendant without unnecessary force and at a proper time, *held*, that the evidence was conflicting. and that a verdict founded thereon should not be disturbed. *Bland* v. *Southern Pacific Railroad Company.* *Cal.* 78.
2. RAILROAD—TICKET LIMITED AS TO TIME—RIGHTS OF PASSENGER.—A railroad ticket entitling the purchaser to a continued passage between two given points, if used within a certain time, is good for such continued passage, if the same be commenced within the time limited. *Lundy* v. *Central Pacific Railroad Company.* *Cal.* 613.

See COMMON CARRIERS, 1; NEGLIGENCE, 3, 7, 10.

REAL ACTIONS.

See VENUE, 2.

RECEIPT.

See COMMON CARRIERS, 1.

RECEIVER.

See APPEAL, 5,

RECLAMATION OF SWAMP LANDS.

See SWAMP LANDS.

RECORD.

See JURISDICTION, I.

RECORDING.

See MORTGAGE, 3.

REDEMPTION.

1. REDEMPTION BY TENANT IN COMMON—RIGHTS AND LIABILITIES OF COTENANTS.—A tenant in common of land, or his successor in interest, who redeems the whole of the common property from a sale under a judgment against all the cotenants, acquires thereby an equitable lien upon the interests of his cotenants for their just proportion of the money paid by him in effecting the redemption, and he may maintain an action to recover such proportion, and a decree to the effect that, in default of such payment, the interests of the cotenant in the land be foreclosed. *Calkins* v. *Steinbach.* *Cal.* 433.

2. THE SAME—EFFECT OF REDEMPTION BY JUDGMENT DEBTOR.—The effect attending a redemption of property sold subject to redemption, depends upon the character of the person making the redemption. If made by a "redemptioner," as that term is defined in subdivision 2 of section 701 of the code of civil procedure, and there be no further redemption within the statutory period, the redemptioner is entitled to a deed from the sheriff, conveying to him the interest of the judgment debtor therein. But if made by the judgment debtor or his successor in interest, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption and a note thereof on the margin of the certificate of sale. *Id.*

REFEREE.

See BILL OF EXCEPTIONS, 2, 3.

RELATION.

See WATER RIGHTS, 8.

RELEASE.

1. EXECUTION AND DELIVERY OF WRITTEN INSTRUMENT—CONSTRUCTION OF CODE.—The execution of a written instrument, within the meaning of section 448 of the code of civil procedure, includes its delivery. *Clark* v. *Childs.* *Cal.* 376.
2. RELEASE—DELIVERY—ESTOPPEL—ADMISSION OF DUE EXECUTION OF INSTRUMENT SET FORTH IN ANSWER.—A release which has never been delivered is not binding. And a defendant who sets up such release in his answer as a bar to the plaintiff's demand, and himself introduces evidence showing that the release was not in fact delivered, is estopped from claiming the benefit of the admission arising out of the plaintiff's failure to deny by affidavit the genuineness and due execution of the instrument. *Id.*

See NEGLIGENCE, 6.

REMOVAL OF CAUSES.

1. REMOVAL—CONTESTED QUESTION OF LAW.—Where a case has been removed to the circuit court under the act of Congress of 1875, on the ground that the suit arose under the constitution or laws of the United States, it will be remanded to the state court, unless it affirmatively appears from the facts alleged in the record that some contested question of law will arise, upon the constitution or laws of the United States. *McFadden et al.* v. *Robinson et al. (U. S. Cir. Ct.)* *Cal.* 201.
2. REMOVAL—FACTS MUST BE STATED IN PETITION.—A petition for removal of a suit from a state to a national court, on the ground that it arises under the laws of the United States, must state the facts, and point out the contested construction or question arising thereon, which are claimed to give the national court jurisdiction, so that the court can determine for itself, from the facts stated, the question of jurisdiction. *Hambleton* v. *Duham et al. (U. S. Cir. Ct.)* *Cal.* 589.
3. MUST BE A CONTROVERSY AS TO CONSTRUCTION.—A suit cannot be removed under the second section of the act of 1875 simply because, in its progress, a construction of a law of the United States may be necessary, unless it in part, at least, arises out of a controversy in regard to the effect or operation of some provision in the law upon the facts involved, and the court should be able to determine from the facts stated that such controversy will arise upon the facts. *Id.*
4. INFORMATION AND BELIEF.—Whether facts stated on information and belief sufficient, at least, doubtful. *Id.*

REMOVAL AND SUSPENSION FROM THE BAR.

See ATTORNEYS, 2, 3.

RENT.

See LANDLORD AND TENANT; LEASE, 5.

REPLEVIN.

1. REPLEVIN—DEMAND—EXECUTION—POSSESSION BY EXECUTION DEBTOR.—No demand is necessary in an action by the real owner to recover possession of personal property

levied upon under an execution against another, if at the time of the levy such property was not in the possession of the execution debtor. *Stone* v. *O'Brien*. *Col.* 243.

See CLAIM AND DELIVERY.

REPORTER'S NOTES.

See LARCENY, 6.

RESIDENCE.

See CHINESE RESTRICTION ACT, 10, 12; HOMESTEAD; SUMMONS, 4.

RESTRICTION ACT.

See CHINESE RESTRICTION ACT.

RES GESTÆ.

See EVIDENCE, 3; VENDOR AND VENDEE.

RIPARIAN RIGHTS.

See WATER RIGHTS, 1-5; EDITORIAL, 225.

ROADS.

See STREETS AND HIGHWAYS.

SALARY.

See ASSIGNMENT, 3, 4.

SALE.

1. CONTRACT OF SALE—BREACH OF MEASURE OF DAMAGES.—In an action by a vendee to recover for the breach of a contract of sale, where the articles contracted to be sold had no market value, the measure of damages is the actual loss sustained by the vendee by reason of his not receiving an advance or profit through agreements which he himself had made in reliance upon the fulfillment of his vendor's contract. *McKay* v. *Riley et al.* *Cal.* 47.
2. SALE OF REAL ESTATE BY BROKER—COMMISSIONS FOR SALE.—A broker, employed by the owner of certain real estate to sell the same at a stated price, if the sale be made within "a short time," is entitled to his commissions upon finding a purchaser within two weeks after the date of his employment, and before the property is withdrawn from the market. *Smith* v. *Fairchild et al.* *Col.* 211.
3. IMPLIED WARRANTY—SALE—CONTRACT OF SALE.—A mere contract of sale or agreement to sell does not imply a warranty. No warranty can be implied except in cases of sale. *Harley et al.* v. *Golden State and Miners' Iron Works.* *Cal.* 696.

See CONSIDERATION, 1; FRAUD, 4, 5; MORTGAGE, 3; STATUTE OF FRAUDS, 1.

SAN FRANCISCO.

1. SAN FRANCISCO LIABLE FOR SEWAGE DISCHARGE.—The city and county of San Francisco is liable for damages caused by the discharge of a public sewer, even if it was part of a plan adopted by the board of supervisors, that such sewer should be left open at the places through which its contents flowed. *Lehn* v. *City and County of San Francisco.* *Cal.* 353.
2. PRESENTATION OF CLAIM AGAINST COUNTY—STATUTES REQUIRING NOT APPLICABLE TO SAN FRANCISCO.—Section 4072 of the political code, requiring claims against counties to be presented to the board of supervisors before an action can be maintained thereon, has no application to the city and county of San Francisco. The act of 1855, requiring such presentation, even if applicable to the city and county of San Francisco, has been repealed by the political code. *Id.*

See ASSIGNMENT, 1; INTERPRETER; POLICE COMMISSIONERS; STREETS AND HIGHWAYS.

SELF DEFENSE.

See MURDER and MANSLAUGHTER.

SERVANT.

See MASTER AND SERVANT.

SERVICE OF PAPERS.

See APPEAL, 11, 13, 22; INFANTS, 2; PLEADING AND PRACTICE, 7; SUMMONS, 1-4.

SET-OFF.

See ASSIGNMENT, 1.

SHERIFF.

See APPEAL, 6.

SOUTHERN PACIFIC R. R. LAND GRANT.

See PUBLIC LANDS, 2-6.

SPECIAL LEGISLATION.

See CONSTITUTIONAL LAW.

STATE INDUSTRIAL SCHOOL.

1. STATE INDUSTRIAL SCHOOL—BOARD OF CONTROL OF—HOW APPOINTED.—The board of control of the state industrial school, as established by the act of February 12th, 1881, are not officers created by the constitution. The legislature has power to provide for the manner of making original appointments to such offices, the terms of office, how all vacancies shall be filled, and when the time of an incumbent appointed to fill a vacancy shall expire. *People* v. *Osborne*. *Col.* 457.
2. THE SAME—VACANCY IN—POWER OF GOVERNOR TO FILL.—A person who has been appointed to fill a vacancy in the board of control of the state industrial school, caused by the resignation of one of the members thereof, is entitled to hold such office in the same manner and for the same time that his predecessor might have held it, and until his successor shall be elected and qualified. While such incumbent so holds such office there is no vacancy, within the meaning of section 2 of the act of February 12th, 1881, which the governor is authorized to fill without the consent of the senate. *Id.*

STATEMENT OF CASE.

See APPEAL, 17, 22; NEW TRIAL, 7.

STATUTES.

1. SPECIAL STATUTE REFERRING TO EXISTING LAW—EFFECT OF REPEAL ON PRIOR STATUTE.—A local and special statute which adopts by reference, provisions relating to procedure in an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted. *Schwenke et al.* v. *Union Depot and Railroad Co.* *Col.* 321.
2. REPEAL OF STATUTE BY IMPLICATION—LEGISLATIVE INTENT.—The law does not favor the repeal of existing statutes by implication; they will not be adjudged to follow unless there is such a positive repugnancy that the two statutes cannot consistently stand together; the legislative intent to substitute the new for the old law must clearly appear; this intent is never *prima facie* presumed. And a strong repugnancy or clearer indication of legislative intent is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law. *Id.*
3. PATENT ISSUED UNDER REPEALED ACT IS VOID.—A patent to land showing on its face that it was issued under and in pursuance of an act of congress, which had been repealed prior to the application therefor is void, and may be collaterally attacked. *Id.*

4. DENVER TOWN SITE ACT NOT REPEALED.—The act of May, 1864, regarding the town site of Denver, was a local and special statute, and was not repealed by the repealing clause of the general town site act of July, 1864. Nor is there anything repugnant or inconsistent in the provisions of such acts. *Id.*

See CHINESE RESTRICTION ACT; EVIDENCE, 12.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—WRITTEN ADMISSIONS OF VERBAL CONTRACT.—Written admissions of a verbal contract of sale, signed by the party sought to be charged, are sufficient to take such contract out of the statute of frauds. *Murphy* v. *Helmrich et al.* *Cal.* 301.

2. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—POSTPONEMENT OF PRIOR MORTGAGE.—A promise, in writing, by a prior mortgagee to a subsequent mortgagee, that, in consideration of the latter's refraining from enforcing his mortgage, the former "will be responsible for whatever he (the mortgagor) owes you (the subsequent mortgagee); and will see that the same is paid," whether valid under the statute of frauds, as a promise to answer for the debt of another, or not, has the effect, in equity, of postponing the lien of the prior mortgage to that of the second. *Held*, also, that such promise, under the Colorado statute of frauds, was binding; that forbearance to enforce the mortgage was a good consideration; that the consideration need not be named in the promise, and that the description of the debt was sufficiently definite. *Sanders* v. *Barlow et al. (U. S. Cir. Ct.)* *Col.* 227.

3. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER.—An agreement between the treasurer of a mining company and a bank, whereby the former promised to remit to the latter the amount of all drafts drawn by the manager of the mining company on and paid by the bank, is not an agreement to answer for the debt of another and need not be in writing. *De Walt* v. *Hartzell et al.* *Col.* 572.

4. LIEN ON REAL ESTATE—AGREEMENT FOR MUST BE IN WRITING.—An agreement for the purpose of creating a lien upon real estate is void unless the same is in writing, subscribed by the party to be charged. In an action to enforce such lien it is not necessary to allege that the agreement was in writing. *Marshall* v. *Livermore Spring Water Company et al.* *Cal.* 631.

See EVIDENCE, 14: LEASE, 2.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—ANTICIPATION OF DEFENSE OF—STRIKING OUT ALLEGATIONS OF.—Averments of a complaint, in anticipation of a defense of the statute of limitations, will be stricken out on motion, if the complaint, without such averments, states a cause of action which is not barred by any existing statute. *Brooks* v. *Bates et al.* *Col.* 463.

2. STATUTE OF LIMITATIONS—TIME LIMITED FOR SUING ON DEATH OF PARTY.—A person in whose favor a cause of action has accrued, has the same length of time to bring suit thereon, notwithstanding the death of the party against whom such cause of action has accrued, as he would have had had such latter person lived. Section 23 of the act defining the time of commencing civil actions, does not limit the time in which an action can be brought, to one year from the death of such party, in all instances. The object of such an action is to prolong, not to curtail, the period for suing, given in other sections of the act. *Rickards* v. *Hutchinson.* *Nev.* 35.

3. STATUTE OF LIMITATIONS—ACTION UPON AN UNDERTAKING ON APPEAL.—The complaint alleged that on April 19th, 1867, one Littlefield recovered a judgment in the district court against Nichol and Weisse for the possession of a tract of land; that, on appeal to the supreme court, an undertaking was given by defendants, for the purpose of staying execution on said judgment, whereby defendants jointly and severally promised on the part of the then appellants Nichol and Weisse, that if said judgment was affirmed, the said appellants would pay the value of the use and occupation of the land recovered from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of $3,000; that said judgment was affirmed, and the remittitur was filed in the district court on January 30th, 1872; that the said land was conveyed to the plaintiff on November 23rd, 1870, and that said undertaking and all rights of action thereon were also then assigned to the plaintiff; that on the same day when said judgment was affirmed, the said Nichol brought an action against said Littlefield and others, and obtained an injunction restraining the defendants therein, including this plaintiff, from enforcing

said judgment, and said injunction continued in force until February 24th, 1876, when it was dissolved; (the court does not consider the effect of this injunction in its decision); the complaint then alleges the value of the use and occupation of said land, and the damage sustained by him therefor, and prays judgment for such amount. The action was commenced on September 7th, 1876. The defendants demurred to this complaint on the ground that the cause of action was barred by section 337 of C. C. P., and that it did not accrue within four years before the commencement of the action, the period of limitation mentioned in section 337 being four years. *Held*, that the order of the court below overruling this demurrer was not error. *Clark* v. *Smith et al.* *Cal.* 90.

4. THE SAME—WHEN THE CAUSE OF ACTION FOR USE AND OCCUPATION ACCRUES.—While the plaintiff might have commenced an action on such undertaking as soon as the judgment appealed from was affirmed, the cause of action for use and occupation is not complete at that time. The right of action only fully accrues when the use and occupation has been had. As against the defendants in the ejectment, each day's wrongful detention is a new cause of action, and the action for it is only barred when four years have elapsed after the right of action has become complete. If they continued in wrongful occupation they would be liable for the use and occupation during the period of four years before the action was commenced, but there could be no recovery for their use and occupation prior to that four years period. *Id.*

5. THE SAME—SURETIES ON THE UNDERTAKING.—As the position of the sureties on the undertaking in suit is analogous to that of guarantors, the same rule determines when the cause of action on the undertaking for the use and occupation accrues against them, and when the right of action against them is barred. *Id.*

6. LIMITATIONS.—A suit in equity may be maintained to enforce a security for a debt, although an action against the debtor directly upon the indebtedness is barred by lapse of time; and for such purpose the debt exists, notwithstanding the lapse of time. *Hickox* v. *Elliott et al.* (*U. S. Cir. Ct.*) *Or.* 397.

7. SUIT TO SET ASIDE A CONVEYANCE.—A suit in equity to set aside an assignment or conveyance of property made to hinder or delay creditors, should ordinarily be brought within the same time after the right accrues, as an action at law to recover possession of the same property. *Id.*

8. FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS—ABSENCE OF MORTGAGOR FROM STATE.—The absence of a mortgagor from the state does not suspend the running of the statute of limitations upon the mortgage as to creditors of the mortgagor, who have obtained attachment liens on the premises subsequent to the mortgage. *Watt* v. *Wright.* *Cal.* 622.

9. LOAN—TIME OF REPAYMENT—PRESUMPTION—STATUTE OF LIMITATIONS.—A loan of money is presumed to be repayable on demand, when no time for repayment is specified; and the statute of limitations commences to run against such loan from the date thereof. *Dorland* v. *Dorland.* *Cal.* 611.

10. PARTITION—STATUTE OF LIMITATIONS—EVIDENCE IN REBUTTAL.—The plaintiffs, in an action for partition, after proving that B. and S. were the owners of the premises in 1853, and that S. executed a deed to C., plaintiff's intestate ancestor, rested. The defendants then proved entry in 1867, by their grantor, under a deed from H., and subsequent continuous, open, notorious, exclusive and adverse possession. Plaintiffs then offered, in rebuttal, a judgment against B., and an execution, sale and sheriff's deed of B.'s interest to H., defendants' grantor. This evidence was objected to on the sole ground that it was not evidence in rebuttal, and should have been offered as part of plaintiff's case in chief. The court sustained the objection. *Held*, error, as such evidence was competent to show that H. acquired no title from B., who had been a joint owner with plaintiff's predecessor in interest, to the end that it might be determined whether the acts of defendants and their grantors had been sufficient to bar the plaintiff's right of recovery. *Hardy et al.* v. *Sexton et al.* *Cal.* 702.

See BANKRUPTCY, 1: ESTATES OF DECEASED PERSONS: GUARDIAN AND WARD, 2.

STOCK AND STOCKHOLDERS.

1. PURCHASE OF STOLEN STOCK CERTIFICATES—RIGHTS OF BONA FIDE PURCHASER.—Judgment and order reversed on authority of Barstow v. Savage Mining Company, 1 West Coast Rep., 116. *Swim* v. *Bernhard.* *Cal.* 525.

See CORPORATIONS 2-5: EVIDENCE, 11: PLEDGE, 1-2.

STREETS AND HIGHWAYS.

1. COUNTY ROAD—PROCEEDINGS TO OPEN—TERM OF COUNTY COURT.—The proper time for the county court to consider the report of the viewers, in proceedings to open a county road, is during the regular term of the court next ensuing after the plat and survey of said road have been delivered to the county clerk, and not during a special term. A claim for damages filed during such regular term is in time. *Tompkins* v. *Clackamas Co. Or.* 598.

2. GRADING STREET IN SAN FRANCISCO—ORDER FOR—NOTICE OF INTENTION.—The board of supervisors of San Francisco, upon the recommendation of the superintendent of streets, were authorized, under the statute of 1872, to give notice of their intention to order that Broadway, from the west line of Buchanan street to the west line of Webster street, be graded, without any petition therefor, when two blocks upon each side of the said portion of Broadway had been graded. *Dyer* v. *Heydenfeldt. Cal.* 585.

3. THE SAME—RECOMMENDATION THAT WORK BE DONE—FINDINGS.—In an action to enforce the lien of an assessment for such work, a finding that the same was ordered without the recommendation of the superintendent of streets is erroneous, when no such issue is raised by the pleadings, and neither party introduced any evidence thereon. *Id.*

4. DISMISSAL OF ACTION AS TO CERTAIN DEFENDANTS—PRACTICE.—The dismissal of such actions as to defendants not having any interest in the land assessed, is not error prejudicial to the other defendants. *Id.*

5. ACTION TO ENFORCE STREET ASSESSMENT—PARTIES DEFENDANT—HEIRS NEED NOT BE JOINED.—An action for the enforcement of the lien of a street assessment under section 17 of the act of April 1st, 1872, may be brought against an executrix, without joining the heirs, of a deceased person, although the latter are in fact the owners of the land assessed. Such heirs, if originally joined in the action, may be dismissed, and judgment rendered against the executrix. *Parker* v. *Bernal et al. Cal.* 428.

6. STREET ASSESSMENT—DENIAL OF OWNERSHIP—NONSUIT—DEMURRER.—In an action to enforce a street assessment, if the answer denies the allegations of the complaint as to the defendants' ownership of the property assessed, and the plaintiff introduces no evidence in support thereof, a nonsuit should be granted. A denial of such allegation, on information and belief, if not sufficiently certain, should be objected to by demurrer. *Harney* v. *McLeran et al. Cal.* 218.

7. STREET ASSESSMENT—JUDGMENT AFFIRMED.—*Dorland* v. *Bernal et al. Cal.* 381.

See NUISANCE, 3.

SUMMONS.

1. SERVICE OF SUMMONS BY PLAINTIFF—DEFAULT—JUDGMENT.—The service of a summons by plaintiff in an action, although specially deputized by the sheriff to make the same, is void, and a judgment by default entered upon such service is a nullity. *Tolnniges* v. *Drake et al. Col.* 253.

2. PROOF OF SERVICE OF SUMMONS—DEFAULT JUDGMENT, WHEN VOID.—Proof of service of summons in a case, by a person other than the sheriff, is a condition precedent to a judgment by default. If such proof is not made, as required by law, the court acquires no jurisdiction of the person of the defendant, and has no authority to render judgment against him. Such judgment would be null and void. *Lyons* v. *Cunninghom et al. Cal.* 294.

3. THE SAME—AFFIDAVIT MUST SHOW AGE OF PERSON SERVING.—The affidavit of service of summons, by a person other than a sheriff, must expressly state that, at the time of service, the person making the same was over the age of eighteen. It is not enough to state that such person is a "white male citizen of the United States," as that expression does not imply that he is an elector, and, consequently, over the age of twenty-one. *Id.*

4. AFFIDAVIT OF SERVICE OF SUMMONS—RESIDENCE OF DEFENDANT.—Where the affidavit of service of summons states that the defendant was served in a certain county, it will be presumed that he was a resident of such county. *Pellier* v. *Gillespie et al. Cal.* 500.

See INFANTS, 2.

SUPREME COURT.

1. SUPREME COURT JUDGES—POWER OF TO ISSUE WRITS IN VACATION.—The judges of the supreme court cannot, acting singly or in vacation, issue any of the writs enumer-

ated in section 3 of article VI of the constitution, or hear or determine the matters arising thereon. *In re Garvey. Col.* 247.

See APPEAL, 7, 8.

SURVEY.

See PUBLIC LANDS, 3, 6.

SWAMP LANDS.

1. RECLAMATION STATUTES NOT IN CONFLICT WITH UNITED STATES CONSTITUTION.—The statutes of this state, regulating the formation of reclamation districts, the levying of assessments, and the mode of collecting the same, are not in conflict with the fourteenth amendment of the United States constitution; nor are the same in violation of section 10, article I of said constitution, forbidding the passage of any law impairing the obligation of contracts, on the ground that the state, in accepting the grant under the "Arkansas Act," assumed the burden of reclaiming the land, and cannot impose this burden upon its grantees. *Reclamation District No.* 108 v. *Hagar. Cal.* 283, 288, 289. *Reclamation District* v. *Martin. Cal.* 289.
2. APPORTIONMENT OF ASSESSMENT—EQUALITY OF BURDEN OR BENEFIT.—Whether or not the mode of assessment is in accordance with proper apportionment, or equality of burden or benefit, is for the consideration of the legislature, in the absence of a palpable violation of private rights. In the present case, the court cannot say that the burdens to be borne are not equal in proportion to the benefits. *Id.*
3. SUCH ASSESSMENT MAY BE MADE PAYABLE IN GOLD COIN. *Id.*
4. BY-LAW OF ASSESSMENT DISTRICT—SUBSEQUENT ASSESSMENT.—A by-law of an assessment district, prohibiting an indebtedness to accrue, in excess of the amount of assessment levied, cannot invalidate an assessment levied in accordance with section 34 of the act of 1868. *Id.*
5. POWER OF TRUSTEES OF RECLAMATION DISTRICTS TO EMPLOY COUNSEL.—The trustees of reclamation districts are authorized to employ special counsel, other than the district attorney of their respective counties, in the prosecution of actions for the enforcement of assessments, and to provide for the payment of their services out of subsequent assessments. *Id.*
6. CONSTITUTIONALITY OF ASSESSMENT.—An assessment for the reclamation of swamp lands, although not made by a municipal corporation, is not unconstitutional. *Id.*
7. RECLAMATION DISTRICT—LANDS WITHIN OTHER COUNTY—POWER OF SUPERVISORS OVER.—The legislature may confer on the board of supervisors of one county the power to include within a reclamation district any lands within another county. *Id.*
8. ACTION TO ENFORCE ASSESSMENT—REAL PARTY IN INTEREST—RECLAMATION DISTRICT AS PLAINTIFF.—In an action to enforce an assessment for the reclamation of swamp lands, brought under the act of March 28th, 1868, the reclamation district is the real party in interest, and a judgment therein, rendered in favor of the plaintiff, if otherwise valid, will not be reversed, because such action was not brought in the name of the people. *Id.*
9. RECLAMATION LANDS—FORECLOSURE OF LIEN OF ASSESSMENT—PLAINTIFF—RES ADJUDICATA.—In an action to foreclose the lien of an assessment on reclamation lands, when the supreme court had reversed a judgment entered in favor of the defendant, after his demurrer had been sustained on the ground that the facts stated in the complaint did not constitute a cause of action, on a subsequent appeal in the same action it will not hold that the action was brought in the name of the wrong plaintiff, as, for example, in the name of the reclamation district, instead of in the name of the people. *Reclamation District No.* 3 v. *Goldman. Cal.* 97.
10. RECLAMATION DISTRICT—FORMATION OF—NOTICE OF MEETING.—The meeting for the reorganization of a reclamation district, under the act of March 28th, 1868, may be called by the swamp land clerk of the board of supervisors, as by the proviso to the forty-sixth section of such act the board is authorized to employ a clerk to attend to matters pertaining to swamp lands. *Id.*
11. THE SAME—DUE PROCESS OF LAW—NOTICE—ASSESSMENT.—An assessment for the reclamation of swamp lands, which, according to the law of this state, can only be enforced by suit against the tax-payer, and in which notice must be given to, and an opportunity afforded, him to question the validity of the assessment, is not an infringement upon the provision of the United States constitution, which declares that no state shall deprive any person of property without due process of law. *Id.*

12. THE SAME—FINDINGS—EVIDENCE—STATEMENT.—The finding that no statement, as required by the amended section 34 of the act of 1868, was ever presented by the board of trustees of the district to the board of supervisors, reviewed, and held not sustained by the evidence. *Id.*

13. THE SAME—ASSESSMENT OF LANDS NOT BENEFITED.—Lands lying within a reclamation district, which would not be benefited by a proposed assessment, need not be assessed. *Id.*

14. THE TRUSTEES OF A RECLAMATION DISTRICT HAVE DISCRETION to make trifling deviations from the approved plans, or deviations which would result in benefit. *Id.*

15. APPROVAL OF FORMATION OF DISTRICT—ADDITIONAL ASSESSMENT.—The formation of reclamation districts previously existing, and reorganized under the act of 1868, need not be approved by the board of supervisors of the county in which the district is situated. As to such district, the board of supervisors have power, whenever the tax levied is insufficient to pay for the reclamation, or for necessary repairs, to make additional levies of assessments, upon revised estimates furnished by the trustees. *Id.*

16. RECLAMATION OF SWAMP LANDS—ACTION TO ENFORCE ASSESSMENT—EVIDENCE THAT LANDS WERE NOT BENEFITED NOT ADMISSIBLE.—The board of supervisors, in hearing the petition for the formation of a reclamation district, and in making the order, has jurisdiction to determine what lands would be benefited by the proposed system of reclamation, and to include such lands within the district, and their determination cannot be inquired into; the trustees have authority to cause surveys, plans, location and estimates of the cost of the work to be made, and the commissioners have authority to assess upon each and every acre within the district, to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, it is not competent for the court below, in an action to enforce an assessment, to determine that certain lands assessed were not benefited, or that such benefit was not of the value of the assessment. *People* v. *Hagar*. *Cal.* 287.

TAXATION.

1. CONSTITUTION LAW—DOUBLE TAXATION.—The constitution of California does not authorize, but forbids, double taxation. *San Francisco* v. *J. W. Mackey (U. S. Cir. Ct.)* *Cal.* 407.

2. STOCK AND PROPERTY OF CORPORATION.—Taxing all the property of corporations to the corporation, and at the same time taxing the stock, which represents the property, to the holder, would be double taxation. *Id.*

3. STOCK OF DOMESTIC CORPORATION—TANGIBLE PROPERTY IN ANOTHER STATE.—Shares of stock, owned by a citizen and resident of the state of Nevada, in a California corporation, having its principal place of business in California, but whose tangible property is all situate and taxed in Nevada, are not taxable to the owner under the constitution and laws of California, in the state of California. The *situs* of the stock, in such cases, for the purposes of taxation, is the residence of the owner. *Id.*

4. SITUS OF MONEY CREDITS AND OTHER SOLVENT CREDITS—TAXATION.—There being no statutory provision to the contrary, the *situs* of money credits, and other solvent credits, for the purposes of taxation, is the residence of the owner or creditor. *Id.*

5. TAXATION OF RESIDENT OF NEVADA ON SOLVENT CREDITS.—A citizen and resident of Nevada is not taxable in California, under its constitution and laws, upon money credits and other solvent credits, not secured by mortgage, trust deeds, etc., due from citizens and residents of California. *Id.*

6. ASSESSMENT OF REAL PROPERTY—MISTAKE IN NAME OF OWNER.—In a suit against the owner of real property to recover the tax levied on it, a mistake in the name of the owner, in the assessment of the land upon which the tax is based, does not render the assessment thereof invalid, nor furnish any defense to the suit. *Lake County* v. *Sulphur Bank Quicksilver Mining Company*. *Cal.* 186.

7. ASSESSMENT OF PERSONAL PROPERTY—MISTAKE IN NAME OF OWNER.—But a mistake in the name of the owner in the assessment of personal property upon which a tax is based, unless the mistaken name is legally equivalent to the true name, does invalidate the assessment, and constitute a defense to a suit brought against the owner to recover such tax. *Id.*

8. THE SAME.—Tax proceedings must be in strict accordance with the statute. Without an assessment all subsequent proceedings are nullities. An assessment of personal property to a named person, other than the owner, is absolutely void. *Id.*

9. THE SAME.—An assessment of personal property was made to "Sulphur Bank Q. M. Co.. F. Fiedler, agent." *Held*, that this was not equivalent to or the same thing as "Sulphur Bank Quicksilver Mining Company," the true name of the owner, and the assessment and tax based thereon were void. *Id.*

10. ASSESSMENT OF REAL PROPERTY—DESCRIPTION OF THE LAND.—Under secs. 3650-3658 of the political code, it would seem to be a sufficient assessment of a tract, where such tract does not contain more than 640 acres, to describe it by stating the congressional subdivisions contained in it where it has been sectionized. The description, "a tract of land entered by Frazier in section 13, township 13, range 7," is fatally defective. *Id.*

11. LEVY OF TAXES BY BOARD OF SUPERVISORS.—When a board of supervisors duly adopted an order "that they have this day fixed the rate of county and district tax to be levied and collected upon each one hundred dollars of the assessed valuation of the county, etc., * * * as follows, to wit: state fund, 0.64; general county fund, 0.40; county school fund, 0.37, etc. * * * Total state, county and district tax, 1880-81, $2.75." *Held*, that the omission of the word "cents" from the various items of the levy did not invalidate the order levying the tax nor render the levy ineffectual. Taking all the order together these various items plainly mean so many "cents" upon each one hundred dollars. *Id.*

12. ORIGINAL ASSESSMENT ROLL—EVIDENCE.—Where a board of supervisors have dispensed with a duplicate assessment roll, the original assessment roll is *prima facie* evidence in the same manner that the duplicate would have been. *Id.*

13. IN AN ASSESSMENT FOR TAXES THE ABBREVIATION "DOLLS" is equivalent to dollars. *Salisbury* v. *Shirley*. *Cal.* 688.

14. CONSTITUTIONALITY OF A STATUTE IMPOSING A TAX.—The following amendment of chapter 88, of the general laws of Colorado, was enacted by the legislature in 1879: "The board of county commissioners of the respective counties of the state may levy a property tax for road purposes, which shall not exceed one dollar on each one hundred dollars, to be levied and collected in the same manner and at the same time as other property taxes are levied and collected in each year; but all property included within the limits of incorporated towns or cities shall not be subject to the tax. *Held*, that the last clause of this statute, purporting to exempt property within incorporated towns and cities, is unconstitutional and void, being in conflict with provisions of the state constitution, which declares that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax," and that "all laws exempting from taxation property other than hereinbefore mentioned, shall be void." And such statute must be construed and enforced as though such final clause had never been enacted. *Board of County Commissioners* v. *Owen et al.* *Col.* 157.

15. TAXATION—ASSESSMENT FOR SEWER—NOTICE OF APPORTIONMENT—DUE PROCESS OF LAW.—The legislature, under the constitution of Colorado, has power to provide for an assessment of a tax for a sewer upon the property within a given district according to the area, and not according to the value of the property. In such case the apportionment of the tax is a mere mathematical calculation, and a failure to give the taxpayer notice thereof, when an opportunity to be heard concerning all other steps in the tax proceeding is given, is not a denial of due process of law. *Gillette et al.* v. *City of Denver (U. S. Cir. Ct.)* *Col.* 206. *Brown* v. *Denver (U. S. Cir. Ct.)* *Col.* 210.

16. ENFORCEMENT OF TAX, WHEN ENJOINED—IRREGULARITIES IN TAX.—Equity will not enjoin the enforcement of a tax, for mere irregularities in the exercise of a constitutional taxing power, or for excess in the amount of the tax, unless it be alleged and shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered, without demanding a receipt in full. *Id.*

17. STATE BOARD OF EQUALIZATION—ASSESSMENT OF MORTGAGES—EQUALIZATION OF.—Under section 9, article XIII, of the constitution, the state board of equalization, in raising the assessment roll of a county, has power to increase the valuation of mortgages as already assessed. *Schroeder* v. *Grady, Tax Collector, etc.* *Cal.* 627.

See LEASE, 5.

TAX COLLECTOR.

See PROHIBITION, 2.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—MEASURE OF DAMAGES AGAINST.—A telegraph company is liable for whatever loss naturally and in the usual course of things follows from its failure to transmit a message promptly and correctly, although such message was written in cipher or was otherwise unintelligible to the company. *Hart* v. *Western Union Telegraph Co.* *Cal.* 37.

2. THE SAME—STIPULATION LIMITING LIABILITY—NEGLIGENCE.—A stipulation printed on a blank upon which a telegraph message is sent, purporting to exempt the telegraph company from all liability for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of consideration. Such company cannot stipulate against or limit its liability for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments. Such company is exempt only for errors arising from causes beyond its control, and the burden of showing such exemption rests upon it, in an action to recover for an alleged loss. *Id.*

3. THE SAME—EXEMPTION FROM LIABILITY—ATMOSPHERIC INFLUENCES.—A telegraph company is not liable for a loss arising from a mistake in the transmission of a message when such mistake was occasioned by a break in the electric current, produced by atmospheric influences beyond the company's control. *Id.*

TENANT.

See LANDLORD AND TENANT.

TENANTS IN COMMON.

1. THE POSSESSION OF ONE TENANT IN COMMON IS PRESUMED TO BE FOR THE BENEFIT of all. *McNeil* v. *First Congregational Soc.* *Cal.* 421.

See EJECTMENT, 2, 3; REDEMPTION, 1, 2.

TENDER.

1. TENDER—OBJECTIONS TO SUFFICIENCY OF—WAIVER.—Objections to the sufficiency of the amount tendered must be made at the time of tender, or the same are waived. *Oakland Bank of Savings* v. *Applegarth.* *Cal.* 605.

2. ACTION FOR PART RESCISSION OF CONTRACT—OFFER TO REFUND AMOUNT DECREED, WHEN DISPENSES WITH TENDER.—Where a plaintiff comes into a court of equity asking for a rescission, in whole or in part, of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication, based on evidence of facts independent of the terms of the contract, an offer to refund such sum as shall be decreed, is a sufficient offer to do equity. In such case, the plaintiff cannot determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action. *Sutter Street R. R.* v. *Baum.* *Cal.* 291.

TORTS.

See CORPORATIONS, 1.

TRADE MARKS.

1. TRADE MARK—EXCLUSIVE USE OF—RECORDING WITH SECRETARY OF STATE.—Subsequent to the adoption of the code, a right to the exclusive use of a trade mark or name, in this state, cannot be acquired, unless it be filed for record with the secretary of state. *Whittier et al.* v. *Dietz.* *Cal.* 356.

TRANSCRIPT ON APPEAL.

See APPEAL; 14, 18–20; NEW TRIAL, 7.

TRUST DEED.

1. JUDGMENT AND ORDER AFFIRMED upon authority of Savings and Loan Society v. Bateman, 10 Pac. C. L. J., 795. *Savings and Loan Soc.* v. *Durkin et al.* *Cal.* 534.

TRUSTS.

1. PARTIES TO A SUIT.—Where a trustee sues to recover possession of the trust property for the benefit of the *cestui que trust*, merely or simply to enforce his right thereto against third persons, such *cestui que trust* is not a necessary party thereto; and in a suit to set aside an assignment or conveyance made to hinder or delay creditors, the grantor or assignor therein, if he has parted with all his right in the property, is not a necessary party either. *Hickox* v. *Elliott (U. S. Cir. Ct.)* *Or.* 397.

See CONSIDERATION, 1; VENUE, 4; WILLS, 1, 2.

ULTRA VIRES.

See CORPORATIONS, 3.

UNDERTAKING ON APPEAL.

See APPEAL, 15, 16; STATUTE OF LIMITATIONS, 3.

UNITED STATES COURTS.

See ABATEMENT, 2.

USE AND OCCUPATION.

See STATUTE OF LIMITATIONS, 3, 4.

VALUE.

See EVIDENCE, 11; LARCENY, 2.

VARIANCE.

See GOODS SOLD AND DELIVERED; NEGLIGENCE, 12.

VENDOR AND VENDEE.

1. STATEMENTS OF A VENDOR OF PERSONAL PROPERTY MADE AFTER A SALE thereof, are not part of the *res gestæ*, and are inadmissible in an action against a vendee. *Garlick* v. *Bowers*. *Cal.* 501.

See CONSIDERATION, 1; FRAUD, 4.

VENUE.

1. ACTIONS AGAINST CORPORATIONS—VENUE—CONSTITUTIONAL LAW.—Section 16 of article XII of the constitution, providing that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases," is applicable to actions arising from torts as well as from contracts. Such provision is not in conflict with the fourteenth amendment to the constitution of the United States. *Lewis et al.* v. *S. P. C. R. R. Co.* *Cal.* 615.

2. PLACE OF TRIAL OF REAL ACTIONS—CONSTRUCTION OF CONSTITUTION.—Section 5, article VI, of the constitution of 1879, requiring "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated," is not retrospective in its operation. Consequently, the superior court of the city and county of San Francisco, as the successor of the district court, has jurisdiction to hear and determine an action for the foreclosure of a mortgage, pending in such latter court at the adoption of the present constitution, although the land affected thereby is situated in another county. *Watt et al.* v. *Wright et al.* *Cal.* 622.

3. ACTION TO SET ASIDE FRAUDULENT CONVEYANCE—PLACE OF TRIAL OF.—An action by an execution creditor to set aside a deed made by his execution debtor, upon the ground that the same was fraudulently executed, is not an action to enforce a lien

upon real property, and need not be commenced in the county where the land is situated. *Beach* v. *Hodgdon et al.* *Cal.* 610.

4. ACTION TO ENFORCE TRUST ON REAL AND PERSONAL ESTATE—PLACE OF TRIAL.—An action to enforce a trust on both real and personal estate, is not based on a lien, nor is it a suit to enforce a lien. Such action may be brought and prosecuted in the county in which the trustee resides, although the real estate subject to the trust is situated in another county. *Le Breton, adm'r, etc.* v. *Superior Court.* *Cal.* 142.

5. CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.—The ruling of the trial court on a motion for a change of venue on account of the convenience of witnesses, when the motion is contested on the same ground, will not be interfered with unless there has been an abuse of discretion. *Bean* v. *Gregg.* *Col.* 241.

6. CHANGE OF VENUE—TIME FOR FILING AFFIDAVIT OF MERITS AND DEMAND.—In an application for a change of venue the affidavit of merits and demand that the trial be had in the proper manner, filed by the defendant before he answers or demurs, are of no avail. Such affidavit and demand must be filed when the defendant appears and answers or demurs. *Nicoll* v. *Nicoll.* *Cal.* 219.

7. THE SAME—AFFIDAVITS OF MERITS MADE BY ATTORNEY.—Such affidavit may be made by the attorney for the defendant if it states a sufficient reason for the defendant's not making it. *Id.*

8. CHANGE OF VENUE WHEN DEFENDANTS RESIDE IN DIFFERENT COUNTIES.—A change of the place of trial of an action, to the county in which most of the defendants reside, may be had, when all of the defendants who were served or have appeared unite in a demand for a change. *Rathgeb* v. *Tiscornia et al.* *Cal.* 375.

9. THE SAME—DISQUALIFICATION OF JUDGE AS AFFECTING RIGHT TO CHANGE.—The disqualification of the judge of the county, to which such change is demanded, to try the case, does not affect the right of the defendants to have it transferred to such county for trial. *Id.*

10. DEMAND FOR CHANGE OF VENUE—AUTHORITY OF ATTORNEY TO MAKE.—An attorney has authority, at the time he appears for the defendants, to sign a demand for a change of the place of trial. *People ex rel. etc.*, v. *Larue et al.* *Cal.* 697.

11. CHANGE OF VENUE—AFFIDAVIT OF MERITS, WHAT MUST STATE.—An affidavit of merits, for use on a motion for a change of the place of trial, must aver that the affiant has fully stated *the case* to his counsel. An averment that he had fully stated *his case* and the facts constituting *his defense* in the action, is not sufficient. *Id.*

12. CHANGE OF VENUE—PREJUDICE OF JUDGE—AFFIDAVIT OF.—An affidavit for a change of venue on the ground of prejudice of the judge and of the inhabitants of the county, must state the facts showing such prejudice. A mere averment of prejudice is not enough. *De Walt* v. *Hartzell.* *Col.* 572.

VERIFICATION.

See CONTEMPT, 1.

WAIVER.

See INSURANCE, 4; TENDER, 1.

WARD.

See GUARDIAN AND WARD.

WARRANTY.

1. BREACH OF WARRANTY OF TITLE—MEASURE OF DAMAGES.—The measure of damages in an action for breach of warranty of title to real estate is the value of the property at the time of sale, to be ascertained by the purchase price, with interest thereon and reasonable costs, if any were expended in defense of the title by the plaintiff. *Hoffman* v. *Bosch.* *Nev.* 36.

See SALE, 3.

WATER RIGHTS.

1. RIGHTS OF GRANTEE IN NATURAL STREAMS AT COMMON LAW IN CALIFORNIA.—Whatever limitations there may be upon the right which the grantee of a parcel of land acquires in a natural stream of water running over it, it is well settled, both by the

common law and in this state, that the right itself is incident to the property in the land, and passes by a grant thereof, as an incorporeal hereditament. *Lux et al.* v. *Haggin et al.* *Cal.* 256, 275.

2. THE SAME—APPROPRIATION OF WATER—CONSTRUCTION OF CODE AND UNITED STATES STATUTES.—One who purchases land from the United States, or from this state, after the whole or some part of the water of a natural water-course, running through such land, has been appropriated by some one else, under the act of Congress of July 26th, 1866, or under the provisions of title VIII of the civil code of this state, takes such land subject to the rights acquired by such prior appropriator. Such provisions of the civil code only affect water flowing over lands owned by this state or by the United States. They do not affect the rights of riparian proprietors, (1) because it is expressly declared that they shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired therein, except for a public use, and not then until just compensation has been made. *Id.*
3. THE SAME—APPROPRIATION OF WATER ON PUBLIC LAND AFTER DATE OF PURCHASE.—The right of a purchaser of public lands of this state to have a natural stream of water flowing thereon, at the date of his purchase, continue to flow *currere solebat*, is not affected by an appropriation of the waters of such stream, made subsequent to the date of his purchase, but prior to the date of his patent. *Id.*
4. RIGHTS OF RIPARIAN PROPRIETORS, AS BETWEEN THEMSELVES AND OTHERS.—A riparian proprietor has a right to the reasonable use of water, flowing in a natural stream over his land. What is a reasonable use, in any given case, depends upon the facts and circumstances of that case. But it is only as between riparian proprietors that the question can ever arise. One, not a riparian proprietor, has no right to interfere, in any way, with the natural flow of a stream of water over a riparian proprietor's land. *Id.*
5. THE SAME—ESTOPPEL IN PAIS—WHAT AMOUNTS TO.—A riparian proprietor is not estopped from disputing the validity of an appropriation of the waters of a stream flowing through his land, by the mere fact that he knew of the intention of the appropriator to divert such water before any was diverted, and of the construction of works for such purpose, but made no objection thereto before bringing an action to prevent the same. *Id.*
6. APPROPRIATION OF WATER—RIGHTS OF APPROPRIATORS.—As between two appropriators of the waters of the same stream, the one whose appropriation was first made, has the prior right to the use of such water. *Simpson* v. *Williams.* *Nev.* 580.
7. THE SAME—AMOUNT OF WATER TO WHICH APPROPRIATOR IS ENTITLED.—The amount of water to which a prior appropriator is entitled, is limited to the amount actually applied to the purpose for which the appropriation was made. *Id.*
8. APPROPRIATION OF WATER—RIGHT OF, WHEN BEGINS—RELATION.—In determining the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water. The right to the use of the water relates back to the time when the appropriator begins his dam, ditch, flume, or other appliance, by means of which the appropriation is effected; provided, the enterprise is prosecuted with reasonable diligence. Under the circumstances of this case, a delay for one season, in using the water, was not unreasonable. *Irwin* v. *Strait et al.* *Nev.* 582.

See LARCENY, 7.

WILLS.

1. WILL CONSTRUED—TRUSTS—RECOMMENDATION AND REQUEST.—The will of David D. Colton contains this provision: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seized, or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." *Held*, that this provision is not an absolute gift or bequest in trust for the mother and sister of the testator—that is, not an imperative command to make the provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of his surviving wife. *Colton* v. *Colton.* *(U. S. Cir. Ct.)* *Cal.* 11, 18.
2. TRUSTS ARISING FROM PRECATORY WORDS IN WILLS.—The conditions necessary to raise a trust from words of recommendation and request in a will discussed. *Id.*
3. RULES FOR CONSTRUCTION OF WILLS under the civil code of California stated and applied. *Id.*

4. DEVISE—CONSTRUCTION OF—SALE, AND REPURCHASE OF LAND DEVISED.—A testator devises to his son "all that portion of real estate he has enclosed and now has in his possession, supposed to contain one hundred and forty acres, more or less." By other provisions of the will an intention was manifested to dispose of all the property the testator possessed. Subsequent to the date of the will he sold a portion of the land devised, and afterward bought the same back. *Held*, that the portion so sold and bought back passed to the son under the foregoing devise. *In re Estate of Hopper*. *Cal.* 368.

5. IDENTIFICATION OF LAND DEVISED—EVIDENCE TO SHOW.—In an action by a devisee to recover the value of a tract of land distributed to him, but which had been lost to the estate of the testator by the inexcusable negligence of an executor, extrinsic evidence is admissible to identify the land described in the complaint by metes and bounds, with that described in the inventory and decree of distribution. *Wheeler* v. *Bolton*. *Cal.* 370.

6. JUDGMENT AFFIRMED for the reasons given in the opinion of the department, reported in 3 West Coast Rep., 426. *Dunne et al.* v. *Dunne*. *Cal.* 523.

WITNESSES.

1. IMPEACHMENT OF WITNESS—CONVICTION, HOW PROVED.—Under section 2051 of the code of civil procedure, a witness may be impeached by asking him if he has been convicted of a felony. The conviction of a misdemeanor, however, must be proved by the record of conviction. *People* v. *Schenick*. *Cal.* 77.

See NEW TRIAL, 4.

WRIT OF REVIEW.

See CERTIORARI.

DIGEST OF CASES

REPORTED IN

VOLUMES 1, 2, 3, 4.

SELF DEFENSE.

See MURDER and MANSLAUGHTER.

SERVANT.

See MASTER AND SERVANT.

SERVICE OF PAPERS.

See APPEAL, 11, 13, 22; INFANTS, 2; PLEADING AND PRACTICE, 7; SUMMONS, 1-4.

SET-OFF.

See ASSIGNMENT, 1.

SHERIFF.

See APPEAL, 6.

SOUTHERN PACIFIC R. R. LAND GRANT.

See PUBLIC LANDS, 2-6.

SPECIAL LEGISLATION.

See CONSTITUTIONAL LAW.

STATE INDUSTRIAL SCHOOL.

1. STATE INDUSTRIAL SCHOOL—BOARD OF CONTROL OF—HOW APPOINTED.—The board of control of the state industrial school, as established by the act of February 12th, 1881, are not officers created by the constitution. The legislature has power to provide for the manner of making original appointments to such offices, the terms of office, how all vacancies shall be filled, and when the time of an incumbent appointed to fill a vacancy shall expire. *People* v. *Osborne*. *Col.* 457.
2. THE SAME—VACANCY IN—POWER OF GOVERNOR TO FILL.—A person who has been appointed to fill a vacancy in the board of control of the state industrial school, caused by the resignation of one of the members thereof, is entitled to hold such office in the same manner and for the same time that his predecessor might have held it, and until his successor shall be elected and qualified. While such incumbent so holds such office there is no vacancy, within the meaning of section 2 of the act of February 12th, 1881, which the governor is authorized to fill without the consent of the senate. *Id.*

STATEMENT OF CASE.

See APPEAL, 17, 22; NEW TRIAL, 7.

STATUTES.

1. SPECIAL STATUTE REFERRING TO EXISTING LAW—EFFECT OF REPEAL ON PRIOR STATUTE.—A local and special statute which adopts by reference, provisions relating to procedure in an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted. *Schwenke et al.* v. *Union Depot and Railroad Co.* *Col.* 321.
2. REPEAL OF STATUTE BY IMPLICATION—LEGISLATIVE INTENT.—The law does not favor the repeal of existing statutes by implication; they will not be adjudged to follow unless there is such a positive repugnancy that the two statutes cannot consistently stand together; the legislative intent to substitute the new for the old law must clearly appear; this intent is never *prima facie* presumed. And a strong repugnancy or clearer indication of legislative intent is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law. *Id.*
3. PATENT ISSUED UNDER REPEALED ACT IS VOID.—A patent to land showing on its face that it was issued under and in pursuance of an act of congress, which had been repealed prior to the application therefor is void, and may be collaterally attacked. *Id.*

4. DENVER TOWN SITE ACT NOT REPEALED.—The act of May, 1864, regarding the town site of Denver. was a local and special statute, and was not repealed by the repealing clause of the general town site act of July, 1864. Nor is there anything repugnant or inconsistent in the provisions of such acts. *Id.*

See CHINESE RESTRICTION ACT; EVIDENCE, 12.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—WRITTEN ADMISSIONS OF VERBAL CONTRACT.—Written admissions of a verbal contract of sale, signed by the party sought to be charged, are sufficient to take such contract out of the statute of frauds. *Murphy* v. *Helmrich et al.* *Cal.* 301.

2. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—POSTPONEMENT OF PRIOR MORTGAGE.—A promise, in writing, by a prior mortgagee to a subsequent mortgagee, that, in consideration of the latter's refraining from enforcing his mortgage, the former "will be responsible for whatever he (the mortgagor) owes you (the subsequent mortgagee); and will see that the same is paid," whether valid under the statute of frauds, as a promise to answer for the debt of another, or not, has the effect, in equity. of postponing the lien of the prior mortgage to that of the second. *Held*, also, that such promise, under the Colorado statute of frauds, was binding; that forbearance to enforce the mortgage was a good consideration; that the consideration need not be named in the promise, and that the description of the debt was sufficiently definite. *Sanders* v. *Barlow et al.* (*U. S. Cir. Ct.*) *Col.* 227.

3. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER.—An agreement between the treasurer of a mining company and a bank, whereby the former promised to remit to the latter the amount of all drafts drawn by the manager of the mining company on and paid by the bank, is not an agreement to answer for the debt of another and need not be in writing. *De Walt* v. *Hartzell et al.* *Col.* 572.

4. LIEN ON REAL ESTATE—AGREEMENT FOR MUST BE IN WRITING.—An agreement for the purpose of creating a lien upon real estate is void unless the same is in writing. subscribed by the party to be charged. In an action to enforce such lien it is not necessary to allege that the agreement was in writing. *Marshall* v. *Livermore Spring Water Company et al.* *Cal.* 631.

See EVIDENCE, 14: LEASE, 2.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—ANTICIPATION OF DEFENSE OF—STRIKING OUT ALLEGATIONS OF.—Averments of a complaint, in anticipation of a defense of the statute of limitations, will be stricken out on motion, if the complaint, without such averments, states a cause of action which is not barred by any existing statute. *Brooks* v. *Bates et al.* *Col.* 463.

2. STATUTE OF LIMITATIONS—TIME LIMITED FOR SUING ON DEATH OF PARTY.—A person in whose favor a cause of action has accrued, has the same length of time to bring suit thereon, notwithstanding the death of the party against whom such cause of action has accrued, as he would have had had such latter person lived. Section 23 of the act defining the time of commencing civil actions, does not limit the time in which an action can be brought, to one year from the death of such party, in all instances. The object of such an action is to prolong, not to curtail, the period for suing, given in other sections of the act. *Rickards* v. *Hutchinson.* *Nev.* 35.

3. STATUTE OF LIMITATIONS—ACTION UPON AN UNDERTAKING ON APPEAL.—The complaint alleged that on April 19th, 1867, one Littlefield recovered a judgment in the district court against Nichol and Weisse for the possession of a tract of land; that, on appeal to the supreme court, an undertaking was given by defendants, for the purpose of staying execution on said judgment, whereby defendants jointly and severally promised on the part of the then appellants Nichol and Weisse, that if said judgment was affirmed, the said appellants would pay the value of the use and occupation of the land recovered from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of $3,000; that said judgment was affirmed, and the remittitur was filed in the district court on January 30th, 1872; that the said land was conveyed to the plaintiff on November 23rd, 1870, and that said undertaking and all rights of action thereon were also then assigned to the plaintiff; that on the same day when said judgment was affirmed, the said Nichol brought an action against said Littlefield and others, and obtained an injunction restraining the defendants therein, including this plaintiff, from enforcing

ated in section 3 of article VI of the constitution, or hear or determine the matters arising thereon. *In re Garvey. Col.* 247.

See APPEAL, 7, 8.

SURVEY.

See PUBLIC LANDS, 3, 6.

SWAMP LANDS.

1. RECLAMATION STATUTES NOT IN CONFLICT WITH UNITED STATES CONSTITUTION.—The statutes of this state, regulating the formation of reclamation districts, the levying of assessments, and the mode of collecting the same, are not in conflict with the fourteenth amendment of the United States constitution; nor are the same in violation of section 10, article I of said constitution, forbidding the passage of any law impairing the obligation of contracts, on the ground that the state, in accepting the grant under the "Arkansas Act," assumed the burden of reclaiming the land, and cannot impose this burden upon its grantees. *Reclamation District No.* 108 v. *Hagar. Cal.* 283, 288, 289. *Reclamation District* v. *Martin. Cal.* 289.
2. APPORTIONMENT OF ASSESSMENT—EQUALITY OF BURDEN OR BENEFIT.—Whether or not the mode of assessment is in accordance with proper apportionment, or equality of burden or benefit, is for the consideration of the legislature, in the absence of a palpable violation of private rights. In the present case, the court cannot say that the burdens to be borne are not equal in proportion to the benefits. *Id.*
3. SUCH ASSESSMENT MAY BE MADE PAYABLE IN GOLD COIN. *Id.*
4. BY-LAW OF ASSESSMENT DISTRICT—SUBSEQUENT ASSESSMENT.—A by-law of an assessment district, prohibiting an indebtedness to accrue, in excess of the amount of assessment levied, cannot invalidate an assessment levied in accordance with section 34 of the act of 1868. *Id.*
5. POWER OF TRUSTEES OF RECLAMATION DISTRICTS TO EMPLOY COUNSEL.—The trustees of reclamation districts are authorized to employ special counsel, other than the district attorney of their respective counties, in the prosecution of actions for the enforcement of assessments, and to provide for the payment of their services out of subsequent assessments. *Id.*
6. CONSTITUTIONALITY OF ASSESSMENT.—An assessment for the reclamation of swamp lands, although not made by a municipal corporation, is not unconstitutional. *Id.*
7. RECLAMATION DISTRICT—LANDS WITHIN OTHER COUNTY—POWER OF SUPERVISORS OVER.—The legislature may confer on the board of supervisors of one county the power to include within a reclamation district any lands within another county. *Id.*
8. ACTION TO ENFORCE ASSESSMENT—REAL PARTY IN INTEREST—RECLAMATION DISTRICT AS PLAINTIFF.—In an action to enforce an assessment for the reclamation of swamp lands, brought under the act of March 28th, 1868, the reclamation district is the real party in interest, and a judgment therein, rendered in favor of the plaintiff, if otherwise valid, will not be reversed, because such action was not brought in the name of the people. *Id.*
9. RECLAMATION LANDS—FORECLOSURE OF LIEN OF ASSESSMENT—PLAINTIFF—RES ADJUDICATA.—In an action to foreclose the lien of an assessment on reclamation lands, when the supreme court had reversed a judgment entered in favor of the defendant, after his demurrer had been sustained on the ground that the facts stated in the complaint did not constitute a cause of action, on a subsequent appeal in the same action it will not hold that the action was brought in the name of the wrong plaintiff, as, for example, in the name of the reclamation district, instead of in the name of the people. *Reclamation District No.* 3 v. *Goldman. Cal.* 97.
10. RECLAMATION DISTRICT—FORMATION OF—NOTICE OF MEETING.—The meeting for the reorganization of a reclamation district, under the act of March 28th, 1868, may be called by the swamp land clerk of the board of supervisors, as by the proviso to the forty-sixth section of such act the board is authorized to employ a clerk to attend to matters pertaining to swamp lands. *Id.*
11. THE SAME—DUE PROCESS OF LAW—NOTICE—ASSESSMENT.—An assessment for the reclamation of swamp lands, which, according to the law of this state, can only be enforced by suit against the tax-payer, and in which notice must be given to, and an opportunity afforded, him to question the validity of the assessment, is not an infringement upon the provision of the United States constitution, which declares that no state shall deprive any person of property without due process of law. *Id.*

12. THE SAME—FINDINGS—EVIDENCE—STATEMENT.—The finding that no statement, as required by the amended section 34 of the act of 1868, was ever presented by the board of trustees of the district to the board of supervisors, reviewed, and held not sustained by the evidence. *Id.*

13. THE SAME—ASSESSMENT OF LANDS NOT BENEFITED.—Lands lying within a reclamation district, which would not be benefited by a proposed assessment, need not be assessed. *Id.*

14. THE TRUSTEES OF A RECLAMATION DISTRICT HAVE DISCRETION to make trifling deviations from the approved plans, or deviations which would result in benefit. *Id.*

15. APPROVAL OF FORMATION OF DISTRICT—ADDITIONAL ASSESSMENT.—The formation of reclamation districts previously existing, and reorganized under the act of 1868, need not be approved by the board of supervisors of the county in which the district is situated. As to such district, the board of supervisors have power, whenever the tax levied is insufficient to pay for the reclamation, or for necessary repairs, to make additional levies of assessments, upon revised estimates furnished by the trustees. *Id.*

16. RECLAMATION OF SWAMP LANDS—ACTION TO ENFORCE ASSESSMENT—EVIDENCE THAT LANDS WERE NOT BENEFITED NOT ADMISSIBLE.—The board of supervisors, in hearing the petition for the formation of a reclamation district, and in making the order, has jurisdiction to determine what lands would be benefited by the proposed system of reclamation, and to include such lands within the district, and their determination cannot be inquired into; the trustees have authority to cause surveys, plans, location and estimates of the cost of the work to be made, and the commissioners have authority to assess upon each and every acre within the district, to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, it is not competent for the court below, in an action to enforce an assessment, to determine that certain lands assessed were not benefited, or that such benefit was not of the value of the assessment. *People* v. *Hagar*. *Cal.* 287.

TAXATION.

1. CONSTITUTION LAW—DOUBLE TAXATION.—The constitution of California does not authorize, but forbids, double taxation. *San Francisco* v. *J. W. Mackey (U. S. Cir. Ct.) Cal.* 407.

2. STOCK AND PROPERTY OF CORPORATION.—Taxing all the property of corporations to the corporation, and at the same time taxing the stock, which represents the property, to the holder, would be double taxation. *Id.*

3. STOCK OF DOMESTIC CORPORATION—TANGIBLE PROPERTY IN ANOTHER STATE.—Shares of stock, owned by a citizen and resident of the state of Nevada, in a California corporation, having its principal place of business in California, but whose tangible property is all situate and taxed in Nevada, are not taxable to the owner under the constitution and laws of California, in the state of California. The *situs* of the stock, in such cases, for the purposes of taxation, is the residence of the owner. *Id.*

4. SITUS OF MONEY CREDITS AND OTHER SOLVENT CREDITS—TAXATION.—There being no statutory provision to the contrary, the *situs* of money credits, and other solvent credits, for the purposes of taxation, is the residence of the owner or creditor. *Id.*

5. TAXATION OF RESIDENT OF NEVADA ON SOLVENT CREDITS.—A citizen and resident of Nevada is not taxable in California, under its constitution and laws, upon money credits and other solvent credits, not secured by mortgage, trust deeds, etc., due from citizens and residents of California. *Id.*

6. ASSESSMENT OF REAL PROPERTY—MISTAKE IN NAME OF OWNER.—In a suit against the owner of real property to recover the tax levied on it, a mistake in the name of the owner, in the assessment of the land upon which the tax is based, does not render the assessment thereof invalid, nor furnish any defense to the suit. *Lake County* v. *Sulphur Bank Quicksilver Mining Company*. *Cal.* 186.

7. ASSESSMENT OF PERSONAL PROPERTY—MISTAKE IN NAME OF OWNER.—But a mistake in the name of the owner in the assessment of personal property upon which a tax is based, unless the mistaken name is legally equivalent to the true name, does invalidate the assessment, and constitute a defense to a suit brought against the owner to recover such tax. *Id.*

8. THE SAME.—Tax proceedings must be in strict accordance with the statute. Without an assessment all subsequent proceedings are nullities. An assessment of personal property to a named person, other than the owner, is absolutely void. *Id.*

9. THE SAME.—An assessment of personal property was made to "Sulphur Bank Q. M. Co.. F. Fiedler, agent." *Held*, that this was not equivalent to or the same thing as "Sulphur Bank Quicksilver Mining Company," the true name of the owner, and the assessment and tax based thereon were void. *Id.*

10. ASSESSMENT OF REAL PROPERTY—DESCRIPTION OF THE LAND.—Under secs. 3650-3658 of the political code, it would seem to be a sufficient assessment of a tract, where such tract does not contain more than 640 acres, to describe it by stating the congressional subdivisions contained in it where it has been sectionized. The description, "a tract of land entered by Frazier in section 13, township 13, range 7," is fatally defective. *Id.*

11. LEVY OF TAXES BY BOARD OF SUPERVISORS.—When a board of supervisors duly adopted an order "that they have this day fixed the rate of county and district tax to be levied and collected upon each one hundred dollars of the assessed valuation of the county, etc., * * * as follows, to wit: state fund, 0.64; general county fund, 0.40; county school fund, 0.37, etc. * * * Total state, county and district tax, 1880-81, $2.75." *Held*, that the omission of the word "cents" from the various items of the levy did not invalidate the order levying the tax nor render the levy ineffectual. Taking all the order together these various items plainly mean so many "cents" upon each one hundred dollars. *Id.*

12. ORIGINAL ASSESSMENT ROLL—EVIDENCE.—Where a board of supervisors have dispensed with a duplicate assessment roll, the original assessment roll is *prima facie* evidence in the same manner that the duplicate would have been. *Id.*

13. IN AN ASSESSMENT FOR TAXES THE ABBREVIATION "DOLLS" is equivalent to dollars. *Salisbury* v. *Shirley*. *Cal.* 688.

14. CONSTITUTIONALITY OF A STATUTE IMPOSING A TAX.—The following amendment of chapter 88, of the general laws of Colorado, was enacted by the legislature in 1879: "The board of county commissioners of the respective counties of the state may levy a property tax for road purposes, which shall not exceed one dollar on each one hundred dollars, to be levied and collected in the same manner and at the same time as other property taxes are levied and collected in each year; but all property included within the limits of incorporated towns or cities shall not be subject to the tax. *Held*, that the last clause of this statute, purporting to exempt property within incorporated towns and cities, is unconstitutional and void, being in conflict with provisions of the state constitution, which declares that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax," and that "all laws exempting from taxation property other than hereinbefore mentioned, shall be void." And such statute must be construed and enforced as though such final clause had never been enacted. *Board of County Commissioners* v. *Owen et al.* *Col.* 157.

15. TAXATION—ASSESSMENT FOR SEWER—NOTICE OF APPORTIONMENT—DUE PROCESS OF LAW.—The legislature, under the constitution of Colorado, has power to provide for an assessment of a tax for a sewer upon the property within a given district according to the area, and not according to the value of the property. In such case the apportionment of the tax is a mere mathematical calculation, and a failure to give the taxpayer notice thereof, when an opportunity to be heard concerning all other steps in the tax proceeding is given, is not a denial of due process of law. *Gillette et al.* v. *City of Denver (U. S. Cir. Ct.)* *Col.* 206. *Brown* v. *Denver (U. S. Cir. Ct.)* *Col.* 210.

16. ENFORCEMENT OF TAX, WHEN ENJOINED—IRREGULARITIES IN TAX.—Equity will not enjoin the enforcement of a tax, for mere irregularities in the exercise of a constitutional taxing power, or for excess in the amount of the tax, unless it be alleged and shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered, without demanding a receipt in full. *Id.*

17. STATE BOARD OF EQUALIZATION—ASSESSMENT OF MORTGAGES—EQUALIZATION OF.—Under section 9, article XIII, of the constitution, the state board of equalization, in raising the assessment roll of a county, has power to increase the valuation of mortgages as already assessed. *Schroeder* v. *Grady, Tax Collector, etc.* *Cal.* 627.

See LEASE, 5.

TAX COLLECTOR.

See PROHIBITION, 2.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—MEASURE OF DAMAGES AGAINST.—A telegraph company is liable for whatever loss naturally and in the usual course of things follows from its failure to transmit a message promptly and correctly, although such message was written in cipher or was otherwise unintelligible to the company. *Hart* v. *Western Union Telegraph Co.* *Cal.* 37.

2. THE SAME—STIPULATION LIMITING LIABILITY—NEGLIGENCE.—A stipulation printed on a blank upon which a telegraph message is sent, purporting to exempt the telegraph company from all liability for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of consideration. Such company cannot stipulate against or limit its liability for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments. Such company is exempt only for errors arising from causes beyond its control, and the burden of showing such exemption rests upon it, in an action to recover for an alleged loss. *Id.*

3. THE SAME—EXEMPTION FROM LIABILITY—ATMOSPHERIC INFLUENCES.—A telegraph company is not liable for a loss arising from a mistake in the transmission of a message when such mistake was occasioned by a break in the electric current, produced by atmospheric influences beyond the company's control. *Id.*

TENANT.

See LANDLORD AND TENANT.

TENANTS IN COMMON.

1. THE POSSESSION OF ONE TENANT IN COMMON IS PRESUMED TO BE FOR THE BENEFIT of all. *McNeil* v. *First Congregational Soc.* *Cal.* 421.

See EJECTMENT, 2, 3; REDEMPTION, 1, 2.

TENDER.

1. TENDER—OBJECTIONS TO SUFFICIENCY OF—WAIVER.—Objections to the sufficiency of the amount tendered must be made at the time of tender, or the same are waived. *Oakland Bank of Savings* v. *Applegarth.* *Cal.* 605.

2. ACTION FOR PART RESCISSION OF CONTRACT—OFFER TO REFUND AMOUNT DECREED, WHEN DISPENSES WITH TENDER.—Where a plaintiff comes into a court of equity asking for a rescission, in whole or in part, of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication, based on evidence of facts independent of the terms of the contract, an offer to refund such sum as shall be decreed, is a sufficient offer to do equity. In such case, the plaintiff cannot determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action. *Sutter Street R. R.* v. *Baum.* *Cal.* 291.

TORTS.

See CORPORATIONS, 1.

TRADE MARKS.

1. TRADE MARK—EXCLUSIVE USE OF—RECORDING WITH SECRETARY OF STATE.—Subsequent to the adoption of the code, a right to the exclusive use of a trade mark or name, in this state, cannot be acquired, unless it be filed for record with the secretary of state. *Whittier et al.* v. *Dietz.* *Cal.* 356.

TRANSCRIPT ON APPEAL.

See APPEAL; 14, 18-20; NEW TRIAL. 7.

TRUST DEED.

1. JUDGMENT AND ORDER AFFIRMED upon authority of Savings and Loan Society v. Bateman, 10 Pac. C. L. J., 795. *Savings and Loan Soc.* v. *Durkin et al.* *Cal.* 534.

TRUSTS.

1. PARTIES TO A SUIT.—Where a trustee sues to recover possession of the trust property for the benefit of the *cestui que trust*, merely or simply to enforce his right thereto against third persons, such *cestui que trust* is not a necessary party thereto; and in a suit to set aside an assignment or conveyance made to hinder or delay creditors, the grantor or assignor therein, if he has parted with all his right in the property, is not a necessary party either. *Hickox* v. *Elliott (U. S. Cir. Ct.)* *Or.* 397.

See CONSIDERATION, 1; VENUE, 4; WILLS, 1, 2.

ULTRA VIRES.

See CORPORATIONS, 3.

UNDERTAKING ON APPEAL.

See APPEAL, 15, 16; STATUTE OF LIMITATIONS, 3.

UNITED STATES COURTS.

See ABATEMENT, 2.

USE AND OCCUPATION.

See STATUTE OF LIMITATIONS, 3, 4.

VALUE.

See EVIDENCE, 11; LARCENY, 2.

VARIANCE.

See GOODS SOLD AND DELIVERED; NEGLIGENCE, 12.

VENDOR AND VENDEE.

1. STATEMENTS OF A VENDOR OF PERSONAL PROPERTY MADE AFTER A SALE thereof, are not part of the *res gestæ*, and are inadmissible in an action against a vendee. *Garlick* v. *Bowers*. *Cal.* 501.

See CONSIDERATION, 1; FRAUD, 4.

VENUE.

1. ACTIONS AGAINST CORPORATIONS—VENUE—CONSTITUTIONAL LAW.—Section 16 of article XII of the constitution, providing that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases," is applicable to actions arising from torts as well as from contracts. Such provision is not in conflict with the fourteenth amendment to the constitution of the United States. *Lewis et al.* v. *S. P. C. R. R. Co.* *Cal.* 615.

2. PLACE OF TRIAL OF REAL ACTIONS—CONSTRUCTION OF CONSTITUTION.—Section 5, article VI, of the constitution of 1879, requiring "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated," is not retrospective in its operation. Consequently, the superior court of the city and county of San Francisco, as the successor of the district court, has jurisdiction to hear and determine an action for the foreclosure of a mortgage, pending in such latter court at the adoption of the present constitution, although the land affected thereby is situated in another county. *Watt et al.* v. *Wright et al.* *Cal.* 622.

3. ACTION TO SET ASIDE FRAUDULENT CONVEYANCE—PLACE OF TRIAL OF.—An action by an execution creditor to set aside a deed made by his execution debtor, upon the ground that the same was fraudulently executed, is not an action to enforce a lien

upon real property, and need not be commenced in the county where the land is situated. *Beach* v. *Hodgdon et al.* *Cal.* 610.

4. ACTION TO ENFORCE TRUST ON REAL AND PERSONAL ESTATE—PLACE OF TRIAL.—An action to enforce a trust on both real and personal estate, is not based on a lien, nor is it a suit to enforce a lien. Such action may be brought and prosecuted in the county in which the trustee resides, although the real estate subject to the trust is situated in another county. *Le Breton, adm'r, etc.* v. *Superior Court.* *Cal.* 142.

5. CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.—The ruling of the trial court on a motion for a change of venue on account of the convenience of witnesses, when the motion is contested on the same ground, will not be interfered with unless there has been an abuse of discretion. *Bean* v. *Gregg.* *Col.* 241.

6. CHANGE OF VENUE—TIME FOR FILING AFFIDAVIT OF MERITS AND DEMAND.—In an application for a change of venue the affidavit of merits and demand that the trial be had in the proper manner, filed by the defendant before he answers or demurs, are of no avail. Such affidavit and demand must be filed when the defendant appears and answers or demurs. *Nicoll* v. *Nicoll.* *Cal.* 219.

7. THE SAME—AFFIDAVITS OF MERITS MADE BY ATTORNEY.—Such affidavit may be made by the attorney for the defendant if it states a sufficient reason for the defendant's not making it. *Id.*

8. CHANGE OF VENUE WHEN DEFENDANTS RESIDE IN DIFFERENT COUNTIES.—A change of the place of trial of an action, to the county in which most of the defendants reside, may be had, when all of the defendants who were served or have appeared unite in a demand for a change. *Rathgeb* v. *Tiscornia et al.* *Cal.* 375.

9. THE SAME—DISQUALIFICATION OF JUDGE AS AFFECTING RIGHT TO CHANGE.—The disqualification of the judge of the county, to which such change is demanded, to try the case, does not affect the right of the defendants to have it transferred to such county for trial. *Id.*

10. DEMAND FOR CHANGE OF VENUE—AUTHORITY OF ATTORNEY TO MAKE.—An attorney has authority, at the time he appears for the defendants, to sign a demand for a change of the place of trial. *People ex rel. etc.*, v. *Larue et al.* *Cal.* 697.

11. CHANGE OF VENUE—AFFIDAVIT OF MERITS, WHAT MUST STATE.—An affidavit of merits, for use on a motion for a change of the place of trial, must aver that the affiant has fully stated *the case* to his counsel. An averment that he had fully stated *his case* and the facts constituting *his defense* in the action, is not sufficient. *Id.*

12. CHANGE OF VENUE—PREJUDICE OF JUDGE—AFFIDAVIT OF.—An affidavit for a change of venue on the ground of prejudice of the judge and of the inhabitants of the county, must state the facts showing such prejudice. A mere averment of prejudice is not enough. *De Walt* v. *Hartzell.* *Col.* 572.

VERIFICATION.

See CONTEMPT, 1.

WAIVER.

See INSURANCE, 4; TENDER, 1.

WARD.

See GUARDIAN AND WARD.

WARRANTY.

1. BREACH OF WARRANTY OF TITLE—MEASURE OF DAMAGES.—The measure of damages in an action for breach of warranty of title to real estate is the value of the property at the time of sale, to be ascertained by the purchase price, with interest thereon and reasonable costs, if any were expended in defense of the title by the plaintiff. *Hoffman* v. *Bosch.* *Nev.* 36.

See SALE, 3.

WATER RIGHTS.

1. RIGHTS OF GRANTEE IN NATURAL STREAMS AT COMMON LAW IN CALIFORNIA.—Whatever limitations there may be upon the right which the grantee of a parcel of land acquires in a natural stream of water running over it, it is well settled, both by the

common law and in this state, that the right itself is incident to the property in the land, and passes by a grant thereof, as an incorporeal hereditament. *Lux et al.* v. *Haggin et al.* *Cal.* 256, 275.

2. THE SAME—APPROPRIATION OF WATER—CONSTRUCTION OF CODE AND UNITED STATES STATUTES.—One who purchases land from the United States, or from this state, after the whole or some part of the water of a natural water-course, running through such land, has been appropriated by some one else, under the act of Congress of July 26th, 1866, or under the provisions of title VIII of the civil code of this state, takes such land subject to the rights acquired by such prior appropriator. Such provisions of the civil code only affect water flowing over lands owned by this state or by the United States. They do not affect the rights of riparian proprietors, (1) because it is expressly declared that they shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired therein, except for a public use, and not then until just compensation has been made. *Id.*
3. THE SAME—APPROPRIATION OF WATER ON PUBLIC LAND AFTER DATE OF PURCHASE.—The right of a purchaser of public lands of this state to have a natural stream of water flowing thereon, at the date of his purchase, continue to flow *currere solebat*, is not affected by an appropriation of the waters of such stream, made subsequent to the date of his purchase, but prior to the date of his patent. *Id.*
4. RIGHTS OF RIPARIAN PROPRIETORS, AS BETWEEN THEMSELVES AND OTHERS.—A riparian proprietor has a right to the reasonable use of water, flowing in a natural stream over his land. What is a reasonable use, in any given case, depends upon the facts and circumstances of that case. But it is only as between riparian proprietors that the question can ever arise. One, not a riparian proprietor, has no right to interfere, in any way, with the natural flow of a stream of water over a riparian proprietor's land. *Id.*
5. THE SAME—ESTOPPEL IN PAIS—WHAT AMOUNTS TO.—A riparian proprietor is not estopped from disputing the validity of an appropriation of the waters of a stream flowing through his land, by the mere fact that he knew of the intention of the appropriator to divert such water before any was diverted, and of the construction of works for such purpose, but made no objection thereto before bringing an action to prevent the same. *Id.*
6. APPROPRIATION OF WATER—RIGHTS OF APPROPRIATORS.—As between two appropriators of the waters of the same stream, the one whose appropriation was first made, has the prior right to the use of such water. *Simpson* v. *Williams.* *Nev.* 580.
7. THE SAME—AMOUNT OF WATER TO WHICH APPROPRIATOR IS ENTITLED.—The amount of water to which a prior appropriator is entitled, is limited to the amount actually applied to the purpose for which the appropriation was made. *Id.*
8. APPROPRIATION OF WATER—RIGHT OF, WHEN BEGINS—RELATION.—In determining the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water. The right to the use of the water relates back to the time when the appropriator begins his dam, ditch, flume, or other appliance, by means of which the appropriation is effected; provided, the enterprise is prosecuted with reasonable diligence. Under the circumstances of this case, a delay for one season, in using the water, was not unreasonable. *Irwin* v. *Strait et al.* *Nev.* 582.

See LARCENY, 7.

WILLS.

1. WILL CONSTRUED—TRUSTS—RECOMMENDATION AND REQUEST.—The will of David D. Colton contains this provision: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seized, or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." *Held*, that this provision is not an absolute gift or bequest in trust for the mother and sister of the testator—that is, not an imperative command to make the provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of his surviving wife. *Colton* v. *Colton.* *(U. S. Cir. Ct.)* *Cal.* 11, 18.
2. TRUSTS ARISING FROM PRECATORY WORDS IN WILLS.—The conditions necessary to raise a trust from words of recommendation and request in a will discussed. *Id.*
3. RULES FOR CONSTRUCTION OF WILLS under the civil code of California stated and applied. *Id.*

4. DEVISE—CONSTRUCTION OF—SALE, AND REPURCHASE OF LAND DEVISED.—A testator devises to his son "all that portion of real estate he has enclosed and now has in his possession, supposed to contain one hundred and forty acres, more or less." By other provisions of the will an intention was manifested to dispose of all the property the testator possessed. Subsequent to the date of the will he sold a portion of the land devised, and afterward bought the same back. *Held*, that the portion so sold and bought back passed to the son under the foregoing devise. *In re Estate of Hopper*. *Cal.* 368.

5. IDENTIFICATION OF LAND DEVISED—EVIDENCE TO SHOW.—In an action by a devisee to recover the value of a tract of land distributed to him, but which had been lost to the estate of the testator by the inexcusable negligence of an executor, extrinsic evidence is admissible to identify the land described in the complaint by metes and bounds, with that described in the inventory and decree of distribution. *Wheeler* v. *Bolton*. *Cal.* 370.

6. JUDGMENT AFFIRMED for the reasons given in the opinion of the department, reported in 3 West Coast Rep., 426. *Dunne et al.* v. *Dunne*. *Cal.* 523.

WITNESSES.

1. IMPEACHMENT OF WITNESS—CONVICTION, HOW PROVED.—Under section 2051 of the code of civil procedure, a witness may be impeached by asking him if he has been convicted of a felony. The conviction of a misdemeanor, however, must be proved by the record of conviction. *People* v. *Schenick*. *Cal.* 77.

See NEW TRIAL, 4.

WRIT OF REVIEW.

See CERTIORARI.

DIGEST OF CASES

REPORTED IN

VOLUMES 1, 2, 3, 4.

DIGEST OF CASES

REPORTED IN VOLUMES 1, 2, 3, 4.

ABANDONMENT.

See HOMESTEAD, 9–12; LEASE, 1; WATER RIGHTS.

ABATEMENT.

1. ABATEMENT—DIVORCE—FRAUDULENT MARRIAGE CONTRACT.—A suit in equity by one party to a marriage contract in writing, alleged to have been entered into in pursuance of section 75 of the civil code of California, to annul the contract as fraudulent, and for an injunction, is for a different cause from one by the other party to the contract, for a divorce arising upon the same alleged marriage contract; and a suit for the latter object pending in one court will not abate a suit of the former character subsequently brought in another court. *Sharon* v. *Hill* (U. S. Cir. Ct., Cal.), IV, 199.
2. ABATEMENT—DIFFERENT JURISDICTIONS.—The state and United States courts are courts of different jurisdictions, and a suit pending in a state court will not abate a suit subsequently brought in a United States court for the same cause. *Id.*

See CORPORATIONS, 50; NUISANCE, 16, 20–22, 26.

ABSENT WITNESSES.

See CONTINUANCE.

ACCESSARY AFTER THE FACT.

See MURDER AND MANSLAUGHTER, 13.

ACCOMPLICE.

See CRIMINAL LAW AND PRACTICE, 23, 25; MURDER AND MANSLAUGHTER, 83, 84.

ACCORD AND SATISFACTION.

1. AN AGREEMENT FOR THE PURCHASE AND SALE OF A CERTAIN AMOUNT OF LUMBER, entered into as an accord of a previous agreement for the same purpose, which required such lumber to be of good quality, will be construed in accordance with the circumstances attending the making of the previous agreement, so as to require the lumber delivered to be of good quality. *Cary* v. *McIntyre* (Col.), II, 117.
2. A CONDITION OF SUCH ACCORD AGREEMENT MAY BE WAIVED by the party in whose favor such condition was made, to the extent, at least, of preventing the party waiving from rescinding the agreement, and declaring it a nullity. *Id.*
3. AN ACCORD AGREEMENT IS BINDING upon the party who signs the same, although it is not signed by the other party. *Id.*

4. FAILURE TO PERFORM AN AGREEMENT FOR AN ACCORD can not be taken advantage of by the party through whose fault such failure was occasioned. *Tucker* v. *Edwards* (Col.), II, 400.

See ACCOUNTING, 3; PLEADING AND PRACTICE, 29, 30.

ACCOUNT.

See ACCOUNTING; HUSBAND AND WIFE, 13; PAYMENT, 2.

ACCOUNTING.

1. DISSOLUTION OF PARTNERSHIP—ACCOUNTING—SETTLEMENT BY PARTNERS.—In an action to dissolve a partnership, and for a settlement of its affairs, the account must generally be taken from the beginning to the end of the partnership. But if there has been a partial settlement between the partners themselves, that fact may be proved in the action; and, if proved, the settlement will be considered valid as between the partners themselves, unless it is assailed on the ground of mistake, error, or fraud. If there is no valid objection to the settlement, it is conclusive upon the parties as far as it goes, and leaves open only the unsettled portions of the account. *Stretch* v. *Talmadge* (Cal.), III, 579.
2. ASSUMPSIT—WORK AND LABOR—AVOIDING SETTLEMENT.—In an *assumpsit* for work and labor, the plaintiff can not avoid a settlement of the account between himself and the defendant, for mistakes or errors in items thereof. Such avoidance can only be had in an action to set aside the settlement. *Roach* v. *Gilmer et al.* (Utah), III, 258.
3. SETTLEMENT OF ACCOUNT—ACCEPTANCE BY CREDITOR.—A payment made and accepted as an adjustment of an unsettled or unliquidated demand will operate as a satisfaction, although shown to be much less than the creditor was entitled to receive, and would have received, had he brought an action. The fact that the creditor dissented at the time of the settlement can make no difference, if he finally accepted the debtor's offer, and agreed to the settlement. *Id.*
4. VERDICT AGAINST EVIDENCE—WORK AND LABOR.—A verdict for the plaintiff, in an action for work and labor, will be held unsupported by the evidence, when the same is largely in excess of the amount prayed for, and when no allowance is made for undisputed payments by the defendant. *Id.*
5. ACCOUNTING BETWEEN PARTNERS—PRESENTATION OF CLAIM.—In an action of accounting between a surviving partner and the administratrix of his deceased partner, the surviving partner is entitled to an allowance for sums drawn by the deceased partner from the partnership during his life-time, notwithstanding the claim for the sum so drawn has never been presented to the administratrix of the deceased partner for allowance and approval. *Manuel, Adm'x,* v. *Escolle* (Cal.), II, 375.
6. IN AN EQUITABLE ACTION TO REOPEN A SETTLEMENT AND SALE MADE BETWEEN PARTNERS, and for an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant, the court can not, without setting aside such sale and making an accounting, render judgment for the plaintiff for a specific amount, on the ground that the defendant was guilty of a breach of warranty or of deceit. *Black et al.* v. *Merrill* (Cal.), II, 137.

See ESTATES OF DECEASED PERSONS, 5, 7, 14, 15; FRAUD, 9; GUARDIAN AND WARD, 4, 6, 7; PARTNERSHIP, 14, 15.

ACCOUNT STATED.

1. UPON AN ACCOUNT STATED THE LAW IMPLIES A VALUABLE CONSIDERATION, and it is not necessary to inquire into the nature of items of the original account. Proof of a settlement and stated account between the parties makes out a *prima facie* case for the plaintiff. *Orr* v. *Hopkins* (N. M.), I, 157.
2. PROMISSORY NOTE IS THE MOST SATISFACTORY EVIDENCE of a settlement between the parties thereto, and may be received in evidence in support of the common count upon an account stated. *Id.*
3. ACCOUNT STATED, WHAT CONSTITUTES.—In an action on an account stated against the three defendants as partners, in which the defendant H. alone appeared and answered, it appeared on the trial, after evidence showing that the defendants B. and M. originally composed the firm, under the name of B. & M., and that the defendant H. subsequently became a partner, and the firm name was, therefore,

changed to B., M. & Co.; that the plaintiff sent by mail, from Stockton, his place of residence, a copy of an account, inclosed in an envelope and properly directed to the defendant H. at Frisco, his residence and post-office address. This account was headed "B. & M., in acct. with L. Benites," and contained a large number of items running through several years, only one of which was charged to the firm of B., M. & Co., and showed a balance of $1,663.70 due to the plaintiff. No letter or other writing accompanied it explaining it, or why it was sent to the defendant H., nor demanding payment. There was no evidence whatever showing the distance between Stockton and Frisco, nor the time required for transportation of the mail between those places, nor the number or frequency of mail communication between them, nor the length of time which had elapsed after the mailing of said account to the defendant H. before the commencement of this action; nor did it appear when this action was commenced. There was evidence that the defendant H. received the account. *Held*, that no account stated between the parties was shown, and a ruling on the trial refusing to admit a copy of such account in evidence against the defendants was not error. *Benites* v. *Bicknell et al.* (Utah), II, 359.

4. THE SAME—EFFECT OF AN ACCOUNT STATED.—When the parties to an account have examined it, and have expressly agreed upon a certain sum of money as the balance justly due thereon from one party to the other, then such account has become an account stated, and an action upon it is not founded upon the original items, but upon the balance ascertained by the mutual accounting of the parties. *Id.*

5. THE SAME—ACCOUNT STATED BY IMPLICATION.—An account stated may be implied from circumstances. If an account be presented for payment by one party thereto, and the other party, upon an examination of it, and after a reasonable time has elapsed, makes no objection to it, it may be legitimately presumed that he was satisfied with it as presented, and the presumption is so strong that a suit can be maintained upon the account as an account stated without proof other than that the account was presented, with a demand for payment, and that reasonable time and opportunity have passed since its presentation for a proper examination of it, and to make objections to it, if there be any. Such presentation may be my mail. *Id.*

6. THE SAME—BURDEN OF PROOF.—The effect of an account stated being to establish *prima facie* the accuracy of the balance found due, the burden of proving that an account is stated or settled rests upon the party making such allegations. *Id.*

ACKNOWLEDGMENT OF DEED.

See DEED, 17. 19; MARRIED WOMEN, 5; MORTGAGE, 43.

ACQUIESCENCE.

1. DELAY AS EVIDENCE OF ACQUIESCENCE.—How far delay may be evidence of acquiesence must depend upon the circumstances of each case. In the present case, the complainant is entitled to the benefit of the conduct of the community, and this conduct shows a constant opposition on their part to the acts of defendants during the whole period of their hydraulic mining operations, since the injury became material. Acquiescence in a certain amount of nuisance is not acquiescence in a similar nuisance which is constantly increasing in magnitude, and in its destructive effects. For the same reasons, the delay or lapse of time in bringing this suit does not constitute laches. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct., Cal.), I, 183.

2. BOUNDARY LINE—ACQUIESCENCE IN AND DISPUTE AS TO.—The fact that two adjoining proprietors verbally agreed upon, and for a long space of time mutually acquiesced in, a boundary line between their respective premises, will not prevent them or their grantees from subsequently disputing the correctness of the same, unless it further appears that, at the time of such agreement, the boundary line was doubtful, uncertain, or in dispute. *Lennox* v. *Hendricks* (Or.), III, 563.

See ADVERSE POSSESSION, 6; BANKS, 2; LACHES, 1; NUISANCE, 8; OREGON DONATION ACT, 2; SPECIFIC PERFORMANCE, 8; WATER RIGHTS, 15.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

1. OFFER OF PILOT SERVICE BY SIGNAL.—The pilot commissioners of Oregon, under the pilot act of 1882, are authorized and required to declare by rule what shall

constitute a valid offer of pilot service on the Columbia river bar pilot grounds, by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made from the vessel signaled. *The Ullock, Swietoslawski, Claimant* (U. S. Dist. Ct., Or.), II, 10.

2. SIGNAL FOR AN OFFER OF PILOT SERVICE.—The statute of the United States does not prescribe any signal to be used on a pilot-boat in making an offer of pilot service, and the light required by section 4233 of the revised statutes to be carried by a sailing pilot vessel at night is only used to prevent collision, and incidentally to give notice of the character of such craft; but the usual signal by which an offer of pilot service is made is the jack set at the main truck in the day-time, and "flare-ups" at night, and this jack is usually the ensign of the country in which the service is offered. In the United States it is a blue flag charged with a star for every state then in the Union, and called the "union jack." *Id.*

3. THE TERM "STATE" CONSTRUED TO INCLUDE A "TERRITORY."—The term "state," in the act of March 2, 1837, 5 Stat. 153, R. S., sec. 4236, regulating the taking of pilots on a water forming the boundary between two states, construed to include an organized "territory" of the United States. *Id.*

4. SALVAGE BY PILOT.—Under the Oregon pilot act of 1882 (Ses. L. 15), a pilot is bound to render aid to a vessel "in stress of weather or in case of disaster," and he is not entitled to salvage for such service unless he is thereby involved in "extraordinary danger and risk." *The C. D. Bryant* (U. S. Dist. Ct., Or.), II, 391.

5. CASE IN JUDGMENT.—The libelant, in a smooth sea and calm weather, boarded the Bryant in a thick fog, while she lay aground at low tide on the outer edge of the middle sand of the Columbia river, and at the next flood sailed her over into deep water in the south channel, and after drifting out to sea in the night, brought her into port the next morning. *Held*, that the service of the libelant did not involve any "extraordinary danger and risk," and that he was only entitled to a pilot's compensation therefor. *Id.*

6. DAMAGES RESULTING FROM A COLLISION between two vessels, when each is guilty of contributory fault, must be equally divided between them. *Puget Sound Commercial Co.* v. *The Barkentine C. L. Taylor. The Barkentine C. L. Taylor* v. *Puget Sound Commercial Co.* (Wash.), II, 787.

7. THE CERTIFICATE OF THE CLERK TO THE RECORD IN AN APPEAL IN ADMIRALTY should distinctly state that the matter sent up included all the pleadings, proofs, stipulations, decrees, and also everything filed or done by way of effecting an appeal. *Steamer Zephyr* v. *Brown et al.* (Wash.), II, 51.

8. THE MANNER OF TAKING AN APPEAL IN ADMIRALTY IS GOVERNED BY THE RULES of the civil law. *Id.*

9. AN APPEAL FROM THE DISTRICT COURT IN A CASE IN ADMIRALTY will not be considered by the supreme court, unless the same was allowed by the district judge. Such appeal must be taken during the term in which the decree appealed from was rendered, and must be made to the next term of the supreme court. *Id.*

10. AN APPEAL IN ADMIRALTY, PETITION FOR.—A petition for an appeal in admiralty from a definite sentence, or for apostles, is not required to be in writing. *Waddell et al.* v. *The Steamer Daisy* (Wash.), II, 557.

11. LETTERS' DISMISSORY OF ADMIRALTY CAUSE.—The allowance of an appeal in admiralty, and the granting of time by the lower court in which to perfect the same, is a sufficient letters dismissory of the cause. *Id.*

12. THE FILING OF AN APPELLATORY LIBEL IS UNNECESSARY in this country on an appeal in admiralty. *Id.*

13. AN APPEAL IN ADMIRALTY IS SUFFICIENT IN POINT OF TIME when the same was taken and allowed at the time of sentence, and perfected within the time fixed by the court. *Id.*

14. NO MONITION FROM THE APPELLATE COURT is necessary to the perfection of an appeal in admiralty, when the same is allowed by the lower court without the intervention of such monition. *Id.*

15. MARITIME CONTRACT—COMPLETED VESSEL.—Whether a contract for putting machinery into a steamer is a maritime one, so as to be enforceable in admiralty by a proceeding *in rem*, depends upon the fact whether the putting in of said machinery was a necessary part of the construction of said steamer as a completed vessel, consideration being had to the purposes for which she was intended. If the machinery were used in such construction, the contract was not a maritime one. *Id.*

16. THE SAME.—A contract to furnish machinery to a steamer, which exists merely as an inchoate hull upon the ways, is not a maritime one. *Id.*

17. PROCEEDINGS IN REM AGAINST VESSEL, POWER OF LEGISLATURE TO AUTHORIZE.—Whether the territorial legislature has power to authorize a proceeding *in rem* against a vessel for materials used in its construction, *quære*. However this may be, it has never sufficiently exercised such power so as to warrant a court in upholding such a proceeding. *Id.*
18. SUBCONTRACTOR, LIEN OF, ON VESSEL.—Under the lien law of this territory, a subcontractor has no lien upon a vessel for materials furnished by him to the contractor, and used in the construction of the vessel. *Id.*
19. FEES IN ADMIRALTY CASES.—Section 823 *et sequitur* of the revised statutes of the United States, providing what the *per foliam* fee shall be in admiralty cases in the circuit and district courts of the United States, apply to such cases in the territorial courts. The territorial legislature has no power to regulate such fees. *Id.*
20. ADMIRALTY RULE 38—"PROCEEDS OF PROPERTY" THEREUNDER.—Where a ship and cargo are saved from a common peril, after a considerable jettison of the latter, and allowed by the salvors to proceed to their destination, where the saved cargo was delivered by the master or agent to the consignees without contribution for salvage or jettison, but on the deposit by each consignee of a sum of money equal to twenty per cent of the value of the cargo delivered to him "to cover general average," and the execution of a bond for the payment of his proportion of the "losses and expenses" consequent upon such peril, the salvage service being for the benefit of both ship and cargo, the expense thereof constituted a general average; and in a suit against the ship and cargo for salvage, the libelants may elect to treat such deposit as so far a substitute for the cargo delivered, and require the agent of the vessel, under admiralty rule 38, to bring the same into court to answer the exigency of such suit. *The Queen of the Pacific* (U. S. Dist. Ct., Or.), I, 109.
21. DERELICT — RIGHT OF FIRST SALVORS. — The bark Cairnsmore went ashore on Clatsop beach in a thick fog, and the master and crew took to the boat and left her, without, so far as appeared, any intention to return, or hope of recovering her; but sold her as she lay, within two days, for the benefit of whom it might concern. but in the mean time she was taken possession of by the libelants, who proceeded at once to save her tackle, apparel, furniture, stores, and cargo: *Held*, that the vessel was derelict, and that the salvors who first got possession of her were entitled, for that purpose, to maintain the same, even against the owners or their vendees, so far and so long as they were reasonably able, and had the means to save her or any part of her; but when it was manifest that they were unable to do so, in any particular, as well and surely as others who might offer to assist in the enterprise, it was their duty so far to yield the possession to such others. *The Tackle, Apparel, etc., of the Cairnsmore* (U. S. Dist. Ct., Or.), III, 173.
22. SALVAGE SERVICE—COMPENSATION OF.—Where there is neither risk of life nor property involved in a salvage service, nor any special knowledge or ingenuity required or used therein, the principal elements in the compensation of the salvor are the value of the labor and care bestowed upon the saved property, and the degree of integrity and responsibility involved in keeping it safely and duly accounting for it, together with the risk of success. *Id.*
23. SALVORS—WHO ARE, AND COMPENSATION OF.—A person rendering aid to a ship in distress is a salvor, whether he is a mere volunteer or acts upon the request of the owner or agent of the ship; and, unless there is an express contract to the contrary, or such a one as must necessarily be implied from the circumstances of the case, the law implies that the service is to be compensated for on the usual condition of the ultimate safety of the property. *Queen of the Pacific* (U. S. Dist. Ct., Or.), III, 723.
24. THE SAME.—A salvor, in pursuance of a request, is entitled to compensation according to the circumstances of the case, although he is unsuccessful, if the property is not lost or is otherwise saved; but a mere volunteer is not entitled to any compensation unless he succeeds, and the fact that his reward depends on this contingency may enhance the amount of it; but even when a salvor acts in pursuance of a request, and it is manifest that the property in peril must be wholly saved or lost, his compensation also depends upon the contingency of success, and should be enhanced accordingly. *Id.*
25. SALVAGE NOT MERE PAYMENT, BUT A REWARD.—In awarding compensation for a salvage service, the courts do not stop at mere payment for the work and labor performed, but go further and give the salvor an appropriate reward, in the interest of commerce and navigation. *Id.*
26. ELEMENTS OF COMPENSATION FOR SALVAGE.—The elements that enter into the estimate in fixing the compensation for a salvage service are: 1. The value of the prop-

erty saved and of that employed in saving it; 2. The degree of peril from which the saved property is delivered; 3. The risk to which the property and person of the salvor is exposed; 4. The severity and duration of his labor; 5. The promptness with which he interposed his services; and 6. The skill, courage, and judgment involved in them. *Id.*

27. PAYMENT FOR SERVICE—WHEN NOT A BAR TO SUIT FOR SALVAGE.—A payment received by a salvor as for work and labor and use of material, upon the reasonable understanding, on his part, that the other and principal salvors would settle and receive payment on the same basis without a suit for salvage, is no bar to such salvor intervening for his interest in a suit subsequently brought by such other salvors for salvage, and receiving his due share of the award therefor, less the payment theretofore made. *Id.*

28. OPPOSING APPEALS IN A CASE IN ADMIRALTY DO NOT CREATE TWO CAUSES in the appellate court. After one party has perfected his appeal, an appeal by the opposite party may be perfected by serving and filing in the court below his notice of appeal. *Steamer City of Panama* v. *Phelps* (Wash.), I, 848.

ADMISSIONS.

See MURDER AND MANSLAUGHTER, 69, 71, 72.

ADMISSION TO THE BAR.

See ATTORNEYS, 12.

ADVERSE POSSESSION.

1. TITLE BY ADVERSE POSSESSION CAN NOT BE ACQUIRED by occasionally cutting up dead timber, felling trees, and removing wood from the land. *Kimball* v. *Stormer* (Cal.), II, 371.

2. ADVERSE POSSESSION—COLOR OF TITLE—POSSESSION.—A plaintiff who claims under color of title a larger tract, which includes the land to which the plaintiff has shown title in fee, can not establish an adverse possession as to the plaintiff's land, which has remained vacant and unoccupied, by proving an actual possession of a portion of the larger tract, when such possession does not extend to any of the land claimed by the plaintiff. Especially is this the case when it appears that the defendant had not asserted an absolute and unqualified right to such plaintiff's land for the time required by the statute of limitations. *Id.*

3. FINDING AS TO ADVERSE POSSESSION—EJECTMENT.—In an action of ejectment, where the plaintiff alleges title in himself, and the defendant relies upon a title obtained by adverse possession, a finding that the defendant has such title, if sustained by the evidence, is sufficient, without finding upon the question whether the plaintiff had or had not title originally. *Id.*

4. ADVERSE POSSESSION.—The open an exclusive possession of real property for the purpose to which it is ordinarily fit or adapted constitutes adverse possession; and the erection of a fence or other artificial boundary to indicate the limits of such possession is not essential thereto. *Zeilin* v. *Rogers* (U. S. Cir. Ct., Or.), III, 466.

5. EJECTMENT—ADVERSE POSSESSION—TAXES.—In an action for ejectment, where the defense relied on is a title acquired by adverse possession after the passage of the act of April 1, 1878, the defendant must prove, and the findings must show, that he or his grantors have paid all taxes levied and assessed on the land in controversy, whether the same were assessed to him or to some other person. Proof, and a finding that he paid all taxes assessed to him, is not enough. *Ross* v. *Evans* (Cal.), III, 428.

6. ADVERSE POSSESSION—RENTS AND PROFITS—ACQUIESCENCE.—In such action, when the defendant's possession of the land in dispute was with the consent and acquiescence of the plaintiff, under an agreement between the parties, and his claim of ownership to such land was also acquiesced in, the plaintiff is not entitled to recover for the rents and profits of such land for the time during which he acquiesced in the possession of the defendant. *Id.*

7. TITLE TO REAL ESTATE CAN NOT BE OBTAINED BY ADVERSE POSSESSION, under section 325 of the code of civil procedure, unless the adverse holder has paid the taxes levied and assessed upon such land during the time of his occupancy. *Webb* v. *Clark* (Cal.), I, 861.

8. SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A FINDING that the possession of the defendants was not adverse will not be considered by the appellate court, when such adverse possession could not have continued for a sufficient length of time prior to the commencement of the action to furnish a defense. *Emeric* v. *Alvarado* (Cal.), I, 708.
9. ADVERSE POSSESSION.—Defendants have not acquired title by adverse possession to the two tracts of complainant's lands—one of seventy-five acres, the other of fifty acres—which have been completely buried by their mining debris. These tracts have not been "protected by a substantial inclosure," or "usually cultivated or improved," by defendants, as required by the code of civil procedure, section 325, in all cases where the adverse possession is "not founded upon a written instrument, judgment, or decree," and there has been no ouster of the complainant by defendants. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct., Cal.), I, 183.
10. FINDINGS—ADVERSE POSSESSION—EVIDENCE.—Finding that the defendant had acquired title to the premises in controversy by adverse possession reviewed, and held supported by the evidence. *Specht etc.* v. *Hager et al.* (Cal.), III, 403, 404.
11. ADVERSE POSSESSION—KNOWLEDGE OF REAL OWNER'S TITLE.—Title to land may be acquired by adverse possession, although the adverse holder has no knowledge of the nature of the title of the real owner. *Packard* v. *Johnson* (Cal.), III, 763. *Packard* v. *Moss* (Cal.), III, 769.
12. SWAMP LANDS—PURCHASE OF—ADVERSE POSSESSION.—Under the act of 1858, the purchaser of swamp lands, who had fully paid for the same and complied with all the terms of his contract, became absolutely entitled to a patent, upon the certification of such lands to the state, and the neglect of himself or his assignee to obtain such patent will not prevent the running of the statute of limitations in favor of an adverse holder from such date. *Id.*

See DEDICATION, 7; INFANTS, 1; TENANTS IN COMMON, 2; WATER RIGHTS, 15, 16, 23.

AFFIDAVITS.

See AFFIDAVITS OF MERITS; APPEAL, 34, 53, 76, 81, 83; ATTACHMENT, 7; CERTIORARI, 10; CONTEMPT, 12, 13; JURY AND JURORS, 31; RELEASE, 2; SUMMONS, 19–21.

AFFIDAVIT OF MERITS.

1. AFFIDAVIT OF MERITS, STATEMENT IN.—The statement in an affidavit of merits that the defendant "has fully and fairly stated the case in this action," is equivalent to a statement that he "has fully and fairly stated the facts of the said case." *Rathgeb* v. *Tiscornia* (Cal.), IV, 375.

See VENUE, 11, 12, 16.

ALIEN.

See ESTATES OF DECEASED PERSONS, 17, 18; MINES AND MINING, 16, 17.

ALIENATION, RESTRAINT OF.

See WILLS, 7.

AMENDMENT.

1. THE POWER OF THE CIRCUIT COURT OVER AMENDMENTS TO PLEADINGS, after a remand from the supreme court, is not affected by the circumstance of an appeal having been taken; and while the supreme court may send a case back for amendment of pleadings and retrial generally, it has no power to prescribe the character of the amendments to be allowed, or the mode of conducting subsequent proceedings. *Branson* v. *Oregonian Railway Co.* (Or.), I, 624.
2. APPEAL FROM JUSTICES' COURT—AMENDMENTS—CERTIORARI.—On an appeal from the justices' court on questions of law and fact, the superior court has jurisdiction to allow an amendment to the pleadings, upon such terms as may be just. The action of the court in allowing an amendment is not reviewable on *certiorari*, even if the same were irregular or erroneous. *Ketchum* v. *Superior Court of San Joaquin County* (Cal.), III, 490.
3. STRIKING OUT PORTIONS OF COMPLAINT AND ANSWER.—Plaintiff brought this action to recover possession of certain grain and hogs, on the ground, as alleged in his

verified complaint. that the same were his property. The defendant, as sheriff, denied the ownership by the plaintiff, and justified his possession under certain writs of attachment. He alleged that the said property had been taken from him by the plaintiff, after his levy, under a writ of replevin, and asked a return thereof to him, to be held subject to such attachment. On the trial the court, against defendant's objection, on the oral statement of plaintiff's counsel, that the defendant had not levied upon the hogs, permitted the plaintiff to strike out from the complaint all reference to the hogs, and struck out all allegations in regard to the same in defendant's answer. *Held*, that such action of the court was erroneous; for if the averments of the answer were true, the effect of the amendment would be to take the hogs from the defendant's possession and transfer them to the plaintiff without affording the former an opportunity to try the question of his right to their return. *Howell* v. *Foster, Sheriff, etc.* (Cal.), II, 743.

4. REFUSAL, DURING THE TRIAL, OF AN AMENDMENT TO AN ANSWER setting up a new defense is not error when the defendant fails to affirmatively show that he did not know of such defense before. *Hallack* v. *Bresnahan* (Wy.), II, 60.

See APPEAL, 12; DEPOSITIONS, 4; FINDINGS, 38; FRAUD, 9; REMOVAL OF CAUSES, 13; REPLEVIN, 1; SPECIFIC PERFORMANCE, 3; SUPPLEMENTARY PROCEEDINGS, 3; TENANTS IN COMMON, 3; VARIANCE, 1–3.

ANSWER.

See DISMISSAL OF ACTION; PLEADING AND PRACTICE.

APPEAL AND WRIT OF ERROR.

1. IN GENERAL.
2. WHO MAY HAVE.
3. THE RECORD AND PRACTICE.
4. THE HEARING.
5. THE RELIEF GRANTED.
6. DISMISSAL OF

1. IN GENERAL.

1. AN APPEAL WILL NOT LIE FROM A JUDGMENT OF THE DISTRICT COURT IN COMMON-LAW ACTIONS or proceedings unless it is expressly allowed by statute. *Van Camp* v. *Commissioners of Custer County* (Idaho), II, 18.
2. AN APPEAL IS NOT THE COMMENCEMENT OF A NEW ACTION or proceeding, but a continuation of the same case, action, or proceeding, being only a transfer from one court, tribunal, or body to another for final trial and judgment. *Id.*
3. THE RIGHT TO APAEAL is statutory and unknown to the common law; it can not be extended to cases not within the statute. *General Custer Mining Co.* v. *Van Camp* (Idaho), II, 174.
4. THE BOARD OF COUNTY COMMISSIONERS AND THE BOARD OF EQUALIZATION, although composed of the same persons, are separate and distinct bodies, with different duties and powers. *Id.*
5. THE RIGHT OF APPEAL GIVEN BY STATUTE FROM ORDERS OF THE BOARD OF COMMISSIONERS does not imply the right of appeal from orders of the board of equalization. *Id.*
6. AN APPEAL FROM AN ORDER OF THE BOARD OF COUNTY COMMISSIONERS declaring the result of an election for a county seat may be taken to the district court of said county, and when so taken, the action is commenced when the notice of appeal is filed with the clerk of the board of county commissioners. *Rupert* v. *County Commissioners of Alturas County* (Idaho), II, 15.
7. THE BOARD OF COUNTY COMMISSIONERS IS NOT A COURT; it has no judicial functions or power, and can not be vested therewith. *Id.*
8. MATTERS DECIDED BY THE DISTRICT COURT ON APPEAL FROM THE ORDERS OF THE BOARD OF COUNTY COMMISSIONERS can only be brought to the supreme court for review by writ of error. *Id.*
9. NO APPEAL LIES FROM AN ORDER IN A CRIMINAL ACTION DISMISSING THE SAME for want of prosecution. Such attempted appeal may be either dismissed or stricken from the calendar. *People* v. *Hollis* (Cal.), II, 71.
10. NO APPEAL LIES, IN A PROSECUTION FOR MURDER, FROM AN ORDER DENYING A MOTION in arrest of judgment, or from a judgment entered upon a plea of former conviction. *People* v. *Majors* (Cal.), II, 287.

11. MOTION FOR NEW TRIAL—APPEAL FROM ORDER DENYING.—A motion for a new trial can not be made in a prosecution for murder after a verdict in favor of the people rendered upon a plea of former conviction, and consequently no appeal lies from an order denying the same. *Id.*
12. STRIKING COMPLAINT FROM FILES—AMENDMENT—APPEAL.—An order striking a complaint from the files, and overruling a motion to allow it to be amended, is not a final judgment. Such order is not appealable. *Owen (a lunatic), by his Committee*, v. *McCormick* (Mont.), IV, 479.
13. AN ORDER STRIKING OUT AN ANSWER IS NOT APPEALABLE.—*Beach* v. *Hodgdon* (Cal.), IV, 610.
14. ORDER MADE AFTER REVERSAL OF JUDGMENT NOT APPEALABLE.—An order made in an action after the judgment therein has been reversed in the supreme court, is not appealable as a special order made after final judgment. The effect of such reversal is to place the parties in the lower court in the same position as if the case had never been tried. *Sharp* v. *Miller* (Cal.), IV, 384.
15. ORDER APPOINTING RECEIVER—APPEAL DOES NOT LIE FROM.—No appeal lies from an order of the district court appointing a receiver, although such order may command the defendants to refrain from any and all interference with the receiver in the discharge of his duties as such. *Stebbins* v. *Savage et al.* (Mont.), IV, 477.
16. SHERIFF—APPEALS BY, FROM ORDER APPOINTING RECEIVER.—A sheriff, who has taken possession of property assigned for the benefit of creditors, under attachment issued in favor of one creditor, can not appeal from an order made at the instance of another creditor of the assignor, which requires him to deliver such property to a receiver. If an appeal lies from such order, the proper parties to take the same are the creditors interested. *Id.*
17. NO APPEAL LIES BY AN EXECUTOR, AS SUCH, FROM A DECREE SETTLING and distributing an estate. *Estate of Marrey* (Cal.), III, 49.
18. AN ORDER DENYING A MOTION TO SET ASIDE A FINAL ORDER OF CONDEMNATION, in an action for the condemnation of land, is not appealable. *California Southern R. R. Co.*, v. *Southern Pacific R. R. Co.* (Cal.), III, 52.
19. SETTING ASIDE JUDGMENT—APPEAL FROM ORDER.—The effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. *Estate of Crozier, deceased* (Cal.), III, 157.
20. NO APPEAL LIES TO THE SUPREME COURT FROM AN ORDER OF THE DISTRICT JUDGE requiring the county assessor of Esmeralda county to file in the district court a statement of taxes, as required by section 6 of the act of March 1, 1883, although such order was made by the court instead of by the judge. *Lyon Co.* v. *Esmeralda Co.* (Nev.), I, 395.
21. NO APPEAL LIES TO THE SUPREME COURT FROM AN ORDER OF THE DISTRICT COURT setting aside a previous order vacating a judgment. The effect of such order is not to revive or reinstate the judgment. *Owen* v. *Going* (Col.), I, 352.
22. THE SUPREME COURT HAS NO JURISDICTION OF AN APPEAL FROM A JUDGMENT of the superior court affirming a judgment of the police court adjudging the defendant guilty of a misdemeanor, and imposing on it a fine of fifty dollars. *People etc.* v. *Meiggs Wharf Company* (Cal.), II, 287.
23. APPEAL FROM JUSTICE'S COURT—JURISDICTION OF.—The supreme court has no jurisdiction of an appeal from a judgment of the superior court, affirming a judgment of the justice's court, in an action brought to recover one hundred and eighty dollars, with interest and costs.—*Hackley* v. *Craig* (Cal.), II, 375.
24. AN APPEAL LIES TO THE SUPREME COURT from a judgment of the superior court granting or denying an application for a writ of *mandamus;* and an undertaking in the sum of three hundred dollars, executed and conditioned according to the provisions of section 941 of the code of civil procedure, stays the execution of such judgment pending the appeal. *Palache* v. *Hunt* (Cal.), I, 485.
25. APPEAL FROM AN ORDER SETTING APART A HOMESTEAD TO A WIDOW, out of the estate of her deceased husband, must be taken within sixty days after such order was made. *Estate of Burton* (Cal.), I, 254.
26. APPEAL FROM AN ORDER DENYING A WIDOW'S APPLICATION FOR A HOMESTEAD, to be set apart to her out of the estate of her deceased husband, must be taken within sixty days after the entry of such order. *Estate of Harland* (Cal.), I, 49.
27. WRIT OF ERROR AND APPEAL.—Whether an error of the county court in denying an appeal can be reviewed on a writ of error to the original judgment, *quare.* *Brandexburg* v. *Reithman* (Col.), II, 774.

28. APPEAL HELD WITHOUT MERIT, AND JUDGMENT AND ORDER AFFIRMED with damages. *Hooper* v. *Powers* (Cal.), IV, 525.

2. WHO MAY HAVE.

29. NO ONE CAN SUE OUT AND MAINTAIN A WRIT OF ERROR UNLESS HE IS A PARTY or privy to the record, or is prejudiced by the judgment. *Van Camp* v. *Commissioners of Custer Co.* (Idaho), II, 18.
30. COURTS WILL LOOK BEYOND THE MERE TITLE OF AN ACTION or proceeding for the purpose of determining who are interested and affected as parties. *Id.*
31. APPEAL FROM JUDGMENT BY PERSON NOT A PARTY.—A person who is not a party nor privy to, nor aggrieved by, a judgment, can not appeal therefrom. *Dunphy* v. *Potrero Co. et al.* (Cal.), IV, 526.
32. A PARTY WHO HAS VOLUNTARILY TAKEN ADVANTAGE OF A JUDGMENT rendered at *nisi prius* can not afterwards prosecute proceedings to reverse it. *Atkinson* v. *Tabor* (Cal.), II, 105.

3. THE RECORD AND PRACTICE.

33. ERRORS APPEARING UPON THE FACE OF THE JUDGMENT ROLL may be taken advantage of upon a writ of error, without a bill of exceptions or statement of the case. *Van Camp* v. *Commissioners of Custer Co.* (Idaho), II, 18.
34. AN APPEAL TO THE DISTRICT COURT FROM A JUDGMENT OF THE PROBATE COURT can not be perfected unless the proper affidavit of non-vexation and delay is made and filed. *Chaves* v. *Perea* (N. M.), I, 807.
35. THE RIGHT OF APPEAL COMMENCES TO RUN FROM THE ACTUAL ENTRY of the judgment, and not from the date as of which it was entered *nunc pro tunc*. *Noce* v. *Daveggio* (Cal.), III, 491.
36. AN APPEAL FROM AN ORDER DENYING A NEW TRIAL must be taken within sixty days after the entry thereof. *Brown et al.* v. *Greene et al.* (Cal.), II., 828.
37. SERVICE OF NOTICE OF APPEAL—FILING UNDERTAKING.—An undertaking on appeal must be filed within five days after service of the notice of appeal. When such service is by mail, the undertaking must be filed within five days after the deposit of a copy of the notice in the post-office. Section 1013 of the code of civil procedure, extending the time in which acts may be done in certain cases, has no application to such case. *Id.*
38. THE SAME—THE TRANSCRIPT MUST CONTAIN PROOF of the service of the notice of appeal upon the opposite party or his attorney. *Id.*
39. AN APPEAL IS INEFFECTUAL WHEN THE NOTICE THEREOF is not signed by the attorneys of record or by the counsel for the appellant, or when the transcript contains no proof that such notice was served upon the respondents. *Ellis* v. *Bennet et al.* (Cal.), II, 884.
40. SERVICE OF NOTICE OF APPEAL, PROOF OF.—The certificate of the clerk of the district court acknowledging due service of appeal is not sufficient proof of such service to confer jurisdiction upon the supreme court. After rendition of judgment the proof of such service may be shown by affidavit, when the validity of such judgment is attacked in a collateral action. *Blinn* v. *Crosby et al.* (Wash.), II, 796.
41. AN UNDERTAKING ON APPEAL MUST BE FILED WITHIN TEN DAYS from the time of the service of the notice of appeal. If filed on the eleventh day the appeal will be dismissed. *Northern Pacific Terminal Co.* v. *Lowenberg et al.* (Or.), II, 823.
42. THE ASSIGNMENT OF ERRORS IN A NOTICE OF APPEAL must be specific. It is not sufficient to state generally that the errors relied on consisted in admitting or excluding testimony as shown by the bill of exceptions. *Id.*
43. PRACTICE OF ASSIGNING MORE ERRORS than are necessary to present the points relied on, strongly condemned. *Brewster, Receiver, etc.*, v. *Baxter* (Wash.), II, 791.
44. AFTER AN APPEAL HAS BEEN PERFECTED THE DISTRICT COURT HAS JURISDICTION to settle and allow the statement on appeal filed in the court below within the time required by statute. *James* v. *Leport* (Nev.), II, 44.
45. CERTIFICATE AS TO THE EVIDENCE INTRODUCED AT THE TRIAL.—Where a trial was partly had in the district court, with the aid of the official reporter, and then discontinued on account of the retirement of the judge, and upon a rehearing by his successor the notes of the reporter were used as correctly presenting the evidence, the only certification as to the evidence introduced at the trial required, so as to bring the cause before the supreme court, is the certificate of the judge who tried the cause. *Seattle & W. W. R. R. Co.* v. *Ah Kowe* (Wash.), II, 53.
46. AN APPEAL FROM A JUDGMENT RENDERED IN FAVOR OF THE UNITED STATES can not be perfected without service of notice upon the United States. Such service

should be made upon the United States attorney; service upon his assistant is not sufficient. *Bennett* v. *United States* (Wash.), II, 213.

47. APPEAL—UNDERTAKING—STAY OF EXECUTION.—An undertaking on appeal to stay execution may be filed at any time after the appeal is taken, and before the execution is satisfied. *Mansfield* v. *Stern* (Cal.), IV, 141.

48. APPEAL—CERTIFICATE OF DEPOSIT IN LIEU OF APPEAL UNDERTAKING.—The statutory requirement that to render an appeal effectual, the appellant may, instead of giving an undertaking with sureties, deposit money equal in amount to the sum named in the undertaking, is substantially complied with by leaving with the clerk a certificate of deposit, payable to his order, for the requisite amount. *Alt* v. *California Fig Syrup Co.* (Nev.), IV, 255.

49. APPELLATE JURISDICTION OF SUPREME COURT—PROCEDURE ON APPEALS.—The supreme court can not decline to take cognizance of a matter clearly within its jurisdiction, because the mode of procedure applicable to it has not been regulated by statute, written rule, or precedent. In such case it is its duty to create a precedent, and it may adopt or ratify the practice resorted to on the first occasion when the exigencies of a cause require a reasonable and unprecedented practice to be resorted to. *People* v. *Jordan* (Cal.), IV, 85.

50. THE SAME—APPEALS IN MISDEMEANORS—PROCEDURE.—The supreme court has jurisdiction to entertain appeals in cases of misdemeanors prosecuted by indictment or information; and, as the legislature has failed to prescribe the mode of procedure on such appeals, to provide therefor by rule, and, in the absence of a previous rule, to sanction a mode of procedure adopted on a particular occasion. The practice pursued in taking the present appeal is adopted, and hereafter appeals in criminal actions prosecuted by indictment or information amounting to misdemeanors only, will be sustained, from the judgments and orders mentioned in chapter 1 of title 9 of part 2 of the penal code, when the appeal is taken in the manner therein prescribed. *Id.*

51. NOTICE OF APPEAL, FORM OF.—A notice of appeal which plainly indicates the particular order appealed from is sufficient in form. *Id.*

52. JUDGMENT ON DEMURRER TO INDICTMENT, ENTRY OF—NOTICE OF APPEAL.—The penal code does not provide for any entry of judgment on a demurrer to an indictment other than the entry of the order upon the minutes. The order in the minutes is the judgment. A judgment that such demurrer be "sustained" is a substantial compliance with section 1007 of the penal code, and is in effect a judgment that the demurrer be allowed. An appeal from such judgment is not rendered ineffectual because, in the notice of appeal, the judgment specifically described is called an "order." *Id.*

53. TRANSCRIPT ON APPEAL—ATTACK ON, IN SUPREME COURT.—The verity of a fact stated in the transcript on appeal can not be attacked by affidavits in the supreme court. *People* v. *Jordan* (Cal.), IV, 138.

4. THE HEARING.

54. REPORT OF REFEREE IN EQUITY CASE—EFFECT OF APPEAL.—Whatever effect the report of a referee in a suit in equity has on the trial in the lower court, it can not be treated as a special verdict upon the facts at the trial on appeal. Such report will not be disturbed on appeal, unless in conflict with the preponderance of evidence, nor will a decree entered thereon be reversed, unless error affirmatively appears. *O'Leary* v. *Fargher* (Or.), III, 333.

55. AN EQUITY CASE IS TO BE RETRIED IN THE APPELLATE COURT upon every issue, both of law and fact, not waived in the lower court, without regard to the results of the previous trial, whether had altogether before the court or partly before a referee. *Id.*

56. REPORT OF REFEREE AND DECREE MODIFIED after a review of the evidence. *Id.*

57. IN THE ABSENCE OF A BILL OF EXCEPTIONS IN THE RECORD, the appellate court will not notice alleged irregularities occurring at the trial. *Newby* v. *Rowland* (Or.), I, 521.

58. ERRORS IN THE CHARGE TO THE JURY CAN NOT BE MADE AVAILABLE ON APPEAL, unless they are material, or calculated to mislead the jury, or to produce a wrong result. *Martin* v. *Hill* (Utah), I, 629.

59. ERRORS ASSIGNED FOR REFUSING TO GIVE CERTAIN INSTRUCTIONS ASKED FOR, and in the form of the judgment, can not be considered by the appellate court unless the transcript contain all of the instructions given, and a copy of the judgment. *Tucker* v. *Parks* (Col.), I, 264.

60. OBJECTIONS TO A COMPLAINT OTHER THAN THAT IT DOES NOT STATE FACTS SUFFICIENT to constitute a cause of action must be made in the court below to entitle them to consideration in the appellate court. *Id.*

61. ASSIGNMENTS OF ERROR.—The court will not review points nor consider questions not clearly covered by the assignments of error on the record. *Kiskadden* v. *Allen* (Col.), II, 320.

62. AN OBJECTION TO A JUDGMENT, that it is inconsistent with the pleadings, may be considered by the appellate court without producing the evidence. *Seattle and Walla Walla R. R. Co.* v. *Ah Kowe et al.* (Wash.), II, 53.

63. APPELLATE COURT WILL NOT REVIEW THE FACTS OF A CASE for the purpose of determining whether the findings are supported by the evidence, unless the same are brought up on a statement of the case after a motion for a new trial. *Beck* v *Truckee Lodge, No. 14* (Nev.), II, 40.

64. REVIEW OF EVIDENCE ON APPEAL.—On an appeal from the judgment only the court can not inquire whether the verdict is supported by the evidence; this can be done only upon an appeal from the order denying a new trial. *The People etc.* v. *Pierson* (Idaho), II, 809.

65. ON APPEAL FROM A JUDGMENT, WITHOUT A STATEMENT OR BILL OF EXCEPTIONS, nothing belongs to the record except the judgment roll, and no question arising outside the roll can be considered. The mode of presenting questions not arising on the judgment roll for review on appeal is by statement or bill of exceptions. *Jones* v. *St. John Irrigating Co.* (Idaho), II, 183.

66. ON APPEAL THIS COURT CAN ONLY NOTICE THE ERRORS COMMITTED AGAINST THE APPELLANT, not those committed against the successful party. *Id.*

67. ERRORS IN THE ADMISSION OR REJECTION OF TESTIMONY, or in the giving or refusal of instructions, can not be considered on appeal when no exceptions were taken during the trial. *Ralph et al.* v. *Weary et al.* (Col.), II, 324.

68. WAIVER OF APPEAL.—Matters may occur subsequent to the judgment which operate to waive the right of a party to have the judgment reviewed on appeal or writ of error. When such matters appear of record, the objection to the appeal may be raised by a motion to dismiss; but where they do not so appear the objection must be raised by a plea in bar of the proceedings in error. The supreme court has jurisdiction to institute the necessary inquiry whether the matters alleged to constitute the waiver have in fact occurred. *Atkinson* v. *Tabor* (Cal.), II, 105.

69. ERRORS OF LAW OCCURRING ON TRIAL MUST BE SPECIFIED.—Errors of law alleged to have occurred on the trial will not be considered on appeal unless the same are specified in the statement of the case. *Carter* v. *Allen et al.* (Cal.), IV, 335.

70. MOTION MADE AFTER JUDGMENT—APPEAL FROM ORDER—IDENTIFICATION OF PAPERS.—Copies of papers used on a motion made after judgment will not be considered on appeal, although contained in the transcript, unless the same are identified by the certificate of the judge, or otherwise, as having been used or considered on the hearing. *Peltret* v. *Frank* (Cal.), IV, 221.

71. THE STATEMENT OF A FACT IN AN OBJECTION MADE AT THE TRIAL is no evidence of the existence of such fact on the hearing in the appellate court. *Chung Yon* v. *Hop Chong* (Or.), III, 325.

5. THE RELIEF GRANTED.

72. JUDGMENT APPEALED FROM MAY BE AFFIRMED IF THE APPELLANT fails to file any points and authorities, as required by the rules of the supreme court. *Robinson* v. *Longley* (Nev.) I, 306.

73. APPEAL FROM JUDGMENT—NOTICE OF APPEAL, SERVICE OF—JURISDICTION OF SUPREME COURT OVER APPEAL.—The supreme court has no power to hear an appeal from a judgment unless the appellant has served a notice of appeal on all the adverse parties whose rights may be affected by a reversal of the judgment; or where the appeal is from a part of the judgment, by a reversal of the part appealed from. But a modification of a judgment may be had on an appeal from the whole judgment, although some of the adverse parties have not been served with notice of appeal; provided such modification can not affect the rights of the parties not served with notice. *Williams* v. *Santa Clara M. Co. of Baltimore et al.* (Cal.), IV, 616.

74. THE SAME—MODIFICATION OF JUDGMENT.—On an appeal from a judgment as an entirety, the power of the supreme court is not limited to an affirmance or reversal of the judgment as a whole. It may modify the judgment when a modification is appropriate and necessary to a correct determination of the rights of the parties. *Id.*

6. DISMISSAL OF.

75. NO JUDGMENT ROLL IS PROVIDED FOR BY THE PROCEDURE IN CALIFORNIA UNTIL FINAL JUDGMENT has been entered, and consequently an appeal from an interlocutory judgment in partition will not be dismissed because the entire judgment roll has not been brought up. *Emeric* v. *Alvarado* (Cal.), I, 708.

76. AN APPEAL FROM AN ORDER DENYING A MOTION FOR A NEW TRIAL, when an interlocutory judgment has been rendered and entered in an action for partition, must be brought up by a statement, or bill of exceptions, or affidavits, as in other cases where a motion for a new trial is made and denied. *Id.*

77. AN UNDERTAKING ON APPEAL CAN NOT BE DISPENSED WITH IN AN APPEAL by a collector of taxes from a judgment against him, in an action to recover delinquent taxes. If such undertaking be not filed as required by statute, the appeal will be dismissed. *Crismon, Collector etc.*, v. *Bingham Canyon & Camp Floyd R. R. Co.* (Utah), I, 697.

78. AN APPEAL WILL BE DISMISSED WHERE NO TRANSCRIPT IS FILED in accordance with the rules and practice of the supreme court. *Estate of Curtis* (Cal.), I, 467.

79. APPEAL FROM JUSTICE'S COURT—EFFECT OF DISMISSAL—DAMAGES FOR FRIVOLOUS APPEALS.—The dismissal of an appeal from the justice's court divests the district court of authority to proceed further, except to include costs on the dismissal. It can not impose damages for frivolous appeals, nor directly, and without trial, reverse or affirm judgments brought by appeal from the justice's court. *State ex rel. Barnett* v. *Fifth District Court* (Nev.), II, 630.

80. APPEAL FROM JUSTICE'S COURT, DISMISSAL OF.—An appeal from a justice's court to the district court is perfected by the appellant's filing and serving his notice of appeal, filing the necessary undertaking, and making payment of the costs in the justice's court, and the cost of the transcript on appeal. The payment of a deposit for costs in the district court is not required by statute, and can not be required by a rule of the district court. The dismissal of such an appeal for failure to make such deposit is error. *Wescoat* v. *Eccles* (Utah), II, 446.

81. DISMISSING APPEAL—AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.—On a motion in the supreme court to dismiss an appeal on the ground that no notice of appeal has been served, an affidavit of service, filed by the appellants in the district court on the same day the notice of motion to dismiss was filed in the supreme court, may be considered on the argument of the motion to dismiss, whenever the supreme court would, upon application, have allowed the appellants to furnish such proof. *Elder* v. *Frevert* (Nev.), II, 414.

82. THE SAME—CONTENTS OF SUCH AFFIDAVIT.—The affidavit so presented alleged a service of the notice upon respondent's attorney, at a time when he was absent from his office and had no clerk therein, or other person in charge upon whom service could be made, "by leaving a copy thereof in a conspicuous place in the office of said attorney between the hours of 8 A. M. and 6 P. M." *Held*, that an affidavit of service thus repeating the exact language of the statute is insufficient; that whether the place where the notice is left is conspicuous, is a fact to be judicially determined by the court, and not by the affiant. The affidavit should set forth the probative facts touching the place where the paper was left, so that the ultimate fact, whether such place was conspicuous, may be inferred therefrom by the court. *Id.*

83. THE SAME—LEAVE TO AMEND.—As this question had never before been decided by the court, and as the service might be a surprise upon the appellants, and might possibly deprive them of a substantial right, leave to amend the affidavit of service should be given them. *Id.*

84. AN APPEAL BY THE PEOPLE FROM A JUDGMENT OR ORDER SUSTAINING A DEMURRER to an indictment will be dismissed where there is a prior appeal by the people from the same judgment or order. *People* v. *Jordan* (Cal.) II, 133.

85. WRIT OF ERROR MAY BE DISMISSED WHERE NO ABSTRACT OF THE RECORD IS FILED, as required by the rules of the supreme court. *Hallack et al.* v. *Bresnahen* (Wy.), II, 60.

86. WHEN THE TRANSCRIPT DOES NOT SHOW THAT THE NOTICE OF APPEAL WAS SERVED upon the respondent's attorney, the appeal will not be dismissed when it appears from the certificate of the clerk of the court below that such service was made. *Nissen* v. *Bendixsen* (Cal.) II, 290.

87. AN APPEAL WILL NOT BE DISMISSED FOR FORMAL DEFECTS IN NOTICE OF APPEAL in regard to the title of the court and cause and the particular description of the judgment appealed from, when the provisions of the statute are substantially complied with in such respects. *Parker et al.* v. *Denny* (Wash.), II, 209.

88. A NOTICE OF APPEAL SHOULD CONTAIN A PARTICULAR DESCRIPTION of every ruling, order, decree, or decision whereby the appellant has been aggrieved. All that it is essential for the appellant to say in such regard is, that he has been aggrieved by the following orders, rulings, and decisions, and then enumerate them severally by descriptions sufficient to identify each. *Id.*

89. FAILURE TO FILE TRANSCRIPT—DISMISSAL OF APPEAL.—Where the transcript on appeal was filed less than fifteen days before the commencement of the term, the appeal will be dismissed unless the appellant shows himself guiltless of inexcusable laches in not having filed the transcript sooner. *Crawford et al.* v. *Haller* (Wash.), II, 210.

90. DISMISSAL OF APPEAL—FILING TRANSCRIPT.—An appeal will be dismissed when the transcript is not filed within the time allowed by the court, although filed after the motion to dismiss was made, if no reason appears why it was not filed before. *Heinlen* v. *Southern Pacific R. R. Co.* (Cal.), III, 61.

91. DISMISSAL OF APPEAL—FILING ABSTRACT OF RECORD.—An appeal, after it has been dismissed for failure of the appellant to file an abstract of the record, as required by rule 12, will not be reinstated upon a showing that the counsel for the appellant supposed no abstract was necessary, and that there was an oral agreement between the counsel for the respective parties dispensing with such abstract. *Spencer et al.* v. *McMaster* (Wy.), III, 87.

92. APPEAL FROM JUSTICES' COURT—UNDERTAKING FOR COSTS.—In an appeal from the justices' to the superior court an undertaking for the payment of costs on appeal is required. In the absence of such undertaking the appeal will be dismissed. *Groves* v. *Superior Court* (Cal.), III, 194.

93. CRIMINAL LAW—NOTICE OF APPEAL MUST BE SERVED ON CLERK.—An appeal in a criminal case will be dismissed if the appellant fails to serve a notice of appeal upon the clerk of the court in which the judgment was rendered, in the manner required by the statute. A notice directed to and served upon the attorney for the respondent, and filed with the clerk, is not sufficient. *Territory* v. *Hanna* (Mont.), IV, 470.

94. THE SAME—TIME FOR FILING TRANSCRIPT.—After an appeal has been properly taken, a failure to file the transcript within the time required by statute is not fatal to the jurisdiction of the appellate court. Such statutory requirement is directory, and not mandatory. *Id.*

95. WHERE THE TRANSCRIPT ON APPEAL CONTAINS NO INDEX, as required by the rule, the appeal may be dismissed. *Donohoe* v. *Mariposa L. and M. Co. et al.* (Cal.), IV, 192.

96. APPEAL—MOTION FOR NEW TRIAL—SERVICE OF PROPOSED STATEMENT.—An appeal from an order denying a new trial will not be dismissed merely because the proposed statement, on which the motion for a new trial was based, was not served upon one of the adverse parties. *Dore* v. *Dougherty et al.* (Cal.), IV, 420.

See ADMIRALTY, 7–14, 28; AMENDMENTS, 1, 2; ARREST AND BAIL, 8, 9; ATTACHMENT, 23; BILL OF EXCEPTIONS, 4–9; BILL OF PARTICULARS; CERTIORARI, 5, 6, 12, 13, 15; CONTEMPT, 7, 11; COSTS, 6–10; CRIMINAL LAW AND PRACTICE, 46–55; DEMURRER, 17; ESTATES OF DECEASED PERSONS, 2, 13; EVIDENCE, 18, 19; EXECUTORS AND ADMINISTRATORS, 13; FINDINGS, 4, 33; FORCIBLE ENTRY AND DETAINER, 6; FUGITIVES FROM JUSTICE, 9, 10; HABEAS CORPUS, 3; INJUNCTION, 21; JUDGMENT, 1, 2, 4, 18, 35; JURY AND JURORS, 8; JUSTICES' COURTS, 6; MORTGAGE, 21; NEW TRIAL, 12; PLEADING AND PRACTICE, 43, 49; RECEIVERS, 1; REMOVAL OF CAUSES, 15; SUPPLEMENTAL PROCEEDINGS, 6; TOLL ROADS, 1.

APPEARANCE BY ATTORNEY.

See CANCELLATION, 2.

APPROPRIATION OF WATER.

See PARTIES, 12; WATER RIGHTS, 2.

ARBITRATION AND AWARD.

1. SUBMISSION TO ARBITRATION—ENTRY OF, BY CLERK.—A submission to arbitration, under section 1283 of the code of civil procedure, is invalid, unless a note thereof is entered by the clerk of the superior court in his register of actions. *Kettleman* v. *Treadway* (Cal.), III, 574.

2. AWARD OF ARBITRATORS WILL NOT BE SET ASIDE FOR THE FAILURE OF ONE of the arbitrators to inspect the subject-matter of the controversy, in company with his associates. Such inspection, if no testimony is taken, or points involved in the litigation decided, does not constitute a hearing. *Glass-Pendery Consolidated Mining Co.* v. *Meyer Mining Co.* (Col.), I, 290.
3. OBJECTIONS TO ALL IRREGULARITIES IN THE PROCEEDINGS OF ARBITRATORS, which are not jurisdictional, must be seasonably made, in order to render them available; and if a party to an arbitration, knowing of an irregularity in the proceedings, remains silent, and permits the investigation to proceed, in order to avail himself of all chances of an award in his favor, he can not afterwards question the validity of an award unfavorable to him. *Id.*
4. ARBITRATION PROCEEDINGS VOID FOR WANT OF JURISDICTION IS A MERE NULLITY, and the defects which make it void are incapable of being waived. *Id.*
5. FAILURE OF ONE OF SEVERAL ARBITRATORS TO BE PRESENT AT A MEETING of his associates is not a jurisdictional defect, and may be waived by the parties to the arbitration. Such waiver takes place by proceeding with the business of the meeting without interposing any objection to the absence of the said arbitrator. *Id.*
6. FAILURE OF ARBITRATORS TO EXAMINE CERTAIN BOOKS, as required by the articles of submission, is immaterial, where by stipulation of counsel a complete statement of all that such books contained was used by the arbitrators instead of the books. *Id.*
7. REFUSAL OF ARBITRATORS TO EXAMINE A WITNESS OFFERED IN BEHALF OF THE UNSUCCESSFUL PARTY will not warrant setting aside the award, unless the record shows that the facts which the witness could have testified to would have been material or pertinent. *Id.*
8. PARTIES AGAINST WHOM AN AWARD IS MADE, UNDER SEVERAL SEPARATE AND DISTINCT submissions to arbitration, are not estopped for disputing the validity of such award as to costs, which were jointly awarded against them, either by consenting to a common trial or by paying the separate sums awarded as damages. *Springer* v. *Schutz* (Cal.), I, 349.
9. THE ASSIGNEES OF PORTIONS OF AN AWARD MAY MAINTAIN A SUIT IN EQUITY to recover the amount of their respective assignments from the person against whom the award was made. *Bett et al.* v. *Poppleton* (Or.), II, 191.
10. AWARD WILL NOT BE SET ASIDE BECAUSE CERTAIN ITEMS WERE CONSIDERED by the arbitrators which were not included within the terms of the written submission, when the party against whom the award was made consented to such action on the part of the arbitrators, especially if he subsequently promised to perform the award. *Id.*
11. AN AWARD WHICH DOES NOT DETERMINE EVERY MATTER SUBMITTED is not binding. But a subsequent ratification takes away all objection on this ground, and a promise to perform the award is such ratification. *Id.*

See CONTRACTS, 16.

ARRAIGNMENT.

See CRIMINAL LAW AND PRACTICE, 30.

ARREST AND BAIL.

1. FRAUD ON CREDITORS—ARREST—TORT.—A defendant residing in this state against whom a personal judgment has been obtained in an action arising from his tort may be arrested in a subsequent action on such judgment, for fraudulently removing or disposing of his property, with the intent to defraud his judgment creditor, although such acts were committed out of the state and prior to the rendition of the judgment sued on, if the plaintiff had no knowledge thereof until after the date of such judgment. *Ex parte Bergman* (Nev.) III, 394.
2. THE SAME—VOLUNTARY SURRENDER—RELEASE.—A notice by the plaintiff or his attorney to the sheriff, to release a defendant against whom a judgment for his arrest had been rendered, under which he had surrendered himself before any process had been issued against him, does not prevent the plaintiff from causing his subsequent arrest under an execution issued on such judgment. *Id.*
3. IMPRISONMENT FOR DEBT—CONSTRUCTION OF CONSTITUTION.—Article 1, section 14, of the constitution does not prohibit the arrest of a defendant for fraudulently disposing of his property with intent to defraud his creditor under a judgment in an action for tort. *Id.*

4. THE SAME—COSTS OF SUIT.—A judgment authorizing the arrest of a defendant for fraudulently disposing of his property with intent to defraud his creditors, may provide for his detention until the costs of the suit in which such judgment was rendered have been paid. *Id.*
5. BAIL—WHO MAY ADMIT PRISONER TO.—Under section 1284 of the penal code, a person charged with an offense not punishable with death, can not be admitted to bail by a magistrate of any county, except the one in which the warrant was issued or the arrest was made. *Mansir* v. *Superior Court* (Cal.) III, 762.
6. POWER OF DISTRICT JUDGE TO ADMIT TO BAIL—DEFENDANT CHARGED WITH MURDER. The power of a district judge under section 1016 of the United States revised statutes, to admit a prisoner to bail in a criminal case where the punishment may be death, is discretionary. Such power should only be exercised when the necessity is most urgent, and when peculiar reasons exist, and are shown to the court, for granting the application. The fact that the prisoner is suffering from disease, which his confinement may have increased, is not sufficient to warrant his admission to bail, unless further confinement might seriously affect his body or mind, and possibly bring about his death. *United States* v. *Kie* (U. S. Dist. Ct., Alaska), IV, 553.
7. RIGHT OF PRISONER TO SPEEDY TRIAL—CONFINEMENT TO AWAIT TRIAL.—Confining a prisoner to await his trial at the next regular term of the court is not depriving him of his right to a speedy trial, as guaranteed by the constitution of the United States. Nor does the fact that such confinement must necessarily continue until such term entitle the prisoner to be admitted to bail. *Id.*
8. BAIL ON APPEAL DISCRETIONARY—ORDER DENYING BAIL, WHEN NOT REVIEWED.—A defendant convicted and under sentence for public offense is not entitled, as of right, to be admitted to bail pending an appeal by him, even though a certificate of probable cause for the appeal has issued; but bail in such cases is discretionary, and where the court in which the conviction was had has, in the exercise of its discretion, denied bail to a defendant pending an appeal by him, the appellate court will not revise its action, where it is not plainly to be seen that the discretion has been abused. *Clawson's Case* (Utah), IV, 416.
9. HABEAS CORPUS—REVIEW ON OF ORDER DENYING BAIL.—Whether the appellate court, in any event, can, by *habeas corpus*, review the action of the trial court in denying bail, considered doubtful but not decided; for the writ is not one of review, and confers no appellate jurisdiction. *Id.*

See CHINESE RESTRICTION ACT, 27, 28, 33.

ARREST OF JUDGMENT.

See JURY AND JURORS, 32.

ARSON.

1. IMMATERIAL ALLEGATION IN AN INDICTMENT CHARGING THE DEFENDANT with the crime of arson need not be proved. An allegation in such indictment that the defendant occupied the building that was burned is immaterial, and the court may charge the jury that it need not be proved. *People* v. *Lee Hung* (Cal.), I, 45.
2. DEFINITION OF THE CRIME OF ARSON MAY BE GIVEN TO A JURY in the language of the code, and it is not error for the court to refuse to instruct them that "arson is a crime against the security of the dwelling-house as such and the possession, and not against the dwelling as property." *Id.*

ASSAULT AND BATTERY.

See KIDNAPING, 1.

ASSAULT WITH DEADLY WEAPON.

1. ASSAULT WITH DEADLY WEAPON—SUFFICIENCY OF INFORMATION.—An information charging the defendant with having feloniously assaulted one R. S. with a deadly weapon, to wit, a loaded pistol, with intent to kill and murder the said R. S., specifying the time and place, is a sufficient statement of the offense charged, if in other respects the information conforms to the requirements of sections 950, 951, and 952 of the penal code. *People* v. *Villarino* (Cal.), IV, 693.
2. ASSAULT WITH A DEADLY WEAPON—VERDICT—INDICTMENT.—Under section 245 of the penal code, as amended in 1874, in a prosecution for an assault with a deadly

weapon, it is unnecessary to charge in the indictment or for the jury to find that the assault was made with intent to produce great bodily injury. It is sufficient to follow the language of the statute in charging the offense, and for the jury to find in the language of the charge. *People* v. *Turner*, (Cal.), III, 636.

3. THE SAME—INSTRUCTION BY THE COURT.—When on the trial for such an assault, the fact of shooting by defendant was uncontroverted, being directly proved by several witnesses, and admitted by the defendant himself when on the stand as a witness, and the only defense was that the shooting was done in self-defense, and the law on this subject of justification and excuse, and on the subject of reasonable doubt, was fully and correctly given to the jury in the instructions of the court, the refusal of the court to give a further instruction, as follows, was not error: "You are instructed that before you can find the defendant guilty, you must be satisfied, to a moral certainty, that the circumstances of the case are not only consistent with the guilt of the defendant, but are entirely inconsistent with any other reasonable hypothesis that can be decided from the evidence." *Id.*

4. ASSAULT TO MURDER—VERDICT.—Under an indictment for an assault to murder with a deadly weapon, a verdict that "we the jury find the defendant guilty of an assault to murder," is sufficient. *People* v. *McFadden* (Cal.), III, 425.

5. WHETHER THE WEAPON USED IN THE ASSAULT WOULD HAVE PRODUCED DEATH is a question for the jury. *Id.*

6. JURISDICTION OF SUPERIOR COURTS—ASSAULT WITH DEADLY WEAPON.—Under article 6, section 5, of the constitution, the superior court has jurisdiction to convict and punish a prisoner for a simple assault, under an information charging him with an assault with a deadly weapon. In such case the lesser offense is necessarily included with the greater. *Ex parte Donahue* (Cal.), III, 438.

ASSESSMENT.

See CORPORATIONS, 25, 28, 29, 39; FINDINGS, 2; PLEADINGS AND PRACTICE, 10; STREET ASSESSMENTS; SWAMP LANDS; TAXATION.

ASSESSMENT ROLL.

See JURY AND JURORS, 32.

ASSESSORS.

See APPEAL, 20; ELECTION, 12.

ASSIGNMENT.

1. ASSIGNMENT OF CONTRACT—PAYMENTS TO ORIGINAL CONTARCTOR AFTER NOTICE OF ASSIGNMENT.—The assignee of a contract for grading a public square in the city and county of San Francisco, upon performing the work contracted for, is entitled to payment of the full contract price. The amount of money paid by the city and county to the workmen of the original contractor for work done by them under the contract, after it had notice of the assignment of the same, can not be deducted. *McCloskey* v. *San Francisco* (Cal.), IV, 419.

2. SETTLEMENT OF ACTION BY PLAINTIFF AFTER ASSIGNMENT—EFFECT OF AS BETWEEN DEFENDANT AND THE ASSIGNEE.—The settlement of an action made by the defendant with the nominal plaintiff without notice, actual or constructive, of any assignment of the cause of action, is valid as against the plaintiff's secret assignee. The assignee's only remedy is against the plaintiff. Nor, if such assignee is the plaintiff's attorney in the action, does he have any lien for costs by which he can disturb the satisfaction of the demand. *Hogan* v. *Black et al.* (Cal.), IV, 290.

3. ASSIGNMENT OF OFFICIAL'S SALARY BEFORE IT BECOMES DUE.—The assignment by a public official of his salary before it becomes due, is contrary to public policy and void. *Bangs* v. *Dunn, Auditor, etc., et al.* (Cal.), IV, 302.

4. THE SAME—DEMAND FOR SALARY—ESTOPPEL OF OFFICER.—A deputy of a public officer who delivers to his superior a demand upon the treasury for his salary before the same is due, and indorses thereon the words "received payment," subscribing the same with his name, is not estopped from disputing the authority of such superior officer to make an assignment of such demand, if the same is made before the salary becomes due. *Id.*

5. ACTION BY ASSIGNEE—ALLEGATIONS OF ASSIGNMENT—DENIAL OF ON INFORMATION AND BELIEF.—In an action by an assignee of a judgment, allegations of assignment

are material, and proofs thereof are essential to a recovery by the plaintiff. The facts connected with such assignment are not presumptively within the knowledge of the defendant. He may, therefore, specifically deny the allegations of assignment, basing his denials upon information and belief. An answer containing such denials should not be stricken from the files as sham. *Hughes* v. *Brewer* (Col.), IV, 450.

6. EQUITABLE ASSIGNMENT—MAINTENANCE.—E. being a member of a railway construction firm in Oregon, and defendant in a suit brought there by his partners to dissolve said firm and determine the rights of the parties therein, applied, in California, to W., a citizen of that state, for a loan of money to aid him in asserting his rights in said suit, which W. agreed to and did advance on E.'s promise to repay the same with interest, and his assignment to H., in trust for W., of all his interest in said firm, as a security for the repayment of said money and interest; in which suit there was afterward a decree given in favor of E. and against his partners for a sum of money; and at the time of making such assignment E. also gave W. the option to take a portion of any railway property or bonds that he might obtain in such suit, in lieu of said money and interest: *Held* (1), That the assignment of E.'s interest in the firm embraced the decree in his favor for the sum of money which represented and stood for such interest, and that the trustee therein became in equity the assignee of said decree, as soon as it came into existence, and might maintain a suit to set aside specific covinous assignments and conveyances by the defendant therein, made with intent to hinder and delay the collection of the same: (2) The option given W. is not involved in the suit to enforce the decree, and therefore it is immaterial whether it is void for champerty or not; (3) The contract for the loan and repayment of the money was made and to be fulfilled in California, and therefore valid, whether champertous or not by the law of Oregon; and the fact that security was taken on property in Oregon for the performance of the contract, does not change its character in this respect. *Hickox* v. *Elliott* (U. S. Cir. Ct., Or.), IV, 397.

See CORPORATIONS, 9; COUNTER-CLAIM, 5; FRAUD, 11; INSOLVENCY, 13; INSURANCE, 9, 10; LEASE, 4, 5; MARRIED WOMEN, 2, 5, 6; MORTGAGE, 12–14; NEGOTIABLE INSTRUMENTS, 17, 22; PARTIES, 3; PARTNERSHIP, 16–19.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. AN ASSIGNEE FOR THE BENEFIT OF CREDITORS ACQUIRES ONLY SUCH RIGHTS in the property assigned as his assignor had at the date of the assignment. *Gammons* v. *Holman* (Or.), II, 822.
2. A PAROL TRANSFER OF GOODS TO ARRIVE, AS SECURITY FOR A PRE-EXISTING INDEBTNESS and for advances subsequently to be made, is valid as against the assignee for the benefit of the creditors of the transferror, although actual possession of such goods is not obtained by the pledgee until after the assignment for the benefit of creditors. *Gammons, Assignee, etc.*, v. *Holman et al.* (Or.), II, 822.
3. THE SURVIVING PARTNER OF AN INSOLVENT FIRM CAN NOT ASSIGN THE PARTNERSHIP assets for the benefit of preferred partnership creditors. If he does so, the validity of such assignment may be questioned in a legal action by a firm creditor without first resorting to an equitable action to cancel and set aside the same. *Salisbury* v. *Ellison* (Col.) II, 102, 612.
4. ATTACHING CREDITOR.—The lien of an attachment is sufficient to enable a creditor to maintain a suit in equity to set aside a fraudulent assignment of the property attached, particularly under section 148 of the Oregon code of civil procedure, which makes an attaching creditor a *bona fide* purchaser for a valuable consideration. *Kahn* v. *Salmon et al.* (U. S. Cir. Ct., Or.), III, 383.
5. ASSIGNEE, POWER OF.—The assignee in a voluntary assignment is the mere instrument of the debtor for the distribution of his property, and unless the power is conferred upon him specially by statute, he can not maintain any action or suit concerning the same that the debtor could not, in case no assignment had been made. *Id.*

See APPEAL, 16; ATTORNEYS, 1; INJUNCTIONS, 3; PARTNERSHIP, 22.

ASSIGNOR AND ASSIGNEE.

See ASSIGNMENT.

ASSOCIATIONS.

See DEED, 26.

ASSUMPSIT.

1. ACTION FOR WORK AND LABOR — CONTRACT PRICE — QUANTUM MERUIT.—Where work, labor, and materials are done and furnished in pursuance of a special contract, and substantially as specified therein, the contractor is entitled to recover on a *quantum meruit* the reasonable value of the same, not exceeding the contract price. *Todd* v. *Huntington* (Or.), III, 331.
2. PLEADING—INDEBITATUS ASSUMPSIT—SERVICES.—Both at common law and under the code a plaintiff may recover the reasonable value of his services, regardless of contract, under a complaint in the nature of an *indebitatus assumpsit*. *Leitensdorfer et al.* v. *King, administratrix, etc.* (Col.), III, 135

See ACCOUNTING, 2–4; ATTORNEYS, 13–15; PLEADING AND PRACTICE, 17, 18.

ATTACHMENT.

1. MONEY IN THE HANDS OF ONE CORPORATION A STOCKHOLDER IN ANOTHER corporation, the legal title to which is in the latter, is liable to garnishment at the instance of a creditor of the latter. *Hughes* v. *Oregonian R'y Co.* (Or.), I, 689.
2. CONSTABLE CAN NOT ATTACH AND SELL THE PROPERTY OF A THIRD PERSON without incurring liability, notwithstanding he attaches and sells only "the right, title, and interest" of the defendant in the attachment suit. *Rankin* v. *Ekel* (Cal.), I, 344.
3. ATTACHING CREDITOR MAY VOLUNTARILY RELEASE PROPERTY OF THE DEBTOR taken on attachment, without an order of court, and a direction by the attorney of the creditor to the sheriff to release the property attached will have such effect. *Smith* v. *Taylor* (Cal.), I, 113.
4. A COMPLAINT IN AN ACTION ON AN UNDERTAKING GIVEN UNDER SECTION 540 of the code of civil procedure, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that the same was given to prevent a levy. *McNamara* v. *Hammerslag* (Cal.), I, 560; *McCutcheon* v. *Weston*, 850.
5. THE COMPLAINT IN AN ACTION BY THE ADMINISTRATOR OF THE JUDGMENT CREDITOR TO ENFORCE SUCH UNDERTAKING, which is conditioned for the payment to the plaintiff of any judgment recovered by him in the attachment suit, sufficiently alleges the recovery of the same, and the representative capacity of the plaintiff, when it is averred "that judgment was recovered, entered, and docketed," and that on a day certain "letters of administration upon the estate of said judgment creditor were issued by the superior court of Alameda county to this plaintiff, who duly qualified as the administrator, and entered upon the discharge of his duties as such; and ever has been and now is such administrator. *McCutcheon* v. *Weston* (Cal.), I, 850.
6. AN ACTION ON SUCH UNDERTAKING MAY BE SUSTAINED although judgment was only recovered against one of the two defendants in the attachment suit. *Id.*
7. ATTACHMENT LAW—AFFIDAVIT, WHAT MUST CONTAIN.—To authorize the issuance of an attachment under the fourteenth subdivision of the attachment law (civil code, 1883, p. 30), the affidavit need only state the ground therein mentioned. Such subdivision was intended to create a separate and distinct cause of attachment. *Herefort* v. *Cramer* (Col.), IV, 229.
8. ATTACHMENT LAW—AMENDMENT OF 1881.—The fourteenth subdivision of section one of the attachment act as amended in 1881, providing that "in all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section," creates a new and distinct ground of attachment, additional to the twelve others enumerated in such act. *Simmons* v. *California Powder Co.* (Col.), II, 517; *Kellerman* v. *Crescent Milling, etc., Co.* (Col.), II, 520.
9. SHERIFF'S FEES FOR KEEPING ATTACHED PROPERTY, ALLOWANCE OF.—Where property has been attached by a sheriff at the instance of the plaintiff in an action which is afterward dismissed, the sheriff is entitled to a reasonable compensation as fees for his expenses in maintaining a keeper in charge of the property attached. Such fees may be taxed as costs against the plaintiff. To determine the amount of his fees, there being no statute regulating the same, the sheriff should present his bill to the court or judge, and procure an order allowing the same, or so much thereof as may be proper. The party against whom such allowance is made may, upon motion to retax, procure a rehearing and re-examination. The clerk has no power to make such allowance; if, however, he does so, and his action is affirmed by the

court on a motion to retax, such irregularity furnishes no ground for a reversal. *City Bank of Leadville* v. *Tucker, Sheriff etc.* (Col.), II, 402.

10. ATTACHMENT—EXEMPTION, CLAIM OF, HOW MADE.—No form is prescribed for making a claim of exemption by a defendant whose property has been attached in an action in the justice's court. He may make the same orally, and without notice to the plaintiff. The notice referred to in section 12 of the attachment act of 1879 applies to the cases of claimants to the property attached other than the defendant. *Bassett* v. *Inman* (Col.), II, 534.

11. THE SAME—WAIVER OF EXEMPTION.—A defendant does not waive the right of claiming property as exempt from attachment by first traversing the attachment upon other grounds. *Id.*

12. THE SAME—COUNTY COURT—JURISDICTION TO DISSOLVE AN ATTACHMENT.—Upon an appeal from the justice's court, the county court has jurisdiction to dissolve an attachment on the ground that the property attached is exempt. *Id.*

13. THE SAME—REVIEW OF ORDER DISSOLVING ATTACHMENT.—The appellate court will not review an order dissolving an attachment for a ground not raised in the court below. *Id.*

14. ATTACHMENT PROCEEDINGS, TRIAL OF ISSUES ON.—Under the statutes of this territory, attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleadings and a distinct practice. If on the trial of the issues alleged in the affidavit for an attachment a verdict is rendered for the defendant, the attachment is dissolved, but the action at law proceeds to final judgment when the same is founded upon a matured demand. Where, however, the statute authorizes an attachment on demands not due, but fails to describe the mode of procedure to be followed in such cases, this court has authority to provide by rule what the practice shall be, so as to give effect to such attachment. *Staab et al.* v. *Hersch* (N. M.), II, 425.

15. IN ATTACHMENT PROCEEDINGS ON DEMANDS NOT DUE, the only consistent mode of procedure is to treat such proceedings as separate and distinct from the action at law, and to go no further than to create an attachment lien in advance of the commencement of such action. The writ of attachment should contain a citation to the defendant to appear and answer the affidavit. The issues thus raised should be tried and the attachment lien dissolved or continued, according to the verdict of the jury. If sustained, the attachment would remain a subsisting lien on the property of the debtor, and upon the maturity of the demand a declaration might be filed and the defendant cited to plead thereto. If the plaintiff recovered judgment, then a writ of *venditione exponas* might be issued for the sale of the property attached, and the proceeds thereof applied to the satisfaction of the judgment. *Id.*

16. A DEFENDANT WHO APPEARS IN AN ATTACHMENT SUIT AND MAKES NO OBJECTION to the writ can not, after judgment has been given against him, question the sufficiency or character of the writ. *Wagner* v. *Romero* (N. M.), II, 269.

17. FAILURE TO HAVE THE SURETIES ON AN ATTACHMENT BOND justify is a mere irregularity which can be cured, and, therefore, such failure does not render the attachment void. *Baxter* v. *Smith* (Wash.), II, 794.

18. A SUBSEQUENT ATTACHING CREDITOR WITHOUT NOTICE takes priority over a prior mortgagee under an unrecorded chattel mortgage. *Id.*

19. JUDGMENT ON A FORTHCOMING BOND.—In an action on a forthcoming bond given under section 13 of that portion of the Kearney code relating to attachments, an order which directs that the property attached shall be "forthwith delivered to the sheriff of San Miguel county, and that the same be sold and the proceeds of said sale be applied to the satisfaction of the judgment," is sufficiently definite both as to the time and place of delivery. If it were not so, the court has authority to amend such order at the same term by designating more definitely the time and place of delivery. *Wagner* v. *Romero* (N. M.), II, 269.

20. ATTACHMENT—AMOUNT OF DEMAND—STATEMENT OF.—The statement of the amount of the plaintiff's demand in a writ of attachment must be in conformity with the amount stated in the complaint, otherwise the attachment proceedings are void. *Bowers* v. *London Bank of Utah* [*Limited*] (Utah), III, 255.

21. UNDERTAKING ON ATTACHMENT—AMOUNT OF.—The amount of the undertaking to be given before an attachment is issued is largely discretionary with the clerk. When this discretion has been exercised within the limits prescribed by the statute, the writ is properly issued, although the amount of the undertaking is greatly less than the plaintiff's demand. *Id.*

22. AFFIDAVIT ON ATTACHMENT—STATEMENT OF DEMAND.—An affidavit for an attachment which alleges that the plaintiff's demand is on a contract for the direct pay-

ment of money, with the further allegation of how the debts accrued, sufficiently specifies the nature of the contract. *Id.*

23. AN APPEAL LIES FROM AN ORDER REFUSING TO DISSOLVE AN ATTACHMENT. *Shepard* v. *Yocum et al.* (Or.), III, 83.
24. NO ATTACHMENT CAN BE ISSUED IN AN ACTION TO RECOVER DAMAGES for the wrongful taking, carrying away, and conversion of money. Such action is founded in tort. *Id.*
25. ATTACHMENT—DISTRIBUTION OF PROCEEDS.—Under section 116 of the code of civil procedure, where more than one creditor proceeds against the same debtor by attachment, the proceeds of the property attached must be distributed among such creditors in proportion to the respective amounts of their several judgments. *Daniels et al.* v. *Lewis et al.* (Col.), III, 225.
26. THE SAME.—The words "returned to the same term of the court to which they are returnable," used in such section, should be interpreted to mean and to apply to all writs of attachment which are in fact returned to, at, or during the same term of court at or during which they may properly be returned after service according to law. *Id.*
27. LEVY OF ATTACHMENT ON UNOCCUPIED LAND—POSTING NOTICES.—An attachment lien upon unoccupied real estate is not created, under section 542 of the code of civil procedure, unless the officer executing the writ posts upon the land a copy of the description of the land, in connection with a copy of the writ of attachment, and of the notice that the land has been attached. *Watt* v. *Wright* (Cal.), IV, 624.

See APPEAL, 16; ASSIGNMENT FOR BENEFIT OF CREDITORS, 4; CONVERSION, 2; CORPORATIONS, 41; EXECUTORS AND ADMINISTRATORS, 9; FRAUD, 18; INJUNCTION, 3; LANDLORD AND TENANT, 13; MASTER AND SERVANT, 1; MORTGAGE, 44; PARTNERSHIP, 14; SUPPLEMENTAL PROCEEDINGS; SURETIES, 3–5; USE AND OCCUPATION, 2.

ATTORNEYS.

1. ATTORNEY AT LAW IS NOT DISQUALIFIED FROM ACTING AS AN ASSIGNEE of an insolvent firm, and a clause in the assignment to him to the effect that he shall be paid "a reasonable compensation or commission for his services," can not be construed so as to entitle him to counsel fees, and thus render the assignment fraudulent as to the assignor's creditors. *Tucker* v. *Parks* (Col.), I, 264.
2. WHERE ONE ATTORNEY EMPLOYS ANOTHER TO ASSIST HIM IN A CERTAIN LITIGATION, and promises to pay him a "good fee" for his services, in an action against the former to recover the same, evidence of the fee received by him is inadmissible when the amount thereof was contingent upon the success of such litigation. *Wells* v. *Adams* (Col.), I, 496.
3. A LITIGANT IS SUCCESSFUL, SO AS TO RENDER HIM LIABLE FOR THE FEES OF HIS ATTORNEY, which were contingent upon the success of the litigation, if he gains substantially everything of value involved in the controversy, although he fails to gain everything he asked. *Cole* v. *Richmond Mining Company of Nevada* (Nev.), I, 378.
4. AN ATTORNEY IS ENTITLED TO THE COMPENSATION AGREED UPON under a contract with his client, by the terms of which he was to carry on several cases, and be paid such fee if he was successful in one case, and the other cases were continued to await the result thereof in the appellate court, where he wins one case, and the other cases are continued, although the reason for such continuance does not appear. *Id.*
5. LIABILITY OF ATTORNEY ON EXAMINATION OF TITLE TO REAL PROPERTY.—A. applied to a money lender for a loan of three thousand dollars and offered his note therefor, secured by a mortgage on certain real property; B., the attorney of the money lender, examined the title to the real property, and furnished the latter a certificate to the effect that A.'s title was good and the property unincumbered, and thereupon the loan was made on the terms proposed; subsequently, and before the maturity of the note, it was assigned to the plaintiff, who foreclosed the mortgage and sold the property, when it was found that it was encumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt by four thousand seven hundred and ninety-four dollars and thirty-five cents. *Held*, that there was no privity of contract between B. and the plaintiff, and that he was not liable to the latter for the loss. *Dundee Mortgage and Trust Investment Co.* v. *Hughes* (U. S. Cir. Ct., Or.), II, 708.
6. COMPROMISE OF ACTION BY ATTORNEY—INSTRUCTIONS OF CLIENT.—A compromise of an action, entered into by an attorney in accordance with his understanding of

his client's wishes as expressed by the client himself, will not be set aside simply because the attorney misunderstood his client's wishes. *Chaffey et al.* v. *Dexter* (Cal.), IV, 354.

7. ATTORNEY-AT-LAW—MALCONDUCT IN HIS OFFICE—REMOVAL FROM THE BAR.—It appearing that an attorney-at-law stopped a judge of a court as he was driving through the public street in company with his daughter, a young lady, and thereupon addressed abusive, insulting, and threatening language to such judge concerning his judicial action in a certain cause, previously and then pending and undetermined in the court of which he was a judge, wherein the said attorney was counsel for one of the parties; and that he accused said judge of tyranny and oppression in said cause, and having secured its submission to a prejudiced judge for trial; and that he assailed said judge with vile epithets, and threatened to expose him by publishing the said accusations in the newspapers; and it further appearing that the said attorney refuses to retract, apologize for, withdraw, or modify these accusations, but on the contrary still justifies his conduct and insists that he has not violated any professional duty; and it further appearing that upon an opportunity given him to substantiate his said charge by evidence, he has entirely failed to prove their truth. *Held*, that such acts constitute "malconduct in his office" for which the attorney should be removed from the bar, under the statute which provides "that the justices of the supreme court shall have power, at their discretion, to strike the name of any attorney or counselor-at-law from the roll for malconduct in his office." *People ex rel. Elliott* v. *Green* (Col.), II, 311, 521.

8. THE SAME—JURISDICTION OF THE COURT TO PUNISH ATTORNEYS-AT-LAW FOR THEIR MALCONDUCT IN OFFICE.—It is not necessary, in such a case, that the indignity or insult to the judge should occur in open court, nor that it should constitute a statutory contempt of court, in order to confer on the supreme court jurisdiction to disbar therefor. *Id.*

9. DISBARMENT OF ATTORNEY.—Evidence held insufficient to justify the defendant's removal or suspension from the bar. *In re Lowenthal* (Cal.), II, 733.

10. REMOVAL AND SUSPENSION OF ATTORNEY—WHAT CAUSES WILL JUSTIFY.—Whether an attorney can be removed or suspended from the bar for causes other than those specified in section 287 of the code of civil procedure, *quære:* but in this case the court concludes not to investigate any other charges. *In re Treadwell* (Cal.), IV, 608.

11. ATTORNEY AT LAW—SUSPENSION AND REMOVAL FROM THE BAR—UNPROFESSIONAL CONDUCT.—An attorney at law who publicly and without cause charges a court with bribery, is guilty of such a violation of his professional duties as to justify his suspension and removal from the bar, both by the common law and under the statutes of this territory. *In re Brown* (Wy.), IV, 495.

12. ADMISSION TO THE BAR—APPLICATION THEREFOR—EXAMINING COMMITTEE.—An application for admission to the bar should be addressed to the examining committee of the district in which the applicant resides. If the applicant is rejected by such committee he can not apply for examination to any other examining committee. If such rejection is the result of malice or unfairness on the part of the committee, the applicant should apply to the supreme court for relief. A certificate of legal proficiency must be signed by a majority of such committee, after an actual examination by all or a majority of them. A certificate signed by such majority, after an examination only by one, is insufficient, and a license to practice issued thereon will be revoked. *People etc.* v. *Betts* (Col.), III, 132.

13. IN DETERMINING THE REASONABLE VALUE OF AN ATTORNEY'S SERVICES, the jury should consider the character of the litigation in which the same were rendered; the novelty, difficulty, and importance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case as leading or assistant counsel, and the degree of responsibility resting upon him; the length of time necessarily consumed by the trial and other court proceedings; the fact, if it be a fact, that compensation is wholly contingent upon success, and the manner in which his duties are performed. The verdict in this case, tested by these considerations, is not excessive. *Leitensdorfer* v. *King* (Col.), III, 135.

14. VALUE OF PROFESSIONAL SERVICES—EXPERT TESTIMONY.—In an action to recover the value of an attorney's professional services, the jury are not bound by the opinion of experts as to such value, but may use their own knowledge and experience in determining the value. An instruction that their "finding as to such value should be a fair and reasonable sum according to the evidence, after considering all the evidence upon the subject, no more and no less," is proper. *Id.*

15. WHEN AN ATTORNEY'S FEE IS CONTINGENT UPON ULTIMATE SUCCESS in a particular suit, the question when such ultimate success was obtained is a question of law. In

the present instance such success was obtained upon the entry of the decree in the circuit court in the suit in which the services sued for were rendered. *Id.*

See ASSIGNMENT, 2; ATTACHMENT, 3; CANCELLATION, 2; CONTEMPT, 1; CONTRACTS, 2; ESTATES OF DECEASED PERSONS, 10; INFANTS, 2; NEW TRIAL, 5; PLEADING AND PRACTICE, 22; VENUE, 12, 15.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See ARREST AND BAIL; CHINESE RESTRICTION ACT; FUGITIVES FROM JUSTICE, 2.

BAILMENT.

See EMBEZZLEMENT, 1.

BALLOTS.

See ELECTION.

BANKRUPTCY.

1. STATUTE OF LIMITATIONS—BANKRUPTCY LAW—PROVABLE CLAIM—WHEN ACTION MAY BE MAINTAINED IN STATE COURT—UNREASONABLE DELAY OF BANKRUPT.—The plaintiff brought this action to collect a promissory note. The defendant pleaded the statute of limitations. The replication averred that the defendant had been adjudged a bankrupt by the United States district court for the northern district of Illinois, in proceedings under the national bankruptcy act then in force; that the note sued on was a claim provable in said proceedings; that the defendant had never been discharged in bankruptcy, and that he had unreasonably delayed taking the necessary steps to procure such discharge. *Held*, that the replication stated facts sufficient to avoid the statute of limitations; that the plaintiff, not having proved his claim in the bankruptcy proceedings, within the meaning of section 5105 of the revised statutes of the United States, was entitled to bring an action thereon without first obtaining the consent of the bankruptcy court, after the bankrupt had unreasonably delayed his application for a discharge; and that the state court in which such action was brought had jurisdiction to determine whether the bankrupt had been guilty of unreasonable delay in applying for his discharge. *Brooks* v. *Bates* (Col.), IV, 463.

BANKS AND BANKING.

1. CASHIER'S LIABILITY FOR MISAPPROPRIATION OF FUNDS.—A cashier of a bank, empowered to transact its business, subject to the direction of the board of trustees, who loans large sums of moneys to a single individual without taking any security therefor, and without entering the same upon the books of the bank; and who, in order to conceal such loan from the knowledge of the bank officials, falsely reports to them the amount of cash on hand, is liable for the amount of such loan lost to the bank, although the trustees neglected their duty in not regularly examining the cash, as required by the by-laws. *San Joaquin Valley Bank* v. *Bours* (Cal.), II, 901.
2. ACQUIESCENCE BY THE TRUSTEES OF A BANK for a period of seven years in the charges regularly made by their cashier, on account of his salary, is equivalent to an agreement that such amount constituted his salary. *Id.*

See CORPORATIONS, 20.

BATTERY.

See ASSAULT AND BATTERY; ASSAULT WITH DEADLY WEAPON.

BIAS, ACTUAL AND IMPLIED.

See JURY AND JURORS, 2–5, 19.

BIGAMIST.

See JURY AND JURORS, 6.

BILL OF EXCEPTIONS.

1. FAILURE TO NAME AN HOUR IN A NOTICE FOR THE SETTLEMENT OF A BILL OF EXCEPTIONS, when the day for the same has been agreed to by stipulation, is a fault imputable to both parties, and can not be taken advantage of. *City of Seattle* v. *Busby* (Wash.), II, 45.
2. BILL OF EXCEPTIONS NEED ONLY CONTAIN SO MUCH OF THE EVIDENCE as is necessary to explain it. What is necessary will depend upon the peculiar circumstances of each case. *Id.*
3. THE TIME FOR PREPARING AND FILING A BILL OF EXCEPTIONS may be extended by the court thirty days in addition to the ten days allowed by section 659 of the code of civil procedure. *Moffatt* v. *Cook* (Cal.), II, 882.
4. ORDER GRANTING EXECUTION—APPEAL—BILL OF EXCEPTIONS—CERTIFICATE OF JUDGE.—An order authorizing the issuance of an execution will not be reviewed on appeal, when the transcript contains no bill of exceptions nor certificate of the judge below that the papers contained therein were used on the hearing of the motion. *Weiner et al.* v. *Korn et al.* (Cal.), III, 507.
5. BILL OF EXCEPTIONS—NEW TRIAL—CRIMINAL LAW.—In the absence of a bill of exceptions, the supreme court will not review the action of the trial court, on a motion for a new trial in a criminal prosecution. *People etc.* v. *Smith* (Utah), III, 257.
6. MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—RECORD.—A motion for a new trial is no part of the record which can be considered on appeal, unless made so by a bill of exceptions. *Chung Yow* v. *Hop Chong* (Or.), III, 325.
7. IRRELEVANT LANGUAGE ADDRESSED TO JURY—BILL OF EXCEPTIONS.—Objections taken to irrelevant language addressed to the jury by counsel will not be reviewed by the appellate court unless the same are embodied in a bill of exceptions. *State* v. *Drake* (Or.), IV, 574.
8. TRIAL BY REFEREE—EXCEPTIONS TO RULINGS ON REPORT OF.—When no exceptions are preserved to the rulings of the district court upon the issues presented by the report of a referee and the exceptions thereto, or to the final judgment entered thereon, the supreme court is precluded from reviewing such judgment upon the evidence. *People* v. *Rocky Mountain Transportation Co.* (Col.), IV, 557.
9. THE SAME—BILL OF EXCEPTIONS—REVIEW OF EVIDENCE.—Where no bill of exceptions has been taken or preserved, and the evidence contained in the record is not properly authenticated, the supreme court can not consider any exceptions that may have been saved at the trial to the admission or rejection of testimony, but must presume that the findings of fact are correct. *Id.*

See APPEAL, 33, 76; INSTRUCTIONS, 42; JURY AND JURORS, 35.

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BILL OF PARTICULARS.

1. PROVISIONS OF THE STATUTE IN REFERENCE TO FURNISHING A BILL OF PARTICULARS are applicable to proceedings in the county court on appeal from a judgment of the justice's court. *De Lappe* v. *Sullivan* (Col.), II, 107, 108.
2. DENIAL OF A MOTION FOR A MORE SPECIFIC BILL OF PARTICULARS, if erroneous, will not warrant a reversal of a judgment if the defendant was not prejudiced thereby. *Id.*

BILL OF REVIEW.

1. BILL OF REVIEW.—An application to file a bill of review, without the performance of the decree, ought to be made to the court by petition and on notice to the adverse party, and if it appears that the performance of the decree would destroy the subject of the litigation, it ought to be allowed. *Wallamet Iron Bridge Co.* v. *Hatch et al.* (U. S. Cir. Ct., Or.), II, 230.
2. IDEM.—On the hearing of a bill of review, the court can only consider the errors of law apparent on the face of the record, and a fact found or determined by the decree is presumed to have been sufficiently proved by the evidence. *Id.*

BOARD OF EDUCATION.

1. STATE BOARD OF EDUCATION, AFTER IT HAS PASSED A RESOLUTION prescribing a certain series of text-books, may reconsider its action and rescind such resolution at any time before the adoption of such books by the different school districts. *State ex rel. Newnham* v. *State Board of Education* (Nev.), I, 402.

BOARD OF HARBOR COMMISSIONERS.

1. THE BOARD OF STATE HARBOR COMMISSIONERS, UNDER THE STATUTE OF FEBRUARY 28, 1876, HAVE JURISDICTION OVER A WHARF ERECTED IN CHANNEL STREET, between Fourth and Fifth streets, in the city and county of San Francisco. *People* v. *Williams* (Cal.), I, 572.

BONA FIDE PURCHASERS.

1. PURCHASER OF LAND, WHO CLAIMS PROTECTION AS A BONA FIDE PURCHASER for value and without notice, must hold the legal title, or be entitled to call for it; for if his title is merely equitable, it must yield to a legal and equitable title in an adverse party. *United States* v. *Southern Col. etc. Co.* (U. S. Cir. Ct., Col.), I, 11.
2. ONE WHO HAS ACQUIRED TITLE BY FRAUD MAY MAKE A VALID CONVEYANCE to a *bona fide* purchaser; but one who has never acquired the title can not convey it, nor can the title be transferred by fraudulently obtaining from the owner a deed purporting to convey it to a fictitious person, and then forging a conveyance from such fictitious person to another, however innocent the latter may be. *Id.*
3. DEFENSE OF BONA FIDE PURCHASER.—The defense of a *bona fide* purchaser is in the nature of a new case founded on a right as to title to real property operating, if made out, to bar and avoid the plaintiff's equity, which otherwise must prevail. To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment. If he had notice, actual or constructive, at any moment before the payment of the money, he is not a *bona fide* purchaser. *Eversdon* v. *Mayhew* (Cal.), II, 726.
4. PROBATE PROCEEDINGS AS NOTICE OF TITLE.—Proceedings in the probate court to have certain premises set apart to a widow and children as a homestead are not notice sufficient to put a subsequent *bona fide* purchaser from the person holding the legal title upon inquiry as to the equities of such children. *Stockton Building and Loan Association* v. *Chalmers et al.* (Cal.), II, 148; *Chalmers* v. *Chalmers* (Cal.), II, 150.
5. PRE-EXISTING DEBT—VALUABLE CONSIDERATION—BONA FIDE PURCHASER.—The cancellation of a pre-existing indebtedness may be a sufficient consideration to constitute a vendee a purchaser in good faith and for a valuable consideration. *Schluter* v. *Harvey et al.* (Cal.), II, 730.
6. THE SAME—PLEADING BONA FIDE PURCHASE.—Insufficiency in pleading the facts showing a *bona fide* purchase for a valuable consideration can not be taken advantage of in the appellate court, where there was an attempt to plead them, when no objection was raised by demurrer or otherwise in the court below, nor objection made to the evidence tending to prove such facts. *Id.*
7. EXECUTION CREDITOR—PRIORITY—BONA FIDE PURCHASE—EQUITABLE TITLE.—The holder of an equitable title to land, who obtained the same from the legal owner in payment of a pre-existing debt, is not entitled to priority over a subsequent judgment creditor of the legal owner, who, without notice, has caused such land to be levied upon under an execution issued on such judgment. Such execution creditor is a purchaser in good faith and for a valuable consideration. *Bloomfield* v. *Humason* (Or.), III, 614.
8. SACRAMENTO BONDS—ILLEGAL ISSUE—FUNDING ACT OF 1858.—Bonds issued by the municipality of Sacramento, under the funding act of April 24, 1858, are valid in the hands of a *bona fide* purchaser, although the same were irregularly or fraudulently issued by the agents of such city. *Meyer* v. *Brown* (Cal.), III, 760.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4, 5; BONDS, 1; CONVERSION, 6; CORPORATIONS, 30, 32; JUDGMENT, 32; PARTNERSHIP, 18; PLEDGE, 1; WARRANT, 1.

BONDS.

1. RAILROAD BONDS—OVER-ISSUE.—Where a railroad company had contracted that it would not issue its first-mortgage bonds in excess of ten thousand dollars per mile of completed road, but subsequent to the sale of its first mortgage to that extent it did issue its bonds in excess of such an amount: *Held*, that such over-issue was void as against the holders of the bonds regularly issued to the extent limited, none of the holders of such over-issue being innocent purchasers for value. *Union Trust Co. of New York* v. *Nevada and Oregon Railway Co.; Moran et al.* v. *McMurray et al.* (U. S. Cir. Ct., Nev.), II, 701.
2. JUDGMENT REVERSED on the authority of *Meyer* v. *Porter*, 1 West Coast Rep. 874. *Haumeister* v. *Porter* (Cal.), II, 144.
3. NO ACTION MAINTAINABLE ON THE MUNICIPAL BONDS OF SACRAMENTO ISSUED UNDER CHARTER OF 1858.—The city of Sacramento being largely indebted, its charter of 1858 provided for the funding of such indebtedness by the issue of bonds, bearing interest at six per cent, to the creditors who should surrender their former evidences of indebtedness, and accept these bonds in place thereof. This charter provided, among other things, that "none of the claims herein specified shall be liquidated or paid except in the manner herein specified;" also that "the city shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final." It further provided that the city government should levy an annual tax of one per cent on taxable property for municipal purposes, and that of the tax thus levied, and of other revenues specified, there should be annually set apart and appropriated "fifty-five per cent to an interest and sinking fund, which shall be applied to the payment of the annual interest, and the final redemption of the bonds issued for the city indebtedness, in accordance with the provisions of this act;" with a further provision that the interest and principal of these bonds should be paid from this interest and sinking fund. In 1863 this charter of 1858 was repealed, and another charter was adopted, which re-enacts all of the provisions above recited without any material change. The plaintiff is the holder of bonds of the city issued in pursuance of the charter of 1858, and he brings a suit against the city to recover the amount of the unpaid and overdue interest coupons of such bonds. *Held*, that the parties who surrendered their prior evidences of intebtedness and took these bonds took them under the provisions of the charter of 1858, which was a contract made between the city and them, to the effect that the bonds should be collected and paid only in the particular manner therein specified, and in no other, and that the city should not be liable to be sued; and that such contract was made upon a valuable consideration of advantage moving to both parties, and was valid and binding; and therefore no action can be maintained by the holders of said bonds against the city to recover the amounts unpaid and overdue thereon. If the provision of the state constitution making all corporations liable to be sued like natural persons has any application to municipal corporations, it had been waived by the bond-holders. *Kennedy* v. *City of Sacramento* (U. S. Cir. Ct., Cal.), II, 223.
4. MANDAMUS THE REMEDY.—It seems the proper and only remedy of the bond-holders is by *mandamus* against the city treasurer, to compel him to pay the interest out of the fund in his hands; or if there is no such fund, then by *mandamus* against the city government to compel them to raise and appropriate the fund by taxation, as directed by the original charter of 1858. The provision of that charter being a part of the contract between the city and the bondholder, for his benefit, its repeal by the legislature would be nugatory. *Id.*
5. SACRAMENTO BONDS—STATUTE OF LIMITATIONS.—The statute of limitations does not commence to run against the right of action on the coupons attached to the bonds issued by the city of Sacramento, under the act of April 24, 1858, until the money for the payment of such bonds is in the city treasury. *Freehill* v. *Porter* (Cal.), III, 780; *Davis* v. *Porter* (Cal.), III, 781.
6. THE SAME—PRESENTATION OF COUPONS FOR ALLOWANCE.—It was not necessary that these coupons should have been presented to or allowed by the auditor and board of trustees; they did not constitute demands within the meaning of sections 9 and 10 of the act of April 25, 1863; neither the auditor nor board of trustees had any discretion or authority to reject them or prevent their payment; the statute under which they were issued established them as debts to be paid. *Id.*
7. COUNTY BONDS—FORM OF, AFTER ACT OF 1883.—One who has contracted to purchase county bonds issued after the passage of the county government act of March

14, 1863, can not be compelled to take such bonds unless the same are in the form prescribed by such act. *County of Merced* v. *Regents of the University of California* (Cal.), IV, 186.

8. THE BONDS ISSUED UNDER THE ACT OF APRIL 4, 1864, ARE VALID, and the interest due thereon must be paid by the state to the holders thereof. *Bank of California* v. *Dunn, Controller, etc.* (Cal.), IV, 223.

9. PURCHASE OF BONDS FOR SCHOOL FUND—HOW TO BE PAID—HOW DETERMINED.—In determining the amount to be paid by the commissioners for the purchase of territorial bonds for the benefit of the school fund (under the statute of 1879, 15, section 3), the method of computation is to take the bonds at the date of delivery, calculate the interest thereon at nine and one half per cent per annum until March 1, 1887, when the bonds would become due, add the interest to the principal, then discount this amount by four and one half per cent, and the balance is the amount to be paid under the statute. To ascertain the true discount, divide the amount of the principal and interest on the bonds by one dollar plus the product of the rate multiplied by the time in years; the quotient is the sum to be paid by the state for the bonds. Subtract this sum from the amount of the debt, and the true discount remains. Subtract the principal sum, without interest, from the quotient, and the premium remains. *Livingston et al.* v. *The State* (Nev.), IV, 31.

See BONA FIDE PURCHASER, 8; EMINENT DOMAIN, 11; MANDAMUS, 1-7; STATUTE OF LIMITATIONS, 15; SURETIES, 16.

BOUNDARIES.

1. BOUNDARIES—PAROL EVIDENCE—INTENTION OF GRANTOR.—In a legal action for the recovery of land, the boundary of which is described in the deed as commencing at a given point, and running thence to a point on a small creek about two hundred varas south, and thence, etc., parol evidence is inadmissible to show that the grantor intended the line to run to a creek one thousand eight hundred and fifty varas in the same direction. If there was no such creek in that direction nearer than one thousand eight hundred and fifty varas, the reference to "a small creek" should be rejected. *Irving* v. *Cunningham et al.* (Cal.), IV, 136

See ACQUIESCENCE, 2; ADVERSE POSSESSION, 6; DEEDS, 22-24; MINES AND MINING, 23-25.

BREACH OF CONTRACT.

See CONTRACT, 13-15, 17; MASTER AND SERVANT, 6-8.

BRIBERY.

See ELECTION, 3.

BRIDGES.

See CONSTITUTIONAL LAW, 1, 6; WATER RIGHTS, 7, 8, 10-12, 14.

BROKER.

See SALES, 13.

BURGLARY.

1. BURGLARY—WHAT IS.—In section 59, crimes and punishments, revised laws, page 332, wherein it is provided that "every person who shall, in the night-time, * * * break and enter any dwelling-house or tent with intent to commit murder, robbery, mayhem, larceny, or other felony," the term "larceny" applies alike to grand and petit larcenies. In an indictment for burglary drawn upon that statute, it is not necessary to allege the value of the property intended to have been stolen. *People etc.* v. *Stapleton* (Idaho), II, 176.

2. BURGLARY—INTENT—INSTRUCTIONS.—The information charged the defendant with burglary in feloniously entering the ticket-office of a railroad with intent to commit larceny. *Held*, that an instruction that the defendant could not be convicted unless he entered the building with the intent to commit "some felony" was properly refused, since the information charged an intent to commit larceny. *People* v. *Young* (Cal.), II, 830.

3. THE SAME.—One who enters, with burglarious intent, a room of a house, enters the house with such intent. Where such room was known as a ticket-office, it may be properly described as "a building, to wit, the ticket-office." *Id.*
4. BURGLARY MAY BE DEFINED IN THE LANGUAGE of the penal code. *Id.*
5. A ROOM MAY BE CONSTRUCTED WITHOUT A PARTITION reaching to the ceiling, and the court may so instruct the jury. *Id.*
6. CERTAIN INSTRUCTIONS REVIEWED AND HELD CORRECT. *Id.*
7. BURGLARY—BUILDING—INHABITANCY.—Burglary, under the statute of 1861, as amended in 1869, may be committed in buildings of any kind, regardless of the fact of inhabitancy. *State* v. *Dan* (Nev.), III, 275.
8. THE SAME—DESCRIPTION OF PREMISES—VARIANCE.—Under an indictment for burglary, where the premises entered are described and proved to belong to a certain person, a further allegation that the same were in the possession of a particular tenant is immaterial, and a failure to prove the latter allegation is not a variance. *Id.*
9. PREVIOUS CONVICTION—BURGLARY—IMPRISONMENT.—A defendant convicted of burglary in the second degree, and of a previous conviction of grand larceny, may, under section 666 of the penal code, be punished by imprisonment for ten years, or for any time less than ten years. *People* v. *Brooks* (Cal.), III, 57.
10. INFORMATION—ENTERING DWELLING-HOUSE WITH INTENT TO COMMIT LARCENY.—Under an information charging the defendant with the crime of feloniously entering a dwelling-house with intent to commit larceny, a conviction can not be had if the evidence shows an intent to commit some other felony. *People* v. *Mulkey* (Cal.), III, 574.
11. BURGLARY—INSTRUCTIONS.—In a prosecution for burglary, it is error for the court to instruct the jury, without qualification, that "if the defendants took the goods between sunset and sunrise, they committed burglary in the first degree," although, in a prior portion of the charge, the definition of burglary, as given in the penal code, had been read to the jury. *People* v. *Carey* (Cal.), III, 26.

See CRIMINAL LAW AND PRACTICE.

CANCELLATION.

1. UNITED STATES NEED NOT RETURN OR TENDER THE MONEY RECEIVED in consideration of a fraudulent patent, as a condition precedent to its right to maintain a suit to set aside such patent, where the same has been made to a fictitious patentee. *United States* v. *Southern Col. etc. Co.* (U. S. Cir. Ct., Col.), I, 11.
2. FRAUDULENT DECREE OF PROBATE COURT—CANCELLATION OF—VOLUNTARY APPEARANCE OF ATTORNEY.—An equitable action lies to annul and set aside a decree of the probate court, when the same has been obtained by fraud, or without notice to the parties interested. In such case the party defrauded is not confined to the remedy by motion given by section 473 of the code of civil procedure, nor is the court's power to grant equitable relief affected by the fact that an attorney voluntarily appeared for the plaintiff, in the probate proceedings, without being in any way authorized to appear. *Baker* v. *Riordan* (Cal.), III, 210.
3. FRAUDULENT MARRIAGE CONTRACT—EQUITABLE JURISDICTION TO CANCEL.—Equity has jurisdiction to declare null and void and to cancel an instrument which is claimed to be a marriage contract, executed in conformity with section 75 of the civil code of California, when the same is a forgery or was obtained by fraud. *Sharon* v. *Hill* (U. S. Cir. Ct., Cal.), II, 164.
4. CANCELLATION OF DEED PROCURED BY FRAUD.—Every person who signs, executes, and acknowledges a deed is presumed to know the contents and legal effect thereof. But where a deed is executed by reason of false and fraudulent representations as to its contents, and where it is falsely read to the grantor, and by reason of such false and fraudulent representations, and in ignorance of its contents, the grantor executes the same, such deed may be annulled and canceled, and parol evidence is admissible to show such facts. *Tufts, Administrator, etc.*, v. *Tufts* (Utah), II, 459.
5. FINDING THAT A CERTAIN DEED WAS OBTAINED BY REASON OF FALSE and fraudulent representations on the part of the grantee, *held*, supported by the evidence. *Id.*
6. ACTION FOR CANCELLATION—NECESSARY PARTIES.—In an action for the cancellation of a deed, alleged to have been fraudulently obtained by the grantee during his lifetime, the heirs and devisees of the deceased grantee are necessary parties. *Snyder* v. *Voorhies, Executrix, etc.* (Col.), II, 616.

7. EJECTMENT—EVIDENCE—CANCELLATION OF CERTIFICATE OF PURCHASE.—In an action of ejectment, where the plaintiff relies on a certificate of the receiver of public moneys, evidence tending to show a cancellation of such certificate, and the reasons therefor, are admissible on the part of the defendant. *Hays* v. *Parker* (Wash.), II, 801.

See EVIDENCE, 6; FRAUD, 3. 6, 11, 13, 14.

CAUSE OF ACTION.

See ABATEMENT, 1.

CERTIFICATE OF DEPOSIT.

See APPEAL, 48.

CERTIORARI.

1. REVIEW UPON CERTIORARI IS CONFINED to questions of jurisdiction. *State ex rel. Barnett* v. *Fifth District Court* (Nev.), II, 630.
2. A JUDGMENT WHICH IS SATISFIED IS NOT THE SUBJECT OF REVIEW BY CERTIORARI. The judgment of an inferior court, though entered without jurisdiction, which is paid by the party against whom the judgment is rendered, and satisfaction of judgment entered, is not the subject of review by *certiorari*. *Madsen* v. *Kenner* (Utah), IV, 415.
3. CERTIORARI DOES NOT LIE TO REVIEW THE JUDGMENT of a court which has been entirely satisfied. *Morton* v. *Superior Court* (Cal.), III, 488.
4. WRIT OF REVIEW—JURISDICTION.—Where the lower court has jurisdiction over the subject-matter and the parties its action will not be reviewed on *certiorari*. *Nunan* v. *Superior Court etc.* (Cal.), III, 433.
5. CERTIORARI—OBJECT OF THE WRIT—NO REHEARING PERMISSIBLE AFTER JUDGMENT.—An error or irregularity committed in the exercise of a court's jurisdiction is not reviewable on *certiorari*. A rehearing after judgment on a writ of review can not be had in the lower court. The case is heard there upon the return made to the writ; and the only question upon the return is whether the court whose judgment or order is the subject-matter of review pursued its jurisdiction. The judgment rendered on that question is reviewable only on appeal. *Alexander* v. *Municipal Court of Appeals* (Cal.), IV, 299.
6. DISMISSAL OF APPEAL BY MUNICIPAL COURT OF APPEALS—NOTICE OF TO APPELLANT.—The municipal court of appeals of the city and county of San Francisco had jurisdiction to dismiss an appeal from the justice's court taken on questions of law and fact, after the same has been placed on the calendar by stipulation of the parties, if the appellant fails to appear at the trial, although no notice of motion to dismiss had been given. Such dismissal, even if irregular, is not reviewable on *certiorari*. *Id.*
7. CERTIORARI—JUDICIAL OFFICER—MINISTERIAL ACTS OF.—The action of a judicial officer in regard to matters which are exclusively executive or legislative in their nature, even when the statute requiring the performance of such matters is unconstitutional, can not be reviewed by *certiorari*. *State ex rel. Esmeralda County* v. *Third District Court* (Nev.), IV, 597.
8. THE SAME—APPORTIONMENT OF DEBT OF ESMERALDA COUNTY—ACTS OF DISTRICT JUDGE.—The acts required to be performed by the district judge in determining the amount of the indebtedness of Esmeralda county, to be assumed and paid by Lyon county under the act of 1883, are not judicial in their nature, and can not be reviewed by *certiorari*. *Id.*
9. COUNTY COURT—CERTIORARI TO JUSTICE'S COURT—PETITION FOR.—The county court is expressly authorized, by section 1992 of the general statutes, to review the action of a justice's court on *certiorari*, where, without fault on his part, the petitioner is unable to take his appeal in the usual way. The petitioner for such appeal must allege, 1. That the judgment before the justice was not the result of negligence on his part; 2. That the judgment, in his opinion, is erroneous and unjust, stating wherein such error and injustice consist; and 3. That it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing. *Small et al.* v. *Bischelberger* (Col.), IV, 558.

10. ON A MOTION TO QUASH SUCH WRIT OF CERTIORARI, the averments of the petition therefor must be taken as true. They can not be contradicted by affidavits. *Id.*
11. THE SAME—WHEN DEFENDANT IS ENTITLED TO WRIT.—The plaintiff in an action in the justice's court promised the defendant, for a valuable consideration, to dismiss such action. Relying upon such promise, the defendant failed to attend at the trial. Instead of dismissing, the plaintiff procured a judgment, but withheld the levy of the execution until after the time for appeal had expired. The defendant was ignorant of the judgment until the execution was levied. *Held*, upon a petition showing the above facts, that the defendant was entitled to a writ of *certiorari* from the county court to review the action of the justice. *Id.*
12. WRIT OF REVIEW—DOES NOT LIE AFTER EXPIRATION OF TIME FOR APPEAL.—A writ of review does not lie to bring up the record of the proceedings of a county court in a civil action after the right of appeal has expired by the lapse of more than thirty days since the rendition of the judgment. *Broback* v. *Huff* (Or.), IV, 339.
13. CERTIORARI—ORDER MADE AFTER JUDGMENT—DELAY IN APPLYING FOR WRIT.—A writ of *certiorari* will not lie to review an order made after final judgment, when the right of appeal therefrom is barred, unless extraordinary circumstances are made to appear justifying the delay in applying for the writ. *Kimble* v. *Superior Court* (Cal.), IV, 509.
14. WRIT OF REVIEW—CONDEMNATION OF LAND—POSSESSION.—A writ of review does not lie to prevent the plaintiff, in a proceeding for the condemnation of land, from taking possession of the same prior to the order of the court, or to restore the possession so taken to the defendant. The defendant in such case has a plain, speedy, and adequate remedy by motion in the lower court. *In re Application of Bryan* (Cal.), III, 289.
15. ORDER AFTER FINAL JUDGMENT—APPEAL—CERTIORARI.—An order of the court, directing certain money, which had been paid into court in satisfaction of a judgment, to be retained by the clerk until proceedings were had for the purpose of ascertaining who would be entitled to such money, is a special order made after final judgment, and as such is appealable, and therefore not the subject of review by *certiorari*. *Slavonic Illyric Mutual Benevolent Association* v. *Superior Court etc.* (Cal.), III, 524.
16. CERTIORARI TO REVIEW ACTION OF SUPERVISORS—RECLAMATION OF SWAMP LAND. An order of a board of supervisors creating a district for the reclamation of swamp land is an act of legislation in the exercise of the taxing or police power of the state, and is not reviewable upon *certiorari*. *Williams* v. *Board of Supervisors* (Cal.), II, 732.

See AMENDMENTS, 2; CONTEMPT, 9; INJUNCTION, 8, 11; INSOLVENCY, 12.

CESTUI QUE TRUST.

See TRUSTS.

CHALLENGE.

See JURY AND JURORS.

CHANGE OF PLACE OF TRIAL.

See VENUE.

CHARGE TO JURY.

See INSTRUCTIONS.

CHATTEL MORTGAGE.

See MORTGAGE; SUPPLEMENTAL PROCEEDINGS, 1.

CHINESE.

See CHINESE RESTRICTION ACT; CITIZENSHIP, 1, 4.

CHINESE RESTRICTION ACT.

1. RESTRICTION ACT, WHEN TOOK EFFECT.—The act of congress of May 6, 1882, commonly called the Chinese restriction act, does not state when it was to go into

operation, and consequently it took effect immediately upon its approval by the president. *In re Leong Yick Dew* (U. S. Cir. Ct., Cal.), II, 83.

2. CHINESE LABORERS—EVIDENCE OF FORMER RESIDENCE.—A Chinese laborer who was a resident of the United States on the seventeenth day of November, 1880, the date of the treaty with China, but who left the same after the taking effect of the restriction act, and after having an opportunity to obtain the certificate required by section 4 thereof, can not re-enter the United States, either by land or sea, or having re-entered remain therein, unless he proves the fact of his former residence by such certificate. No other evidence of such fact is admissible. *Id.*

3. THE SAME.—Chinese laborers who were in the United States on November 17, 1880, the date of the treaty with China, and who left before the passage of the restriction act on May 6, 1882, and those who came into the United States and departed therefrom between such dates, or afterwards before June 6, 1882, the date on which the collector of the port of San Francisco was prepared to issue the certificates provided for in section 4 of such act, in the form prescribed by the secretary of the treasury, are entitled to re-enter the United States upon satisfactory evidence of their former residence other than that furnished by such certificate. *Id.*

4. APPLICATIONS OF CHINESE PERSONS FOR THEIR DISCHARGE FROM A RESTRAINT claimed to be illegal under the restriction act may be divided into three classes: 1. Applications for discharge on the ground of previous residence; 2. Applications for discharge founded on the production of Canton certificates; 3. Applications for discharge on the part of children brought to or sent for by their parents or guardians. The nature and effect of the evidence usually produced by the petitioners in each of these classes stated and considered. *In re Tung Yeong* (U. S. Dist. Ct., Cal.), I, 647.

5. CONSTRUCTION TO BE GIVEN TO THE RESTRICTION ACT.—In construing the Chinese restriction act, if the provisions of the Chinese treaty and such act are irreconcilably conflicting, the court should follow the requirements of the act; but no construction should be given to such act which would violate the provisions of the treaty, if such construction can be avoided. *Id.*

6. CHINESE RESIDENT OF THE UNITED STATES AT DATE OF TREATY—RIGHT OF, TO RETURN.—A Chinese laborer who was a resident of the United States on November 17, 1880, the date of the treaty with China, and who left this country before the Chinese restriction act went into operation, has a right to return without producing a custom-house certificate; but the burden of proof is on him to show such facts by clear and satisfactory evidence. *Id.*

7. CHINESE WHO WERE NOT IN THE UNITED STATES AT THE DATE OF SUCH TREATY are not embraced within the provisions of the second article of such act. *Id.*

8. CHINESE LABORERS WHO, ALTHOUGH IN THE UNITED STATES AT THE DATE OF SUCH TREATY, left the same after such act went into practical operation, and who neglected to procure a custom-house certificate, are not entitled to return. *Id.*

9. CHINESE CHILDREN WHOSE PARENTS ARE LAWFULLY WITHIN THE UNITED STATES are not excluded therefrom by any provision of the restriction act. *Id.*

10. DETENTION OF CHINESE WHEN UNDER AUTHORITY OF UNITED STATES—HABEAS CORPUS.—When a Chinese person is detained on board of a ship, and refused the right to land, either by the authority of the ship's master or by the collector of the port, he is restrained of his liberty under or by color of the authority of the United States, and is entitled, as of common right, to sue out a writ of *habeas corpus*, that the legality of his detention and restraint may be passed upon by the court. When his body is produced in obedience to the writ, the control of his person remains with the court, which may commit him to the custody of the marshal, or hold him to bail to await the decision of the court. *In re Chow Goo Pooi* (U. S. Cir. Ct., Cal.), I, 535.

11. RIGHT OF CHINESE PASSENGER TO TRIAL BY JURY—FINDING BY THE JUSTICE.—In the investigation before the justice, judge, or commissioner, to ascertain and find out whether a Chinese person is unlawfully within the United States, there is no right to a trial by jury. Such investigation may be had on a proceeding by *habeas corpus*, and the finding of the court or judge in such proceeding, that the petitioner is a Chinese laborer prohibited by law from landing, or from being or remaining in the United States, amounts in fact to a finding by a justice, judge, or commissioner that such person is unlawfully here, within the meaning of section 12 of the Chinese exclusion act. *Id.*

12. DETENTION OF SHIP.—The court has no power to detain the ship pending the investigations with regard to the right of her Chinese passengers to land. *Id.*

13. CUSTODY OF CHINESE PASSENGER PENDING PRESIDENT'S ACTION.—When the justice, judge, or commissioner has determined that the Chinese passenger is not en-

titled to be or remain in the United States, and it is impossible to remand him to the ship on which he arrived, he may be committed to the custody of the marshal, or held to bail for a reasonable time until the president's direction can be had. *Id.*

14. ORDER REMANDING CHINESE PASSENGER.—When the judge or court decides that the petitioner has no right to be or remain in the United States, an order should be made that he be remanded by the marshal to the custody from which he was taken. Upon the return of the marshal apprising the court that the vessel on which he arrived has sailed, the judge may, by a supplemental order, commit him to the custody of the marshal, to be held for a reasonable time to await the direction of the president. As to what constitutes a reasonable time, *quære*. Such direction of the president may be given by a general or special order. It may operate retrospectively as well as prospectively, but it can not revise the judgment of the justice, judge, or commissioner. He may, by a general order directed to the marshal or to the collector, direct that all persons found to be unlawfully here shall be removed, and he may instruct such officers to procure their tickets, and effectuate their removal. If there be any difficulty from the want of appropriation or means at his command in fulfilling the duty imposed on him, it is for congress to remove it. *Id.*

15. PRACTICAL OPERATION OF THE CHINESE EXCLUSION ACT, with reference to the duties imposed on the United States courts, commented on. *Id.*

16. THE PRACTICAL OPERATIONS OF THE CHINESE RESTRICTION ACT STATED and commented on. *In re Tung Yeong* (U. S. Dist. Ct., Cal.), I, 647.

17. CHINESE RESTRICTION ACT OF 1884—CHINESE LABORERS IN COUNTRY AT DATE OF TREATY.—Chinese laborers who were in the United States on the seventeenth day of November, 1880, and who departed from the United States prior to June 6, 1882, before the collector of the port was prepared to give the certificate required by section 4 of the original act, are entitled to re-enter the United States, on satisfactory evidence other than the certificate prescribed in said section 4, that they resided in the United States on November 17, 1880, or came into the United States between that date and August 4, 1882. *In re Ah Quan* (U. S. Cir. Ct., Cal.), III, 461.

18. THE SAME—EVIDENCE AS TO CHINESE LABORERS DEPARTING AFTER JUNE 6, 1882. The only evidence upon which Chinese laborers who departed from the United States after June 6, 1882, can now be admitted, is a certificate containing all the essential matters required by section 4 of the original act, or the certificate provided for in the amendatory act; and Chinese laborers who departed from the United States prior to July 5, 1884, or before the collector was prepared to issue certificates under the latter act, having such a certificate regularly issued under the act of 1882, and who produce it to the collector on their return, are *prima facie* entitled to re-enter the United States, although they do not arrive till after July 5, 1884. *Id.*

19. THE SAME—LABORERS DEPARTING UNDER ACT OF JULY 5, 1884.—Chinese laborers who have departed from the United States since the collector has been prepared and ready to furnish the certificates required by section 4 of the restriction act, as amended by the act of July 5, 1884, can only re-enter the United States upon the production of the certificate required by said amendment, which is the only evidence to show a *prima facie* right in such cases to re-enter the United States. Should the United States produce evidence to overthrow such *prima facie* evidence of a right to re-enter the United States the party claiming the right to re-enter may rebut such evidence produced by the United States by any evidence generally competent under the ordinary rules of evidence. *Id.*

20. THE SAME—CHINESE NOT LABORERS UNDER ACT OF JULY 5, 1884.—Chinese, other than Chinese laborers, entitled under the treaty with China, and not prohibited from entering the United States by the said restriction act, who left China or other foreign country before July 5, 1884, on their way to enter the United States, are now entitled to enter upon such satisfactory evidence as was recognized as competent and sufficient before the passage of said amendatory act of July 5, 1884. *Id.*

21. THE SAME—WIFE AND CHILDREN OF CHINESE OTHER THAN LABORERS UNDER ACT OF 1884.—The wife or minor child of a man of the Chinese race entitled to come to the United States, other than a Chinese laborer, is a "Chinese person" within the meaning of said original and amendatory restriction acts, and entitled to enter upon the production of the required certificate, but not otherwise, under the provisions of the said amendatory act. They can not, nor can either of them, enter upon the certificate issued to the husband, or father alone, not embracing the required description and name of the wife or child. There must be either an independent certificate, such as required, or the certificate issued to the husband or father must also contain a certificate of the facts required by the statute, both as to

the wife and as to each minor child sought to be introduced. But the wife and minor children who have not, in fact, adopted the occupation of a laborer, of a Chinese man, should be deemed to belong to the class to which the husband or father belongs. *Id.*

22. CHINESE RESTRICTION ACT—CUSTOM-HOUSE CERTIFICATE—EXCUSE FOR NOT OBTAINING.—Chinese laborers who left the United States after the restriction act of 1882 went into effect, and before the passage of the act of July 5, 1884, can not re-enter without producing the custom-house certificate required by the former act. No excuses for the failure to obtain such can in any case be received. *In re Shong Toon* (U. S. Dist. Ct., Cal.), III, 596.

23. CHINESE RESTRICTION ACT OF 1884—REMOVAL OF CHINESE.—Under the Chinese restriction act of 1884, where the court finds that a Chinese person is unlawfully within the United States, it has implied authority to order the marshal to cause such person to be removed to the country whence he came. Unless such construction is given, the act would prove utterly abortive as a means of attaining the object which congress had in view. *In re Chin Ah Sooey* (U. S. Dist. Ct., Cal.), III, 603.

24. CHINESE RESTRICTION ACTS CONSTRUED—CERTIFICATE OF COLLECTOR ESSENTIAL—CUSTOM-HOUSE TAG.—A Chinese laborer who left the United States after the restriction act of May 6, 1882, went into operation, without obtaining the certificate provided for in such act, can not be permitted to re-enter after the amendatory act of 1884 went into operation, upon the presentation of a tag given to him by the custom-house officials, prior to his departure, authorizing the issue of such certificate to him. *In re Ah Kee, on Habeas Corpus* (U. S. Dist. Ct., Cal.), IV, 19.

25. THE SAME—NOTHING ELSE TAKEN AS A SUBSTITUTE FOR CERTIFICATE.—The provision of the amendatory act of 1884, that such "certificate shall be the only evidence permissible to establish" the right of re-entry, is as applicable to the certificate issued under the act of 1882, as to that issued under the act of 1884. No evidence can be taken as an equivalent or substitute for the certificate. *Id.*

26. THE SAME—REMOVAL OF CHINESE UNLAWFULLY IN UNITED STATES.—Parties unlawfully bringing Chinese persons to the United States, who are prohibited by such acts from landing, must take them back to the country from which they are brought, or at least beyond the jurisdiction of the United States. A steamship company which brings such persons can not escape from this duty by the departure of the vessel on which they are brought, or by any change in its officers or management. *Id.*

27. HABEAS CORPUS—CUSTODY OF COURT.—Where a return is made to a writ of *habeas corpus*, accompanied by a production of the petitioner, the court, pending the proceedings on the writ, may, if deemed proper, continue him in the custody of the party detaining him, commit him to the custody of the marshal, or admit him to bail. SAWYER, J. *Id.*

28. RESTRICTION ACT—CUSTODY OF COURT.—Where a party, detained on board a steamship, and not permitted to land, under the provisions of the Chinese restriction act, has been produced in court on *habeas corpus*, and admitted to bail pending the proceedings, he is in the custody of the law, and in contemplation of law he has not been landed. SAWYER, J. *Id.*

29. REMANDING PRISONERS.—In such case, if, pending the proceeding, the steamship on which he came departs, he may be remanded to the custody of the master when she returns to port, whether the master be the same one who produced him or another; and a refusal to receive the party so remanded would, in law, constitute a permitting or aiding and abetting an unlawful landing, within the meaning of the restriction act. SAWYER, J. *Id.*

30. CHINESE RESTRICTION ACT—WIFE OF LABORER—CERTIFICATE.—The wife of a Chinese laborer, who left China after the restriction act of 1884 went into operation, can not enter the United States without furnishing the certificate required by section 6 of that act. She can not enter upon the certificate of her husband authorizing his entry. *In re Ah Moy, on Habeas Corpus* (U. S. Cir. Ct., Cal.), IV, 25.

31. CHINESE LABORER'S WIFE.—The wife of a Chinese laborer, she being herself a Chinese laborer in fact, who has never before been in the United States, can not now lawfully enter the United States on her own personal right, under the provisions of the restriction act; nor can she be introduced by the husband, who is himself entitled to enter, upon any right pertaining to him, under the provisions of the treaty and the said restriction act. SAWYER, J. *Id.*

32. STATUS OF WIFE.—A Chinese wife who was not a Chinese laborer in fact prior to her marriage, upon her marriage takes the *status* of the husband, as one of a class

whose entry into the United States is prohibited by the restriction act, and she can not lawfully enter. SAWYER, J. *Id.*

33. CHINESE RESTRICTION ACT—ADMISSION TO BAIL OF REMANDED PRISONER.—A Chinese person, prohibited by the restriction act from coming into the United States, and who has been remanded to the custody of the marshal to be deported therefrom, can not be permitted to land upon giving bail for his appearance at the time of the sailing of the vessel upon which he is ordered to be deported. *In re Ah Moy, on Habeas Corpus* (U. S. Cir. Ct., Cal.), IV, 75.

34. CHINESE RESTRICTION ACT—LABORER—EVIDENCE OF PRIOR RESIDENCE—CERTIFICATE.—A Chinese laborer, who left the United States before the restriction act of 1882 went into operation, can not re-enter the same, after the amendatory act of 1884 went into operation, without producing the certificate provided for in such acts. Parol evidence of his former residence is inadmissible. *In re Cheen Heong, on Habeas Corpus* (U. S. Cir. Ct., Cal.), IV, 53.

35. CHINESE RESTRICTION ACT—CERTIFICATE—PRIOR RESIDENCE.—A Chinese laborer, who left the United States after the passage of the restriction act of 1882, can not re-enter the same without producing the certificate required by such act. Such certificate is the only evidence permissible to establish his right of re-entry. He can not re-enter upon proof of having received a custom-house tag entitling him to a certificate, if he left without obtaining it. *In re Kew Ock, on Habeas Corpus* (U. S. Cir. Ct., Cal.), IV, 29.

See CITIZENSHIP, 4.

CIRCUMSTANTIAL EVIDENCE.

See EVIDENCE.

CITIZENSHIP.

1. CITIZENSHIP OF PERSONS BORN IN THE UNITED STATES OF CHINESE PARENTS.—A person born within the United States, of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the emperor of China, is a citizen of the United States. *In the Matter of Look Tin Sing* (U. S. Cir. Ct., Cal.), IV, 71, 363.

2. CONSTRUCTION OF WORDS "SUBJECT TO JURISDICTION THEREOF," IN FIRST CLAUSE OF SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.—Persons are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, with the consequent obligation to obey them when obedience can be rendered; but only those who are thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. Persons excepted from citizenship, notwithstanding their birth or naturalization in the United States. *Id.*

3. ORIGIN OF THE CLAUSE IN THE AMENDMENT DECLARING WHO ARE CITIZENS OF THE UNITED STATES.—Previous to this amendment, the general doctrine, except as applied to Africans brought here and sold as slaves, and their descendants, was, that birth within the dominions and jurisdiction of the United States of itself created citizenship. The amendment was adopted as an authoritative declaration of this doctrine as to the white race, and also to do away with the exception as to the Africans and their descendants. *Id.*

4. THE RESTRICTION ACTS NOT APPLICABLE TO CITIZENS.—The acts of congress of 1882 and 1884, restricting the immigration of Chinese laborers to the United States, are not applicable to citizens of the United States, though of Chinese parentage. No citizen can be excluded from the United States except in punishment for crime. *Id.*

5. CITIZENSHIP OF THE UNITED STATES—RENUNCIATION OF.—A person born in the United States and a citizen thereof has a right to expatriate himself, to renounce his allegiance to the country of his birth, and to become a citizen of another state or kingdom. *Brown* v. *Dexter* (Cal.), IV, 275.

6. THE SAME—CHILD BORN IN FOREIGN COUNTRY OF EXPATRIATED FATHER.—A child born in a foreign country of a father who had previously renounced his citizenship of the United States, and assumed allegiance to another power, is not a citizen of the United States. *Id.*

CLAIM AND DELIVERY.

1. CLAIM AND DELIVERY—PLEADINGS—DENIAL OF OWNERSHIP.—An allegation of the plaintiff that he is the owner, and entitled to the possession, of the property sued for, is put in issue by a denial of plaintiff's ownership, coupled with an allegation that the defendant "has not sufficient information or belief upon the subject to enable him to answer" as to the plaintiff's right to possession, and a consequent denial of the same. *Cunningham* v. *Skinner* (Cal.), III, 290.
2. CLAIM AND DELIVERY—OWNERSHIP, EVIDENCE OF.—Where issue is joined as to the ownership of property in an action of claim and delivery, the books of a person not a party to the action, purporting to show a sale of such property to the plaintiff, are inadmissible for the purpose of corroborating the testimony of the plaintiff that he was the owner. *Watrous* v. *Cunningham et al.* (Cal.), III, 365.
3. CLAIM AND DELIVERY—PRIOR JUDGMENT—DEFENSE.—It is no defense to an action for claim and delivery of personal property that, in a certain action which the defendant at one time brought against the present plaintiff to recover the same property, a judgment of nonsuit was entered against him, or that the present plaintiff, in a prior action against a third person for the same property, got a judgment on the pleadings for its recovery, with damages and costs. *Fleming* v. *Hawley* (Cal.), III, 487.
4. CLAIM AND DELIVERY—VERDICT—JUDGMENT.—In an action to recover possession of certain cattle, and for damages for their detention, when the answer denies all the material averments of the complaint, a verdict for the defendants for one half of such cattle is not responsive to the issues, and should be disregarded by the court; and a judgment for the defendant entered on such verdict is erroneous. The jury should have also found as to the other half of the cattle sued for. *Muller* v. *Jewett et al.* (Cal.), IV, 638.

See CONVERSION, 1; REPLEVIN.

CLOUD ON TITLE.

See TAXATION, 36–39.

CODE.

1. THE DIFFERENT SECTIONS OF A CHAPTER IN ANY ONE OF THE CODES MUST BE SO CONSTRUED as to reconcile all apparent conflicts; and if there are conflicting provisions in the different sections of a chapter, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter. *Emeric* v. *Alvarado* (Cal.), I, 708.

COLLATERAL SECURITY.

See INSURANCE, 10; MARRIED WOMEN, 5, 6.

COLLISION.

See NEGLIGENCE, 32–34.

COLLUSION.

See CONSIDERATION, 4; EVIDENCE, 20.

COLOR OF TITLE.

See DEED, 20, 21.

COMMISSIONER OF IMMIGRATION.

See IMMIGRATION COMMISSIONER.

COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS, 5–7.

such consideration was an agreement on the part of the wife to abandon her defense in an action of divorce then pending between them, and doing nothing to resist or prevent or delay him in obtaining a decree of divorce. *Beard* v. *Beard* (Cal.), III, 208.

See ACCOUNT STATED, 1; BONA FIDE PURCHASER, 3-5, 7; CANCELLATION, 1; CONTRACTS, 7; CORPORATIONS, 11; DEED, 6-8; HOMESTEAD, 7; INSANE PERSONS, 2; MARRIED WOMEN, 6; NEGOTIABLE INSTRUMENTS, 3, 4, 6, 8, 13; PLEADING AND PRACTICE, 12, 39; PUBLIC LANDS, 3, 8-12; SPECIFIC PERFORMANCE, 2-5.

CONSIGNOR AND CONSIGNEE.

See CONVERSION, 4.

CONSPIRACY.

1. AN ACTION FOR A CONSPIRACY DOES NOT LIE unless the same is accompanied by some overt act damaging the plaintiff. *Taylor* v. *Bidwell et al.* (Cal.), III, 479.

See MORTGAGE, 29; MURDER AND MANSLAUGHTER, 80.

CONSTABLE.

See ATTACHMENT, 2.

CONSTITUTIONAL LAW.

1. THE ACT OF THE LEGISLATURE OF APRIL 1, 1876, AUTHORIZING THE CITY OF OAKLAND to construct a bridge across the estuary of San Antonio, between Eighth street and East Ninth street, is not unconstitutional. *Pacific Bridge Co.* v. *Kirkham* (Cal.), I, 769.
2. PROVISIONS OF THE CONSTITUTION REGULATING THE MANNER IN WHICH BILLS and joint resolutions which have passed the legislature shall be signed, are mandatory and not directory. *State ex rel. Cardwell* v. *Glenn* (Nev.), I, 50.
3. EVIDENCE THAT AN ENROLLED ACT HAS BEEN CERTIFIED TO BY THOSE OFFICERS who are charged by the constitution with the duty of deciding what laws have been enacted, that it has been signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, is conclusive as to the passage of such act as enrolled, and the only evidence thereof. *Id.*
4. PROVISIONS OF THE CONSTITUTION REGULATING THE PASSAGE OF BILLS, and providing for their authentication, should be construed with reference to existing customs in legislative and parliamentary bodies. And in cases of doubt, the courts will give due consideration to the contemporary construction which has been deliberately given to such provisions by the legislative and executive departments of the government. *Id.*
5. SIGNING AN ACT OF THE LEGISLATURE BY THE ASSISTANT SECRETARY OF THE SENATE is a substantial compliance with the provision of the constitution requiring all acts and joint resolutions to be signed by the secretary of the senate. *Id.*
6. JURISDICTION UNDER A LAW OF THE UNITED STATES.—A suit arises under a law of the United States, when the controversy involved therein turns upon the existence, effect, or operation of such a law, and therefore a suit by a riparian owner to enjoin the construction of a bridge contiguous and injurious to his property, upon the ground that the defendant is not authorized to build the same by a certain act of congress as it pretends and claims, arises under said act, and is within the jurisdiction of the proper circuit court. *Hughes* v. *Northern P. R'y Co.* (U. S. Cir. Ct., Or.), I, 21.
7. IN WHAT COURTS THE NORTHERN PACIFIC MAY SUE OR BE SUED—CITIZENSHIP OF.—*Semble*, that the Northern Pacific Railway Company, being created by an act of congress, may sue or be sued in the proper circuit court of the United States in all cases; and *quære*, of what state, if any, is it a citizen, for the purpose of jurisdiction in such courts? *Id.*
8. THE WORD "PROPERTY," AS USED IN THE CONSTITUTIONAL GUARANTY that "private property shall not be taken or damaged without just compensation," includes not only the corporeal thing, whether the same be chattels or land, but also the right to fully possess, use, and alienate the same. *Denver* v. *Bayer* (Col.), I, 505.
9. DUE PROCESS OF LAW.—A person arrested and imprisoned for the violation of a void ordinance of a municipal corporation is imprisoned by the state without due process of law, and therefore in violation of the fourteenth amendment, and may be dis-

charged therefrom by the writ of *habeas corpus* issued from the proper court of the United States. *In re Lee Tong* (U. S. Dist. Ct., Or.), I, 35.

10. CONTROVERSY, WHEN ARISES UNDER ACT OF CONGRESS.—A controversy which turns upon the existence, effect, and operation of an act of congress, is an action arising under such act, and a suit brought to determine such controversy is properly commenced in the district court of the territory, sitting to hear and determine causes arising under the constitution and laws of the United States; and especially is this the case when the action is brought by or against a corporation chartered by an act of congress. *Northern Pacific R. R. Co.* v. *Carland, Treasurer, etc.* (Mont.), II, 326.
11. WHEN RIGHTS HAVE BECOME VESTED UNDER A VALID CONTRACT, legislative authority can not invalidate such contract or disturb such rights. *Id.*
12. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IS NOT A LIMITATION UPON THE POWER OF CONGRESS in the disposal of the property of the United States. *Id.*
13. STATE STATUTE INVOLVING FEDERAL QUESTION.—In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court. *Dundee Mortgage etc. Co.* v. *School District* (U. S. Cir. Ct., Or.), II, 241.
14. THE ACT OF APRIL 6, 1877, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act, and to revise and amend the same," is not unconstitutional as being in contravention of the provisions of the constitution respecting special legislation. *Brown* v. *City of Denver et al.* (Col.), II, 618.
15. SPECIAL LEGISLATION—LEGISLATIVE DISCRETION.—Where the constitution, after enumerating certain subjects on which special legislation is prohibited, provides that "in all other cases where a general law can be made applicable no special law shall be enacted," the question whether a subject not enumerated can be provided for by a general law is one of legislative discretion, and not for the courts. *Id.*
16. DUE PROCESS OF LAW—NOTICE.—Whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary, or otherwise, at some stage of it and before the property is taken, or the charge becomes absolute against either the owner or his property, an opportunity to be heard must be given; otherwise such proceeding is without due process of law. *Id.*
17. THE SAME—SIDEWALK ORDINANCE OF DENVER.—Tested by the above rules, the sidewalk ordinance passed by the city council of Denver, on March 17, 1881, is void, as furnishing the owner no notice of the assessment and no opportunity to be heard thereon. *Id.*
18. THE CONSTRUCTION PUT UPON LAWS PASSED UNDER THE LATE CONSTITUTION, by the highest court then in existence, will be accepted and followed by the present supreme court. *Emery* v. *Reed* (Cal.), III, 195.
19. THE ACT OF MARCH 23, 1874, AUTHORIZING the city of Oakland to construct a main sewer, is constitutional. *Id.*
20. SLAUGHTERING OF ANIMALS—SACRAMENTO—CONSTRUCTION OF CHARTER.—Under the act of April 25, 1863, incorporating the city of Sacramento, the board of trustees thereof have power to prevent the slaughtering of animals within the city limits. *Ex parte Heilbron* (Cal.), III, 776.
21. CHARTER OF GEORGETOWN, VALIDITY OF—SPECIAL LEGISLATION.—The charter of Georgetown having become a law prior to the adoption of the constitution, remains in force after such adoption, so far as not inconsistent with the latter instrument. The fact that it is local or special legislation does not affect its validity. *People* v. *Jobs* (Col.), IV, 236.
22. THE SAME—AUTHORITY OF POLICE JUDGE.—Whether the declaration in such charter clothing the police judge of Georgetown with power to act as justice of the peace, is valid, *quære?* Conceding, however, that such extension of power is unconstitutional, the authority of the police judge, as such, is not affected thereby. The right of such officer to preside at meetings of the selectmen, and to exercise other powers, usually devolved upon the mayor, is not abrogated by the constitution. *Id.*

See ARREST AND BAIL, 4, 7; CITIZENSHIP; COUNTY GOVERNMENT ACT; DIVORCE, 1–4, 6; ELECTION; EMINENT DOMAIN, 18; JURY AND JURORS, 33; JUSTICE'S COURT, 11; LAUNDRY ORDINANCE; LICENSE; LICENSE COLLECTOR; NUISANCE, 7; PUBLIC OFFICERS; REMOVAL OF COUNTY SEAT; SWAMP LANDS; TAXATION; VENUE.

CONTEMPT.

1. AN ATTORNEY IS GUILTY OF CONTEMPT FOR SENDING TO A GRAND JURY, while engaged in the discharge of its duties, an accusatory and threatening letter, for the purpose of exasperating the jurors by the aspersions upon their official conduct which it contained, or of deterring them from performing their duties by the threats of public clamor which it expressed, or of creating a distrust and want of confidence in any action which might be taken as the result of their investigation. *In re Tyler*, (Cal.), I, 337.
2. SUPERIOR COURT HAS POWER TO PUNISH FOR CONTEMPT BY SENTENCING THE PERSON GUILTY thereof to pay a fine of five hundred dollars, or be imprisoned until payment of such fine at the rate of two dollars per day for every day's imprisonment. *Id.*
3. COMMITMENT FOR CONTEMPT IS LEGAL UNDER SECTION 473 OF THE COMPILED LAWS, which provides for the payment of a fine of five hundred dollars by the person guilty of the contempt, with the direction that unless such fine is paid immediately the prisoner shall be imprisoned for two hundred and fifty days. *Ex parte Sweeney* (Nev.), I, 359.
4. CONTEMPT OF COURT IS IN THE NATURE OF A CRIMINAL OFFENSE, and the proceeding for its punishment is in the nature of a criminal proceeding. *Id.*
5. FINE IMPOSED FOR A CONTEMPT IS PUNITIVE, AND INFLICTED AS PUNISHMENT in other criminal cases is inflicted. The direction for an alternative imprisonment is but a mode for the enforcement of the fine, incident to the power of the court to impose the same, and can not be regarded as a punishment for the contempt. *Id.*
6. PUNISHMENT FOR CONTEMPT.—In a proceeding for contempt between the parties to a suit for disobedience to an injunction, causing a pecuniary loss or injury to the party instituting the proceeding, the court, in imposing punishment upon the wrong-doer, may do so for the benefit of the party injured. *Well, Fargo & Co.* v. *Oregon Railway and Navigation Co.* (U. S. Cir. Ct., Or.), I, 547.
7. NO APPEAL LIES TO THE SUPREME COURT FROM A JUDGMENT OF THE SUPERIOR COURT, CONVICTING A PARTY OF CONTEMPT, and imposing on him a fine exceeding three hundred dollars. *Tyler* v. *Connolly* (Cal.), I, 779.
8. CORPORATIONS, OTHER THAN MUNICIPAL, MAY BE PUNISHED FOR CONTEMPT, for violation of an injunction. *Golden Gate C. Hy. M. Co.* v. *Superior Court* (Cal.), II, 736.
9. CONTEMPT—AFFIDAVIT ON PROCEEDINGS FOR.—The jurisdiction of a court to adjudge a contempt, committed out of its presence, does not depend upon the form of the affidavit which sets the proceeding in motion, although the facts constituting the contempt are stated therein on information and belief. The finding that the alleged contempt was committed after a hearing on an order to show cause issued on such affidavits, will not be reviewed on *certiorari*. *Id.*
10. ORDER TO SHOW CAUSE ON CONTEMPT PROCEEDINGS—SERVICE OF, ON ATTORNEY, WHEN SUFFICIENT.—An order to show cause why a corporation should not be punished for contempt should ordinarily be served upon the president, or other head of the corporation, secretary, cashier, or managing agent thereof. But where it appears that diligent efforts have been made to serve an officer or managing agent, and that they had attempted to resign their offices, and had concealed themselves to avoid service of the order, the court may order service to be made upon one or more of its attorneys. Service upon an attorney who had repeatedly appeared for the corporation is sufficient, although he did not appear as such attorney on the record. *Id.*
11. CONTEMPT—APPEAL.—No appeal lies from a judgment imposing a penalty for a contempt of court. *Teller* v. *People* (Col.), III, 132.
12. PROCEEDINGS FOR CONTEMPT are criminal in their nature. *Id.*
13. CONTEMPT, AFFIDAVIT FOR—VERIFICATION OF BY THIRD PERSON.—The affidavit charging a person with a contempt for refusing to obey an injunction decree, need not be verified by a party beneficially interested in the injunction proceedings; and although the court should refuse to act unless satisfied that the party making the affidavit was authorized to do so by the party beneficially interested, the presumption is that such party, by his attorney, presented the affidavit, and that fact is sufficient to show that the party making the affidavit was authorized. *Strait et al.* v. *Williams* (Nev.), IV, 480.
14. THE SAME—WHAT THE AFFIDAVIT MUST SHOW.—Such affidavit is sufficient to give the court jurisdiction of the contempt proceedings, if it states in substance the ren-

dition of the judgment, that the same is in full force and effect and unreversed, and shows the violation thereof by the defendant. *Id.*

See ATTORNEYS, 8; FUGITIVES FROM JUSTICE, 1.

CONTINGENT FEE.

See ATTORNEYS, 2-4.

CONTINUANCE.

1. REFUSAL TO ALLOW A CONTINUANCE of a trial is within the discretion of the court. *Fleming* v. *Hawley et al.* (Cal.), III, 675.
2. TRIAL OF ACTION—CONTINUANCE FOR REASONABLE TIME.—The trial of an action to recover possession of land, claimed by the plaintiff under a United States patent as agricultural land, may be continued for a reasonable time, and until the determination of a suit in the federal courts, in which the plaintiff's title is sought to be impeached for fraud. *Rose* v. *Superior Court of Nevada County* (Cal.), III, 680.
3. CONTINUANCE ON ACCOUNT OF THE ABSENCE OF A WITNESS SHOULD BE REFUSED, unless such attendance can be procured within a reasonable time. *People* v. *Lewis*, (Cal.), I, 131.
4. WHERE A MOTION FOR A CONTINUANCE IS MADE ON ACCOUNT OF THE ABSENCE OF A WITNESS, an offer of the adverse party to admit that such witness, if present, would swear to what was stated in the affidavit for a continuance, may be allowed, at the discretion of the court, as well after the court has decided that such evidence is material as when the motion is first made. *Alden* v. *Carpenter* (Col.), I, 598.
5. ADMITTING THE TESTIMONY OF AN ABSENT WITNESS IN ORDER TO AVOID A CONTINUANCE is not an admission of the truth of such testimony, nor does such admission preclude the party admitting it from rebutting the same on the trial. *Id.*
6. IN REVIEWING THE RULING OF THE TRIAL COURT IN REFUSING to grant a prisoner a continuance, so that the testimony of absent witnesses might be produced to prove an *alibi*, the appellate court is authorized to examine the whole record, as well subsequent to as before such ruling, in order to determine whether there was any abuse of discretion. It may also consider the fact that the defendant did not himself take the stand as a witness, as it is only at his trial and before the facts are passed upon by the jury, that his failure to do so shall not raise any presumption against him, and under such a state of the record it will not be held that there has been an abuse of discretion. *Territory* v. *Kinney* (N. M.), I, 801.

CONTRACTS.

1. IMPLIED CONTRACT.—Whenever one person does work or service for another with his consent, and there is no agreement as to compensation, the law implies a contract to pay what the same is reasonably worth; but when the circumstances of the case clearly repel the idea that the work or services were done with the expectation of payment being either made or received, no such contract will be implied. *Hughes* v. *Dundee Mortgage Trust Investment Co.* (U. S. Cir. Ct., Or.), III, 544.
2. CASE IN JUDGMENT.—The plaintiff acted as attorney for the defendant and amalgamated corporations engaged in loaning money in Oregon and Washington, under written instructions as to his duties and responsibilities. It was his duty to examine titles to real property offered as security for loans, for which he was permitted to charge the borrowers specific fees; he was also to aid and advise the corporations generally in all matters affecting their interests; but for this service no compensation was expressly provided. The fees received from borrowers were no more than a reasonable compensation for the services rendered them. Under these circumstances the plaintiff acted as the sole and general counsel and adviser of the corporations for some years, without making any charge or rendering any account of his services, or receiving any intimation from the corporations that they did not expect to pay him for them. Upon being sued to recover the reasonable value of these services, the corporations claimed that it was "understood" that the plaintiff was to perform these services gratuitously, or in consideration of the fees received from borrowers. *Held* (1), That the mere understanding of either party to the contract was no part of it, and did not bind the other; and that there was nothing in the circumstances of the case, or the conduct of the parties, sufficient to prevent or repel the legal implication of a promise by the corporation to pay the plaintiff what his services were reasonably worth; and (2) That the plaintiff, not having kept any account of

his services, and being unable to prove any specific items, ought not to recover more than a reasonable annual retainer therefor. *Id.*

3. STIPULATIONS NECESSARY TO MAKE A CONTRACT REASONABLE ARE IMPLIED, and need not be alleged in an action to recover for a breach of such contract. *Biggerstaff* v. *Briggs* (Cal.), III, 353.

4. WHERE ONE PARTY TO A CONTRACT IS PREVENTED FROM FULLY PERFORMING THE SAME by the fault of the other party, the latter can not take advantage of his own wrong to exempt himself from liability thereunder. *Smith* v. *Roe* (Col.), I, 502.

5. CONTRACT, BY THE TERMS OF WHICH ONE PARTY AGREES TO PAY ALL THE EXPENSES, and furnish the skill and labor necessary for obtaining a patent to certain lands from the United States, in consideration of a conveyance of a part of the land so obtained, is valid and binding in the absence of actual or constructive fraud. *Gutierrez* v. *Brinkerhoff* (Cal.) I, 127.

6. DEFENDANT'S PREVIOUS CONSENT TO OR SUBSEQUENT RATIFICATION OF certain work done by the plaintiff can not be inferred from the fact that, at the latter's request, he gave them a statement of such work, especially when it appears that the work was originally done against his protest. *Tognini* v. *Hansen* (Nev.), I, 146.

7. AN AGREEMENT BY THE TERMS OF WHICH ONE PARTY PROMISES TO CONVEY certain land to the other, in consideration of the latter's performing certain services, conveys no interest, legal or equitable, to such latter unless the services stipulated for are performed. *Emeric* v. *Alvarado* (Cal.), I, 708.

8. CONTRACT FOR THE SALE OF SPIRITUOUS LIQUORS, at a certain place, in quantities greater than one gallon, can not be enforced by the vendor, when he has neglected to take out a license for the place at which such sale is to be made. *Bach, Meese & Co.* v. *Smith* (Wash.), II, 779.

9. BUILDING CONTRACT—LIABILITY OF CONTRACTOR UNDER.—When a party contracts to build a house of suitable materials and in a workmanlike manner, and violates his contract, the party injured may either refuse to pay the contract price of the building to the amount to which he is damaged, or he may pay for and take possession of the building, and then sue and recover of the builder the amount of his damages. Such recovery may be had whether the breach of the contract was known at the time of payment or not. *Hallack* v. *Bresnahen* (Wy.), II, 60.

10. SUCH PAYMENT IS NOT A WAIVER of the right of action for failure to perform the contract so as to discharge the contractor or his sureties. *Id.*

11. THERE IS A CONSIDERATION FOR THE CONTRACT contained in the charter incorporating the Northern Pacific Railroad Company, which consideration is found in the public benefits to be derived to the whole people of the United States by reason of the construction of such road. *N. P. R. R. Co.* v. *Carland* (Mont.), II, 326.

12. OBLIGATION, MEANING OF. — The word "obligation," as used in section 1834 of the General Statutes, providing that "all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants;" and in section 14 of the Code of Civil Procedure, providing that "all persons jointly or severally liable upon the same obligation or instrument * * * may, all or any of them, be included in the same action," is confined to contracts in writing, and does not include oral contracts. *Exchange Bank of Denver* v. *Ford* (Col.), II, 624.

13. DAMAGES FOR BREACH OF CONTRACT—NEGLIGENCE—PREVENTION OF LOSS. — One who sues to recover damages for injuries in an action arising out of contract or tort cannot recover if the injuries were consequent upon his own negligence which directly contributed to them. Every one engaged in the performance of a contract is bound to do everything in his power to prevent loss to himself from a breach of the contract by the other party. If he can not prevent it altogether, he must make reasonable exertions to render it as light as possible; and if by his own negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss must fall upon him. *Winans* v. *Sierra Lumber Co.* (Cal.), IV, 277.

14. PARTIAL BREACH OF CONTRACT — ESTOPPEL — PART PERFORMANCE OF CONTRACT. A party to a contract is not estopped from asserting his claim for a partial breach of the contract by the other party from the fact that at the time when a settlement was had between them for work done under the contract no mention was made of such claim. If the contract was susceptible of more or less performance, and there was a partial breach thereof by one of the parties, the other has the right to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the partial breach. *Id.*

15. BREACH OF CONTRACT TO MANUFACTURE LUMBER—MEASURE OF DAMAGES.—The plaintiff and defendant entered into a contract whereby the plaintiff agreed to manufacture lumber, and the defendant agreed to purchase all that the plaintiff might manufacture, at a stipulated price, and to furnish him certain machinery for such purpose. The machinery furnished was inadequate, and by reason thereof the plaintiff was unable to manufacture as much lumber as he otherwise would have done. In an action to recover for the breach of such contract, *held*, that the measure of damages was the contract price for the lumber which the plaintiff was so prevented from manufacturing, less the expense he would have incurred in manufacturing said lumber over and above the amount necessarily expended under the circumstances in manufacturing the amount actually manufactured by him. *Id.*

16. STIPULATION IN BUILDING CONTRACT FOR ARBITRATION—CONSTRUCTION OF CONTRACT.—A stipulation in a contract for building a railroad, that in case any disputes or differences arise between the company and contractors "as to the construction or meaning of the agreement or specifications, or sufficiency of the performance of any work to be done under it, or price to be paid, the same shall be referred to the chief engineer of the company, who shall consider and decide the same, and his decision shall be final," is valid, and the decision of the engineer on any of such matters is binding on the parties, in the absence of fraud or mistake on the part of such officer. *Held*, however, that a dispute as to the amount of work done by the contractor was not included within such stipulation. *D. S. P. & P. R. R.* v. *Riley* (Col.), IV, 238.

17. CONSTRUCTION OF CONTRACT SUED ON—BREACH OF CONTRACT.—The plaintiffs and the defendant entered into a contract whereby the latter agreed to sell to the former ice, in such quantities as might be demanded, at a certain price. The plaintiffs agreed not to buy ice from any one else. During the continuance of the contract one of the plaintiffs bought ice from other parties. *Held*, that the same constituted a breach of the contract, and released the defendant from its obligations under the contract, although the ice was bought by such plaintiff for his individual use. *Twomey et al.* v. *People's Ice Co.* (Cal.), IV, 700.

18. CONTRACT—LIABILITY FOR ILLEGAL ACT—INFERENCES OF INTENTION.—A party is not bound for the consequences of an illegal act, from a mere suggestion in a conversation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually. *Andrews* v. *Runyon* (Cal.), IV, 81.

19. JUDGMENT AND ORDER affirmed after construing the contract sued on. *Martin* v. *Hill et al.* (Cal.), IV, 430.

See ACCORD AND SATISFACTION; ADMIRALTY, 15, 16; ASSIGNMENT, 1; ASSUMPSIT, 1; ATTORNEYS, 2–5; BANKS, 2; BONDS, 3; COMMON CARRIERS, 9; CONSTITUTIONAL LAW, 11; CORPORATIONS, 28, 53; COUNTY PHYSICIAN, 1; GUARANTY; HUSBAND AND WIFE, 2; INSANE PERSONS; LANDLORD AND TENANT, 11; MASTER AND SERVANT; MARRIED WOMEN, 2–6; PLEADING AND PRACTICE, 38.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE; PLEADING AND PRACTICE, 7.

CONVERSION.

1. CLAIM AND DELIVERY—SHERIFF—CONVERSION—JUDGMENT—UNDERTAKING—AFFIDAVIT—NONSUIT.—Prior to the commencement of the present action, one Hawley commenced an action against the plaintiff herein, and one Fowler, to recover the identical property described in the complaint herein. In that action, upon proper affidavit, undertaking, and order of the attorney for the plaintiff herein, the present defendant, as sheriff, took said property from the defendants on the twelfth day of November, 1881. On the seventeenth day of the same November (the day after the present action was commenced) the plaintiff herein made affidavit for claim and delivery, and executed bond, which affidavit and bond (together with an order of the attorneys for the plaintiff herein) were delivered to an elisor, appointed by the court, by whom the property was taken from the defendant herein, sheriff as aforesaid. Afterwards, on the twenty-second of November, 1881, defendant gave the undertaking provided for in such case by the code, and demanded a return of the property of the elisor, who on the same day delivered the property to the present defendant, who thereupon *delivered the property to Hawley*, the plaintiff in the action wherein plaintiff and Fowler were defendants. Afterwards, on the twelfth

day of December, 1881, the plaintiff herein filed an answer in the action, wherein he and the said Fowler were defendants, in which he demanded a return of the property therein and herein sued for. That the action of *Hawley* v. *Fowler and Fleming* came on to be tried on the twenty-first day of January, 1882, and at the conclusion of the evidence on the part of the plaintiff therein, the court, on motion of defendants, ordered a judgment of *nonsuit* in that action, on the ground that plaintiff had not made out a case sufficient to go to a jury, and thereupon a judgment was entered in favor of defendants therein for their costs. *Held*, that the present defendant did not take the property from the plaintiff wrongfully, but as sheriff, under process which made it his duty to take it; that after the return of the property to him, the defendant simply performed his duty in delivering it to Hawley, and that an independent action could not be maintained against him for its possession or value in case delivery could not be had. *Fleming* v. *Wills* (Cal.), III, 159.

2. CONVERSION BY SHERIFF—JUSTIFICATION—PLEADING.—In an action against a sheriff for a conversion, an answer which sets up an attempted justification by virtue of a seizure under a writ of attachment is defective, and should be stricken out, unless it is alleged that the defendants under the attachment were the owners of the property taken, or had some interest therein. Failure to strike out such portion of the answer, when the plaintiff's title is denied and a general verdict is given in favor of the defendant, will not warrant a reversal, unless it affirmatively appears that such verdict was founded upon the attempted plea of justification. *Krewson et al.* v. *Purdom et al.* (Or.), III, 85.

3. IN AN ACTION AGAINST A SHERIFF FOR THE CONVERSION OF PROPERTY by reason of a sale under an execution against a third person, where issue is joined as to the ownership of such property at the time of sale, a finding that the plaintiff had sold the property to the execution debtor, and from the date of such purchase until the taking by the sheriff the same has remained in the debtor's possession "by virtue of such purchase," responds to the issue of ownership. *Hardwick* v. *Tyrrel* (Cal.), I, 345.

4. WHERE GOODS ARE SHIPPED TO A CONSIGNEE IN PURSUANCE OF AN AGREEMENT BETWEEN HIM AND THE SHIPPER that the same are to be sold, and the proceeds applied to the payment of prior advances made by the former to the latter, the title to the goods and the right of possession thereof vest in the consignee upon delivery to the carrier; and an action to recover for a wrongful attachment of such goods while in the hands of the carrier should be brought by the consignee, and not by the consignor. *Wetzel* v. *Power* (Mont.), I. 791.

5. ACTION FOR THE CONVERSION OF PERSONAL PROPERTY IS NOT BARRED by the statute of limitations when the evidence fails to show when such statute commenced to run. *Whitcomb* v. *McClintock* (Cal.), I, 876.

6. CONVERSION OF HORSE—STATUTE OF LIMITATIONS.—Where a horse is wrongfully converted from its owner and afterwards sold to a *bona fide* purchaser, who uses it in an open and notorious manner, without attempting to conceal it, the statute of limitations commences to run in favor of such purchaser and against the owner from the time of the purchase, and not from the time when the owner discovers the whereabouts of the horse. *Dee* v. *Hyland et al.* (Utah), II, 469.

See ATTACHMENT, 24; HUSBAND AND WIFE, 3; PARTNERSHIP, 14.

CONVEYANCE.

See DEED.

COPYRIGHT.

1. PRINTED COPY OF TITLE OF BOOK, ETC.—The "printed" copy of the title of a book or other article, required by section 4956 of the revised statutes, to be delivered or mailed to the librarian of congress, may be "printed" with a pen as well as type, with or without the aid of tracing-paper. *Chapman* v. *Ferry* (U. S. Cir. Ct., Or.), I, 105.

2. DEPOSIT OF COPIES OF WORK WITH LIBRARIAN.—The copies of a copyright work required by section 4959 of the revised statutes to be deposited with the librarian of congress within ten days after publication may be so deposited after the printing of the work, and before its formal publication. *Id.*

3. COPYRIGHT OF MAP, INFRINGEMENT OF.—It is difficult to say, in some cases, what constitutes an infringement of the copyright of a map, but where the subsequent

map appears to have been substantially copied from the prior one, without alteration or revision, except in scale and color, there is clearly an infringement which authorizes a court of equity to enjoin the sale of such infringing map and to require the publisher to account for the profits arising from the sale thereof. *Id.*

CORPORATIONS.

1. NATURE, ORGANIZATION, AND RESIDENCE OF.
2. POWERS AND LIABILITIES OF.
3. POWERS AND LIABILITIES OF OFFICERS.
4. STOCK AND STOCKHOLDERS.
5. FORFEITURE OF CORPORATE RIGHTS.
6. ACTIONS BY AND AGAINST.
7. MUNICIPAL CORPORATIONS.

1. NATURE, ORGANIZATION, AND RESIDENCE OF.

1. CERTIFICATE OF INCORPORATION—ATTACK ON.—The corporate existence and validity of the acts of a *de facto* corporation, whose user is established, can not be attacked collaterally upon the ground that its certificate of incorporation does not contain certain specifications which it was required by statute to contain. *City of Denver* v. *Mullin* (Col.), II, 852.
2. RAILROAD, WHAT IS—UNION DEPOT.—A corporation organized for the purpose "of locating, building, owning, and maintaining a union depot for railroads in the city of Denver, and for the location, building, owning, and maintaining of as many lines of railroad from said depot to the exterior boundaries of said city as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," is not an ordinary railroad company within the meaning of the general statutes. *People ex rel. Bernard et al.* v. *Cheeseman et al.* (Col.), II, 870.
3. CREATION OF PRIVATE CORPORATION UNDER GENERAL LAW.—A substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence in an appropriate proceeding prosecuted by the proper authority. *Id.*
4. THE SAME—STATEMENT OF TERM OF CORPORATE EXISTENCE.—The statement in the articles of incorporation of a private corporation that the same is to exist for fifty years, is not fatal to the creation of the corporation, although the general law under which it was organized limits the existence of such corporation to twenty years. *Id.*
5. CERTIFICATE OF ACKNOWLEDGMENT OF INCORPORATION.—Failure of the officer who took the acknowledgment of the articles of incorporation of a company to state in his certificate thereof that the individuals who acknowledged the same were personally known to him, or proven to him to be the persons who executed the same, does not vitiate such certificate. *Id.*
6. RESIDENCE OF CORPORATION.—Neither the principal place of business of a corporation, nor the place in which its officers reside, is necessarily the place of residence of the corporation. *California Southern R. R. Co.* v. *Southern Pacific R. R. Co.* (Cal.), III, 301, 302.
7. THE ADOPTION OF CERTAIN RULES OF BUSINESS BY A CHINESE COMPANY may be inferred from the fact that such rules were printed in a book kept by the company's agent, and were hung in the company's house. *Chong Yow* v. *Hop Chong* (Or.), III, 329.

2. POWER AND LIABILITIES OF.

8. A CORPORATION HAS NO POWERS except such as are specially granted, and those that are necessary to carry the same into effect. *Salmon River Mining and Smelting Co.* v. *Cunn* (Idaho), III, 70.
9. A CORPORATION ORGANIZED FOR THE PURPOSE OF MINING, SMELTING, AND REFINING ORES, and for dealing in mining property, can not become the assignee for a chose in action growing out of the breach of a contract for building a bridge. *Id.*
10. A CORPORATION CAN NOT APPOINT AN AGENT, nor can it become a *cestui que trust*, until it has a legal existence. *Kelly* v. *Ruble* (Or.), III, 737.
11. CONVEYANCE—CONSIDERATION—CORPORATION—ULTRA VIRES.—A conveyance by a corporation, in consideration that its grantee would prevent the recovery of or protect it against any personal judgment in an action brought to recover on its contract

of guaranty is valid, although such contract of guaranty was *ultra vires*. *Mound City Land and Water Ass'n* v. *Slauson et al.* (Cal.), III, 372.

12. CORPORATIONS—LIABILITY OF FOR TORTIOUS ACTS OF SERVANTS.—Corporations are liable for the acts of their agents and employés in the same manner and to the same extent as private persons. Accordingly the employés of a railroad corporation who are engaged in service at its stations or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their position; and the corporation is liable for their tortious acts which are performed in the course of such service. *Denver S. P. and P. R. R. Co.* v. *Conway* (Col.), IV, 672.

13. THE SAME—KNOWLEDGE OF SERVANT KNOWLEDGE OF CORPORATION.—Knowledge acquired by agents of corporations in the discharge of official duties, of facts material to the transactions in which they are engaged, or coming within their respective departments, is the knowledge of the corporation. *Id.*

14. IN AN ACTION AGAINST A CORPORATION FOUNDED ON THE UNLAWFUL OR TORTIOUS ACTS OF ITS AGENTS or servants, the fact whether the acts complained of were done by such agents on their own account exclusively, or on behalf of the corporation, and within the scope of their employment, need not ordinarily be established by the plaintiff by proof of what occurred at some meeting of the directors of the corporation, but by proof of what the agents and servants had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and if the corporation accepted such acts and used the fruits thereof, proof thereof might be given to establish the corporate liability. *Denver & Rio Grande Railway Co.* v. *Harris* (N. M.), I, 826.

15. CORPORATIONS ARE LIABLE FOR EVERY WRONG, TRESPASS, AND TORT COMMITTED BY THEIR AGENTS and employees within the scope of their employment, to the same extent as individuals under like circumstances. The doctrine of *ultra vires*, as formerly understood, does not have any application to such cases. *Id.*

16. A RAILROAD CORPORATION IS LIABLE FOR THE ACTS OF VIOLENCE OR THE TORTS OF AN ARMED BODY of men, formed of its servants and employees, in taking forcible possession of another railroad by its authority. Such acts of its agents, as well as their declarations in respect thereto, are admissible in evidence, as tending to prove an authorization by the corporation; and if the latter accepted and received into its possession, and assumed control of the railroad so seized, and operated the same, such facts would be strong circumstantial evidence that the agents, in taking such possession, were acting within the scope of their employment, and under the direction of their principal. *Id.*

3. POWERS AND LIABILITIES OF OFFICERS.

17. PRESIDENT OF A CORPORATION IS AUTHORIZED TO DONATE LAND to a county, to be used for public purposes, by virtue of a resolution of the board of trustees, empowering him to deed and convey to purchasers such land, at his discretion. *State* v. *Glenn* (Nev.), I, 50.

18. CORPORATION—UNAUTHORIZED DEED BY PRESIDENT—SEAL.—The president of a corporation has no power, as such, without express authorization from the directors, to purchase or sell real property in the name of the corporation. An instrument executed by him for such purpose, in the name of the corporation, and under its common seal, without the authorization of the directors, may be shown to be void. *Bliss* v. *Kaweah Canal and Irrigation Co.* (Cal.), III, 571.

19. THE SAME—ESTOPPEL—CONTRACT.—A corporation is not estopped from denying the validity of an unauthorized contract made by its president, where it has never availed itself of the benefits of such contract. *Id.*

20. SETTLEMENT OF BANK DEFALCATION—AUTHORITY OF BANK OFFICERS AND DIRECTORS.—The settlement of a defalcation to a bank, and the acceptance of a deed of real estate in satisfaction and release thereof, are not transactions which fall within the ordinary powers of a corporation, which may be exercised by its agents, or persons who are held out to the public as such. Power to do such acts must be conferred by the board of directors. *Bank of Healdsburg* v. *Bailhace* (Cal.), III, 140.

21. NOTES OF CORPORATION, POWER OF DIRECTORS TO AUTHORIZE.—The board of directors of a corporation has power to appoint two of its members a committee for the purpose of making and delivering the notes of the corporation to such stockholders as have debts against the company. If such committee, in executing the trust imposed upon them, exceed their authority, the corporation is not bound by their unauthorized acts. *Leavitt* v. *Oxford etc. Mining Company* (Utah), II, 462.

22. MEETING OF DIRECTORS, NOTICE OF—PRESUMPTION.—In the absence of any law on the subject, a meeting of the directors of a corporation is presumed to have been held after due and sufficient notice thereof to all the directors, unless the contrary affirmatively appears. *Id.*
23. WHAT CONSTITUTES A QUORUM.—At common law the major part of a board of directors constitutes a quorum, a majority of which may decide any question upon which they have power to act. *Id.*
24. NOTE GIVEN TO DIRECTOR, VALIDITY OF.—A promissory note of a corporation given to one of its directors, in pursuance of the unanimous vote at a meeting of the directors, is not invalid because such director was present and voted for the same, if without counting his vote the same was authorized by a majority of a quorum of the directors. *Id.*
25. NOTES OF CORPORATION—ITEMS INCLUDED IN—STATUTE OF LIMITATIONS.—A resolution of a board of directors empowering its committee "to make and deliver to the several stockholders who have loaned money to this company, and for the liabilities of this company, the company's notes for such loans and liabilities," does not authorize the committee to include, in a note so given, money paid by a stockholder, prior to the corporation of the company, for the purpose of developing property which afterwards is conveyed to the corporation, and for which he receives certain shares of stock; nor money paid by the stockholder, in pursuance of a resolution of the company calling for a voluntary assessment for the purpose of developing the company's property. Such resolution does not prohibit the giving of a note for an indebtedness barred by the statute of limitations. *Id.*
26. CONTRACT BETWEEN A DIRECTOR AND THE CORPORATION—LOAN ON EXCESSIVE INTEREST.—A director of a corporation can not contract with his co-directors that, in consideration of a sum of money advanced by him, he should receive the company's notes for a much larger amount, bearing an excessive rate of interest, although by oral contemporaneous agreement it was provided that of the excess beyond the amount loaned, the corporation should be required to pay only the sum which the lender might pay for taxes upon the property, with interest thereon. The corporation may satisfy such notes by paying the amount actually loaned, with interest thereon at the ordinary rates. *Sutter Street R. Co.* v. *Baum et al.* (Cal.), IV, 291.

4. STOCK AND STOCKHOLDERS.

27. CORPORATE STOCK—TRANSFER OF—PARTIES TO ACTION.—In an action to have the plaintiff declared the owner of certain shares of stock, and to have the same transferred to him on the books of the company, the corporation is a proper party defendant, together with a purchaser of such stock, with notice of the plaintiff's equities. *Johnson* v. *Kirby et al.* (Cal.), III, 482.
28. STOCK ASSESSMENT—CONTRACT—JUSTICE'S COURT.—A shareholder's liability for the amount of his unpaid assessment on the corporate stock is founded on contract. A justice's court has jurisdiction of an action to enforce such liability. *Alpers* v. *Superior Court* (Cal.), III, 526.
29. ASSESSMENT TO PAY DEBT NOT DUE—FRAUD.—Levying an assessment to pay a debt which the corporation did not owe, and selling stock for such purpose, especially when it does not appear that the money so obtained was used for such purpose, is not *per se* a fraud on the stockholder. *Johnson* v. *Kirby* (Cal.), III, 482.
30. BONA FIDE PURCHASER FROM A THIEF OF CERTIFICATES OF STOCK, standing on the books of the company in the name of one person, although owned by another, acquires no title as against the real owner, notwithstanding such certificates were regularly indorsed by the person in whose name they stood, if they were stolen without the fault or negligence of the owner. *Barstow* v. *Savage Mining Co.* (Cal.), I, 116.
31. CERTIFICATE OF STOCK IN AN INCORPORATED COMPANY is not a negotiable instrument according to the definition of the civil code. *Id.*
32. BONA FIDE PURCHASER OF CERTIFICATES OF STOCK FROM ONE who has not the title and has no authority to sell, who relies upon the negligence of the owner for his protection, must show that such negligence was the proximate cause of his deceit. *Id.*
33. ONE WHO PURCHASES STOCK FOR ANOTHER WITH MONEY ADVANCED BY HIMSELF, taking the title thereto in his own name, has a special property in the stock so purchased, and may hold the same as security for such advances; nor is he compelled to obey an order to sell, given him by the party for whom such purchases were made, which would necessarily result in a loss to himself. *Jones* v. *Gallagher* (Utah), I, 307.

34. QUESTION OF GOOD FAITH AND THE EXERCISE OF A SOUND DISCRETION on the part of the one so refusing to sell should be left to the jury. *Id.*

35. DIRECTION BY THE OWNER OF SUCH STOCK TO THE HOLDER THEREOF to sell the same and invest the proceeds in another stock, constitutes an indivisible order, and confers no authority on the holder to sell and apply such proceeds to the owner's account due him. *Id.*

36. WHETHER DAMAGES RESULTED TO SUCH OWNER BY REASON OF A REPORT TO HIM by the holder of such stock that he had sold the same at a certain date, when in fact they were not sold, but were held by him for a long time, and afterwards sold at an advanced price, is a question for the jury. *Id.*

37. JUSTICE'S COURT HAD JURISDICTION PRIOR TO THE ADOPTION OF THE PRESENT CONSTITUTION to entertain an action by one having a claim against a life insurance company, incorporated under the act of April 22, 1866, against a stockholder in such company, to recover his proportionate share of such liability, when the same is less than three hundred dollars. *Morrow* v. *Superior Court* (Cal.), I, 114.

38. LIABILITY OF A STOCKHOLDER FOR THE DEBTS OF SUCH COMPANY IS PRIMARY, and not contingent upon the fact that the creditor has exhausted his remedies, or any part of them, against the corporation. *Id.*

39. RIGHT OF TRANSFEREE OF UNRECORDED STOCK TO VOTE AT CORPORATE ELECTION. Transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election. *People ex rel. Probert* v. *Robinson* (Cal.), I, 47.

40. ASSESSMENT ON FULLY PAID-UP STOCK.—Corporations organized and existing under the laws of this state have authority to levy and collect assessments upon stock for which the subscription price has been fully paid. *Santa Cruz Railroad Co.* v. *Spreckels* (Cal.), II, 752, 833.

41. ADVANCE BY DIRECTOR—LIABILITY OF CORPORATION FOR.—A corporation is liable for moneys advanced to it by a director which it receives and uses at a time when it was out of money and in debt, and unable to obtain money from any other source. *Id.*

42. STOCKHOLDER'S LIABILITY AS GARNISHEE.—A stockholder in a company incorporated under the general corporation law of Nevada can not be held as a garnishee for the debts of the corporation, to the extent of his unpaid and uncalled subscription to his stock. *McKelvey* v. *Crockett* (Nev.), II, 37.

42. INCREASE OF CAPITAL STOCK—FICTITIOUS ISSUE—SPRING VALLEY WATER WORKS The Spring Valley Water Company is authorized to increase its capital stock, and to sell the increased issue at the actual market value of the stock of the corporation, for the purpose of raising funds to extend and enlarge the capacity of the works of the corporation, so as to afford greater protection to the property of the inhabitants of the city and county of San Francisco, and to supply them with an abundance of water. Such increased issue is not "fictitious" within the meaning of article 12, section 11, of the constitution. *Stein* v. *Howard et al.* (Cal.), IV, 43.

43. CORPORATION HOLDING STOCK OF ANOTHER CORPORATION — ULTRA VIRES. — It is not presumptively *ultra vires* for one corporation to hold or acquire the stock of another corporation. *Evans* v. *Bailey* (Cal.), IV, 427.

44. SUBSCRIPTION FOR STOCK—SHAREHOLDER—BOOKS OF COMPANY. — The books of a corporation are competent evidence to prove the number of shares which had been subscribed for and issued at the time an alleged indebtedness arose, and who were the shareholders. *Id.*

45. THE SAME—ARTICLES OF INCORPORATION.—The articles of incorporation of a company dated in 1877 do not necessarily show who were the shareholders, or in what amounts, respectively, during a subsequent period. *Id.*

5. FORFEITURE OF CORPORATE RIGHTS.

46. FORFEITURE OF CORPORATE RIGHTS.—The legislature may provide that a corporation shall cease to exist, or forfeit a particular right or privilege, unless it does certain things within a given time; and in case of such failure, the prescribed consequence will follow of course, without the intervention of a court, or any proceeding to declare or establish the same; but the provisions in the acts aforesaid, to the effect that the grants thereby made to the Northern Pacific Railway Company are made upon the condition that the road will be completed within a certain time, have no such effect, but are simply conditions subsequent without any special con-

sequence prescribed for a breach of them, and therefore no one can complain of any such breach, or take advantage of it, except the government of the United States, and it only, as declared in the act, for the purpose of securing "a speedy completion of the said road." *Hughes* v. *Northern P. R'y Co.* (U. S. Cir. Ct., Or.), I, 21.

47. FORFEITURE OF CORPORATE FRANCHISE.—The franchise and charter of a banking corporation will be adjudged forfeited, and the corporation ousted of the same, when the corporation continues to carry on its business beyond the time limited by a condition in its charter, although such business is carried on solely for the purpose of closing up the affairs of the bank, in anticipation of a voluntary dissolution. *People ex rel. Attorney General* v. *City Bank of Leadville* (Col.), II, 308.

48. EQUITY WILL INTERPOSE TO PREVENT THE DESTRUCTION OF A FRANCHISE. — *N. P. R. R.* v. *Carland* (Mont.), II, 326.

49. A FRANCHISE IS PROPERTY, and in the case of a continuing injury to the same, courts of equity will prevent a repetition of the injury, and protect the franchise. *Id.*

6. ACTIONS BY AND AGAINST.

50. PLEA IN BAR OR ABATEMENT.—In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff, but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered unless expressly pleaded in abatement. *Oregonian etc. R. R. Co.* v. *Oregon R. R. etc. Co.* (U. S. Cir. Ct., Or.), IV, 548.

51. ESTOPPEL BY CONTRACT.—A party who contracts with a corporation, as such, is thereby estopped, in an action on such contract, to deny its corporate existence, or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action, the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived. *Id.*

52. PLEADING AN ESTOPPEL.—When the matter constituting the estoppel (the contract) does not appear in the previous pleadings, it must be set up by replication; but where the same does so appear, the estoppel must be raised by demurrer. *Id.*

7. MUNICIPAL CORPORATIONS.

53. THE REPEAL OF A MUNICIPAL CHARTER DOES NOT IMPAIR the validity of contracts made under its provisions. *Meyer* v. *Porter* (Cal.), I, 874.

54. MUNICIPAL CORPORATION, THE CHARTER OF WHICH IMPOSES, AND WHICH ASSUMES THE DUTY of exclusively controlling and regulating the distribution of water within its limits, for irrigating and other purposes, although it may not own the water so used, is liable for damages suffered by a private individual by reason of its neglect to perform such duty with reasonable care and prudence, although no right of action against the municipality is expressly given by statute. Such duty is ministerial and not judicial. *Levy* v. *Salt Lake City* (Utah), I, 310.

55. DISTINCTION BETWEEN THE LIABILITY OF A MUNICIPAL CORPORATION for failure to perform duties imposed on them by charter, and the liability, under such circumstances of *quasi* corporations, such as counties and towns, stated. *Id.*

56. POWERS OF A MUNICIPAL CORPORATION.—Apart from the few faculties incident to the existence of a municipal corporation, such as the capacity to sue and be sued and have a common seal, it has no power to do any act except such as are essential to the plain purpose of its creation, or are authorized by the express provisions of its charter, or a clear or necessary implication therefrom. *In re Lee Tong* (U. S. Dist. Ct., Or.), I, 35.

57. WHERE THE CHARTER OF A MUNICIPAL CORPORATION REQUIRES IT TO DO A CERTAIN ACT by resolution, it may do the same by ordinance. *Los Angeles* v. *Waldron* (Cal.), I, 335.

58. THE POWER OF CONTRACTING FOR COUNTY PRINTING IS GIVEN BY THE POLITICAL CODE, sections 3766, 4046, and 4047, to the boads of supervisors of the respective counties, and not to a county or township officer. *Times Publishing Co.* v. *County of Alameda* (Cal.), I, 482.

59. THE PUBLICATION OF THE DELINQUENT TAX LIST OF A COUNTY IS PART OF THE COUNTY PRINTING required to be published by the tax collector, and is included in a contract made by the board of supervisors providing for the publication of "all notices required to be published by the board," and "all notices that are required to be published by any county or township officer that may be ordered by the board." *Id.*

60. WHEN A CONTRACT HAS BEEN AWARDED ACCORDING TO LAW, work required by law to be done in performance of it is in legal effect done by order of the board of super-

visors who let the contract for it, and is a charge against the county, enforceable according to the terms of the contract. *Id.*

61. WHERE THE CHARTER OF A MUNICIPAL CORPORATION REQUIRES IT TO DO A CERTAIN ACT by resolution, it may do the same by ordinance. *Los Angeles* v. *Waldron* (Cal.), III, 42.

See ATTACHMENT, 1; BONDS, 3; CONTEMPT, 8; ESTOPPEL, 8; INJUNCTION, 14, 15; JURISDICTION, 2; PRINCIPAL AND AGENT, 5; SUMMONS, 14; TAXATION, 2-4, 6, 7, 82, 83; TRUSTS, 1; VENUE, 2, 3.

COSTS.

1. FEES FOR MILEAGE OR ATTENDANCE OF THE SUCCESSFUL PARTY'S WITNESSES CAN NOT BE TAXED, and judgment therefor entered, against the losing party, when such witnesses have not been subpœnaed in the case according to law, or sworn or examined, although present in court at the request of the successful party. *Meagher* v. *Van Zandt* (Nev.), I, 663, 666.
2. A JUDGMENT FOR COSTS WAS VOID, UNDER THE PRACTICE ACT OF 1851, SECTION 511, and may be collaterally attacked, when the costs were not inserted by the clerk at the time of the entry of the judgment, but were inserted by him afterwards, without any order of the court; and a sale of land under an execution issued on such judgment confers no title on the purchaser. *Emeric* v. *Alvarado* (Cal.), I, 708.
3. A DEFENDANT IS ENTITLED, AS OF COURSE, TO A JUDGMENT FOR HIS COSTS and disbursements incurred in the trial of an action brought to determine the plaintiff's title to certain land, and to enjoin the defendant from trespassing upon the same and from asserting any title thereto, when the court finds that there is no cause of action against the defendant. *Lawrence* v. *Getchell* (Cal.), I, 861.
4. THE DEFENDANT IS ENTITLED TO A JUDGMENT FOR HIS COSTS, in an action prosecuted in the district court for the recovery of money only, and arising on contract when the plaintiff's recovery is for a less amount than one hundred dollars. *Busby* v. *Carpenter* (Wash.), I, 837.
5. A JUDGMENT TAXING AND APPORTIONING THE COSTS OF A RECEIVER will not be disturbed when the only parties who could be affected by a retaxation of costs are not before the appellate court. *Chapman et al.* v. *Pocock et al.* (Col.), II, 306.
6. COSTS ON APPEAL FROM JUSTICE'S COURT.—Properly construed, section 522 of the civil practice act prohibits the district court to render a judgment for costs in favor of the appellant on an appeal from the justice's court, unless he recovers a judgment substantially more favorable than that from which the appeal was taken. Whether or not, in any particular case, the amount of enhancement or reduction is sufficient to make the judgment substantially more favorable depends upon the circumstances of each case, and is left to the discretion of the district judge to determine. As a rule, a reduction or enhancement of the judgment by a few dollars would not suffice to make it more favorable within the meaning of the statute. *Baxter* v. *Scoland* (Wash.), II, 552.
7. COSTS OF PROTEST OF INLAND BILL.—The allowance of costs for the protest of inland bills of exchange is not reviewable on appeal, when no motion to retax costs was made in the lower court. *Dawson* v. *Lail* (Ariz.), II, 396.
8. REPAYMENT OF REDEMPTION MONEY—COSTS AFTER DISMISSAL.—In the lower court plaintiff recovered judgment for costs. Both parties appealed. On appeal this judgment was reversed, and at the defendants' request the action was dismissed. Pending the appeal, no *supersedeas* bond having been filed, plaintiff issued execution on his judgment for costs, and levied the same on certain mining property of the defendants, which was sold and bought in by the plaintiff. Subsequently the defendants sold said property to one Lubbock, who redeemed it from the plaintiff. After the judgment of the supreme court reversing and dismissing the action had been certified to the lower court, such court, on motion of defendants' counsel, taxed the defendants' costs, and ordered the plaintiff to pay back to Lubbock the amount paid by him on redeeming. *Held*, that the lower court had no power to award such costs, or to make such order, as it no longer had jurisdiction of the case after the dismissal by the supreme court; and even if it had jurisdiction, it could not, on such motion, order the repayment of the money paid by the redemptioner. *Wall* v. *Dodge et al.* (Ariz.), II, 457.
9. DIRECTION MADE AS TO COSTS ON APPEAL. *Emeric* v. *Alvarado et al.* (Cal.), II, 134.
10. APPEAL FROM COUNTY COURT—COSTS AND DISBURSEMENTS.—The circuit court, in an action to recover the possession of personal property, appealed from the county

court, has no power to award to the successful plaintiff all his costs and disbursements incurred in both courts. In such appeals the allowance of costs and disbursements is discretionary with the circuit court when a new trial is ordered, or the judgment appealed from modified. The nature of the judgment in the appellate court determines the amount of the costs and disbursements to be allowed on account of the proceedings in the lower court. If the judgment is such as would, had it been recovered in the court below, have entitled the prevailing party to costs and disbursements there, its recovery in the circuit court on appeal has the same effect. *Burt* v. *Ambrose* (Or.), III, 554.

11. ORDER AMENDING JUDGMENT AS TO COSTS, AND DIRECTING SAME TO BE PAID in due course of administration, affirmed. *Estate of Crozier, deceased* (Cal.), III, 212.

See ADMIRALTY, 19; APPEAL, 23, 79, 80, 92; ARBITRATION AND AWARD, 8; ATTACHMENT, 9; EJECTMENT, 1; ELECTION, 9; EMINENT DOMAIN, 1; INJUNCTION, 18; JUDGE, 1; JUSTICES' COURTS, 7; NEW TRIAL, 10.

CO-TENANTS.

See TENANTS IN COMMON.

COUNTER-CLAIM.

1. ITEMS OF A COUNTER-CLAIM WHICH ACCRUED AFTER THE COMMENCEMENT of the action can not be given in evidence by the defendant. *Paige* v. *Carter* (Cal.), I, 558.
2. IN THE ABSENCE OF THE EVIDENCE INTRODUCED ON THE TRIAL, an appellate court will not reverse a judgment for the plaintiff much less in amount than that sued for, on the ground that the jury failed to allow such proper amount of the defendant's counter-claim as the evidence warranted. *Jones* v. *Nathrop* (Col.), I, 279.
3. ACTION FOR SERVICES—COUNTER-CLAIM.—In an action by an employee to recover the value of his services, a counter-claim set up by the defendant, *held* unsupported by the evidence. *James* v. *Duke* (Col.), II, 515.
4. CROSS-DEMANDS — SET-OFF — COMPENSATION — FORECLOSURE OF MORTGAGE.—In an action by an administrator to foreclose a mortgage which matured after the death of his intestate, a cross-demand in favor of the mortgagor and against such intestate, which was due and payable at the time of the intestate's death, can not be set off as a compensation of the mortgage debt, nor can such cross-demand be so set off if the same is barred by the statute of limitations at the time of the commencement of the foreclosure suit. *Lyon, Administrator, etc.*, v. *Petty et al.* (Cal.), III, 107.
5. COUNTER-CLAIM — ASSIGNMENT OF NOTES.—Promissory notes assigned before maturity may be pleaded as a counter-claim by the assignee, if there is an existing cause of action upon them at the commencement of the plaintiff's action. If assigned after maturity the assignee takes them subject to all existing equities between the maker and payees. Under such circumstances they would not be the subject of a counter-claim, and as such could not be pleaded under section 438 of the code of civil procedure. *Id.*

COUNTY CLERK.

1. EXAMINATION OF RECORDS—DUTY OF COUNTY CLERK.—Section 667 of the general statutes, providing that the county clerk shall keep his office "open during the usual business hours, * * * and that all books and papers required to be in his office shall be open for the examination of any person," gives no right to a private individual to examine and abstract the entire records of a county for the sole purpose of securing future private emolument from the sale of abstracts thus obtained, and imposes no duty upon the clerk to allow such acts to be done. *Bean, County Clerk etc.*, v. *People etc.* (Col.), II, 121.

See PUBLIC OFFICERS.

COUNTY COMMISSIONERS.

See APPEAL AND WRIT OF ERROR, 4–8.

COUNTY COURT.

1. JURISDICTION OF COUNTY COURT—AMOUNT IN CONTROVERSY—AVERMENT OF.—A complaint in an action in the county court need not allege, in the very words of the

statute, that the amount in controversy does not exceed two thousand dollars. It is sufficient if it affirmatively appears from the complaint that the value of the property in controversy or the amount involved for which relief is sought, does not exceed that sum. *Hughes* v. *Brewer* (Col.), IV, 450.

See CERTIORARI, 9, 11, 12.

COUNTY GOVERNMENT ACT.

1. COUNTY GOVERNMENT ACT OF MARCH, 1883—VALIDITY OF.—The act of March, 1883, entitled "An act to establish a uniform system of county and township governments," is not in violation of that provision of the constitution requiring every act to embrace but one subject, which subject shall be embraced in its title. *Longan* v. *Solano County* (Cal.), II, 493; *Cruz* v. *County of Los Angeles* (Cal.), II, 760.
2. THE SAME.—The provisions of such act regulating the fees and salaries of the county officers, as classified therein, are not in violation of that provision of the constitution prohibiting the legislature from passing local or special laws affecting the fees or salary of any official. *Id.*
3. COURTS HAVE NO POWER TO DETERMINE INTO HOW MANY CLASSES the legislature shall divide the counties of the state for the purpose of carrying out the provisions of the constitution. *Id.*
4. COUNTY GOVERNMENT ACT—ORDINANCE—SUPERVISORS.—An ordinance of the board of supervisors of San Bernardino county, passed on May 7, 1883, at a regular session commencing on May 7, 1883, is valid, although passed after the county government act of May 14, 1883, took effect. *Ex parte Benjamin* (Cal.), III, 96.
5. THE SAME—THE COUNTY GOVERNMENT ACT MUST BE CONSTRUED with reference to the laws in force at the time of its enactment and taking effect. It did not and was not intended to operate as a repeal of that provision of the political code providing for the regular meetings of the boards of supervisors, until the board itself should provide for the holding of such regular meetings. Such act superseded and repealed the act of March 13, 1883. *Id.*
6. THE SAME—LIQUOR ORDINANCE.—At the time of the passage of the ordinance in question, the board of supervisors had authority to regulate the sale of spirituous liquors by imposing a license thereon. *Id.*

See BONDS, 7.

COUNTY PHYSICIAN.

1. COUNTY PHYSICIAN—DISCHARGE OF, BY SUPERVISORS.—The board of supervisors of Santa Cruz county may contract with a physician for his attendance upon the indigent sick of said county for the period of a year, and if the physician performs the duties required of him by the contract, the supervisors have no power to discharge him during the period embraced in it. *Grindley* v. *Santa Cruz County* (Cal.), III, 296.

COUNTY PRINTING.

See CORPORATIONS, 58–60.

COUNTY SEAT, REMOVAL OF.

See ELECTION, 1, 4, 6, 7.

COUPONS.

See BONDS; MANDAMUS, 4; STATUTE OF LIMITATIONS, 15.

COVENANTS.

See LANDLORD AND TENANT, 4, 5; LEASE, 3–6; WATER RIGHTS, 23.

CRIMINAL LAW—IN GENERAL.

1. COMMITMENT AND EXAMINATION.
2. INDICTMENT AND INFORMATION.
3. EVIDENCE AND PRACTICE ON TRIAL.
4. JUDGMENT AND SENTENCE.
5. APPEALS AND WRITS OF ERROR.

1. COMMITMENT AND EXAMINATION.

1. COMMITMENT AND EXAMINATION BY JUSTICE OF PEACE.—Where a complaint is filed before a justice of the peace, charging a defendant with a felony, and he is thereupon arrested and taken before the magistrate issuing the warrant, by whom an order of commitment for examination is made, such defendant may be examined and committed by another justice of the peace of the same township, although no warrant for the defendant's arrest is issued by such latter magistrate, and it does not appear why the defendant was taken before a magistrate other than the one issuing the warrant. *Ex parte Moan* (Cal.), II, 760.
2. THE SAME—ORDER FOR COMMITMENT—HABEAS CORPUS.—A defendant's commitment, under section 872 of the penal code, is sufficient, when the justice by whom he was examined makes the following order: "It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe the within-named defendant guilty thereof, I order that he be held to answer to the same, and that he be admitted to bail in the sum of two thousand five hundred dollars." If such commitment were not sufficient, the defendant would not be entitled to his discharge on *habeas corpus*, after his trial and conviction, when he failed to move to have the information set aside under which he was tried. *Id.*

2. INDICTMENT AND INFORMATION.

3. AN INFORMATION WHICH SUBSTANTIALLY complies with the provisions of the penal code is sufficient on demurrer. *People* v. *Biggins* (Cal.), II, 887.
4. SWEARING TO COMPLAINT.—The complaint charging a person with the commission of a crime may be sworn to before a justice of the peace. *People* v. *Le Roy* (Cal.), III, 785.
5. INFORMATION—NAME OF DEFENDANT—INSERTION OF.—An information can not be set aside because the defendant is designated therein by different names. Upon the discovery of his true name, the same may be inserted in the information. *Id.*
6. SETTING ASIDE INFORMATION—FAILURE TO FILE REPORTER'S NOTES.—An information filed by the district attorney, after a prisoner has been examined and held to answer by a committing magistrate, will not be set aside for the failure of the short-hand reporter to transcribe and file his short-hand notes. *People etc.* v. *Riley* (Cal.) II, 364.
7. ERRONEOUS REFERENCE IN STATUTE.—Subdivision 2 of section 192 of the criminal practice act, providing that a defendant may demur to an indictment when it fails to comply with the requirements of section 152, will be construed as referring to section 151, when it is manifest that such was the legislative intent, and that the reference to section 152 was evidently a mistake. *People* v. *Hill* (Utah), II, 476.
8. A DEMURRER TO AN INDICTMENT IS SUFFICIENT that states that the same does not substantially conform to the requirements of section 151 of the criminal practice act, and under such allegation specifies that two of the essentials mentioned in section 151, to wit, certainty as to the offense charged and the particular circumstances, are wanting. *Id.*
9. RESUBMISSION TO GRAND JURY, CONSTRUCTION OF SECTION AUTHORIZING.—Section 197 of the criminal practice act, authorizing a resubmission of the case "to the same or the next grand jury," after a demurrer to an indictment has been sustained, does not limit such resubmission to the same grand jury that found the indictment, nor to the one immediately succeeding. Such resubmission may be made to the first grand jury that meets after the demurrer is allowed, although one or more grand juries have met and been discharged between then and the time when the indictment was found. *Id.*
10. INFORMATION—FILING OF.—A district attorney is authorized to proceed against a defendant by an information charging him with the crime of an assault with a deadly weapon, after an examination and commitment by a magistrate. *People* v. *Wheeler* (Cal.), II, 70.
11. FILING INFORMATION AFTER DISMISSAL OF CHARGE BY GRAND JURY.—The district attorney has authority to file an information against a defendant, within thirty days after his commitment, notwithstanding the grand jury had previously examined the case and dismissed the bill. *Ex parte Moan* (Cal.), II, 760.
12. FILING INFORMATION—CONFESSION OF DEMURRER.—After a plea of not guilty has been entered in a prosecution for murder, upon which the case is set for trial, the court may set aside an order overruling a demurrer to the information, and allow the counsel for the people to confess the demurrer and to file a new information: and an order entered allowing such confession of the demurrer, and directing a new

information to be filed, is equivalent to an order allowing the demurrer. *People* v. *Biggins* (Cal.), II, 887.

13. DENIAL OF A MOTION TO SET ASIDE AN INFORMATION which was subscribed by the district attorney of the county is not error, where it does not affirmatively appear from the transcript that before the filing thereof the defendants had not been committed by a magistrate. *People v. Shem Ah Fook* (Cal.), I, 112.

3. EVIDENCE AND PRACTICE ON TRIAL.

11. THE EVIDENCE IN A CRIMINAL CASE MUST CONVINCE TO A MORAL CERTAINTY before a conviction can be had. *Territory* v. *Adolphson* (Mont.), IV, 474.

12. ADMISSIBILITY OF DEPOSITION TAKEN BEFORE COMMITTING MAGISTRATE—CONSTITUTIONAL LAW.—On the trial of a defendant for having in his possession dies, plates, etc., designed for and used in counterfeiting coins current in this state, the deposition of a witness taken before the committing magistrate is admissible in evidence, upon proof that such witness is absent from the state. Sections 686 and 869 of the penal code, authorizing such evidence, are not in conflict with the last clause of section 13, article 1 of the constitution of 1879. *People* v. *Oiler* (Cal.), IV, 383.

13. STATEMENT AND SILENCE OF PRISONER.—The conduct, acts, and statements of a person accused of crime are admissible in evidence against him; and such inferences may be drawn from them as are warranted by the evidence considered in the light of human experience. But an inference of guilt can not be drawn from a statement evincive of innocence, nor from silence where a person is not bound to speak; nor from refusal to answer unauthorized questions touching the charge against him, which, under the circumstances, called for no reply. If the officer making the arrest asks him any questions touching the circumstances connected with the crime, the prisoner has the right to be silent, or to assign the reason why he at that time declines to enter into explanations. If he keeps silence, or refuses to answer "because he does not know the law and had better say nothing," no inference from his silence or refusal can be drawn against him. *People* v. *Elster* (Cal.), III, 33.

14. THE SAME—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.—Facts and circumstances upon which instructions are predicated must be founded upon the evidence in the case. If there be no evidence tending to prove them, it is error for the court to assume them, or to so word instructions with reference to them as to leave it to the jury to infer their existence. While, therefore, it would be proper in a case in which there is any evidence tending to prove inculpatory facts and circumstances in connection with the possession of property recently stolen, for the court to instruct the jury that they would be justified in finding the defendant guilty of theft, it is error to give such instruction, if there were no evidence to warrant the inference of such circumstances. *Id.*

15. THE CREDIBILITY OF A WITNESS CAN NOT BE IMPEACHED by evidence that he has been arrested for a felony. *Id.*

16. A CONFESSION IS A PERSON'S DECLARATION of his agency or participation in a crime. The term is restricted to acknowledgment of guilt. *People* v. *Le Roy* (Cal.), III, 785.

17. STATEMENTS OF PRISONER—PROOF OF GUILT—VOLUNTARY ADMISSIONS.—Statements made by a prisoner not in themselves involving his guilt are admissible in evidence without preliminary proof that they were voluntarily made, although such statements, when taken in connection with other facts, tend to prove his guilt. *Id.*

18. EVIDENCE—REFRESHING MEMORY—MEMORANDA.—A witness, in testifying to statements made by a prisoner, may refresh his memory from written memoranda made by him at the time the statements were made. *Id.*

19. DRUNKENNESS AS BEARING ON INTENTION IN COMMISSION OF CRIME.—The effect of a prisoner's inebriated condition, as bearing upon the intention with which he committed a crime, is a question for the jury. *Cook* v. *Territory* (Wy.), IV, 340.

20. EVIDENCE OF A WITNESS FOR THE PROSECUTION, ALTHOUGH NEITHER STRONG NOR SATISFACTORY, should not be stricken out where there is other evidence to support it. *Cornish* v. *Territory* (Wy.), III, 89.

21. EVIDENCE OF THE EXISTENCE AND CONTENTS OF A LETTER WRITTEN BY THE DEFENDANT may be proved by a witness who knew the defendant's handwriting, and had read the letter, when said letter had never been under the control of the witness, nor of the prosecution, nor within the jurisdiction of the court, although the prosecution had never made any effort to procure it. *Id.*

22. CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.—Where a defendant's guilt is sought to be established by circumstantial evidence, an instruction that the proof of such guilt "must be established beyond the possibility of a doubt" is equivalent to an

instruction that the evidence "must be absolutely incompatible with the innocence of the accused." *Id.*

23. THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE may be sufficient to warrant a conviction. *Territory* v. *Kinney* (N. M.), I, 801.
24. THE TESTIMONY OF A WITNESS TO THE EFFECT THAT HE SAW THE DEFENDANT AT HIS HOME, and in the vicinity of the place where the crime was committed, is corroborative of the testimony of an accomplice as to the defendant's guilt, when the defense relied on is an *alibi*. *Id.*
25. TO CORROBORATE THE TESTIMONY OF AN ACCOMPLICE, the evidence must not only corroborate his story in a general way, as to the fact of the crime itself, but must tend to show that the defendant took part in the commission of the crime. *Id.*
26. ERROR IN REGARD TO THE ADMISSION OF EVIDENCE which could not have prejudiced the prisoner is not ground for reversal. *People* v. *Bennett* (Cal.), II, 905.
27. IMMATERIAL ERROR.—A judgment of conviction will not be reversed for an immaterial error. *People* v. *Wheeler* (Cal.), II, 70.
28. PREVIOUS CONVICTION—ARRAIGNMENT.—After the repeal of section 1025 of the penal code, a defendant charged with a previous conviction must be arraigned under section 988 of such code. *People* v. *Brooks* (Cal.), III, 53.
29. THE SAME—ANSWER TO CHARGE OF CONVICTION.—Upon the arraignment of a defendant charged with a felony and a previous conviction, although after the repeal of section 1025 of the penal code, he can not be asked whether he has suffered a previous conviction; still he may voluntarily answer that part of the indictment charging him therewith. When he does so answer, admitting or denying the previous conviction, the court, under section 1158 of the penal code, when the conviction is denied, must take the verdict of the jury on the issue of previous conviction, and the jury must respond as required by such section. If the conviction is confessed, there need be no verdict on the answer under the same section, and the court can proceed on the verdict as to the other issues in the case, and pronounce judgment on the verdict when it declares guilt, and the voluntary answer or confession. *Id.*
30. ARRAIGNMENT—DUTY OF COURT TO INSTRUCT AS TO RIGHT TO COUNSEL.—An arraignment is not void because the court, before the commencement of the proceedings of arraignment, omitted to inform the defendant of his right to counsel, or to assign counsel to defend him if he was unable to employ one, if the court instructed the defendant concerning his right to counsel during the course of arraignment. *People* v. *Villarino* (Cal.), IV, 693.
31. OBJECTIONS TO INFORMATION, WHEN MUST BE TAKEN.—Any statutory objections to an information, or any defects apparent upon its face, can not, after a plea of not guilty, be availed of on the trial, nor on a motion for a new trial, nor on a motion in arrest of judgment. It is only a want of jurisdiction, or a failure to state facts constituting a public offense, which may be taken advantage of at any time in the course of criminal proceedings. *Id.*
32. MOTION TO QUASH INDICTMENT—PATENT DEFECTS.—A motion to quash an indictment under the compiled laws, page 152, section 101, only lies for defects which are apparent upon the face of the record. *Cook* v. *Territory* (Wy.), IV, 340.
33. AN OBJECTION TO AN INDICTMENT "THAT IT DOES NOT SUBSTANTIALLY CONFORM to sections 233 and 234 of the criminal practice act" can not be taken advantage of upon a motion in arrest of judgment under section 426. Such objection, if made at all, must be taken by demurrer under section 285, as limited by section 293. *People* v. *Stapleton* (Idaho), II, 176.
34. AN IMPRISONMENT IS LEGAL, UNDER SECTION 19 OF THE HABEAS CORPUS ACT, where the commitment, which in this territory is a certified copy of the judgment, fully shows the character of the court rendering the judgment, the names of the judge and clerk, and the date of the judgment, although such judgment does not contain the usual recitals. *In re Waldrip* (Ariz.), I, 44.
35. AFTER A PLEA OF NOT GUILTY TO AN INDICTMENT CHARGING THE DEFENDANT with a previous conviction of a like offense, the defendant is not entitled, as of right, to withdraw such plea on the trial, and plead guilty to the charge of previous conviction. *People* v. *Lewis* (Cal.), I, 131.
36. REFUSAL TO ALLOW DEFENDANTS TO WITHDRAW THEIR PLEA OF NOT GUILTY, and to interpose instead a demurrer and a motion to set aside the information, is not an abuse of discretion. *People* v. *Shem Ah Fook* (Cal.), I, 112.
37. RECEIVING A VERDICT IN THE ABSENCE OF COUNSEL FOR THE PRISONER.—If the jury in a criminal prosecution come into court with their verdict, in the absence of the counsel for the prisoner, the court may, after notifying such counsel, and

waiting a reasonable length of time for him to come into court if he had been so disposed, receive the verdict, poll the jury, and discharge it. *People* v. *Bennett* (Cal.), II, 905.

38. PRIVATE COUNSEL MAY BE PERMITTED TO ASSIST the district attorney in the trial of a criminal prosecution. *People* v. *Turcott* (Cal.), II, 490.

39. PUBLIC TRIAL—EXCLUSION FROM COURT-ROOM.—An order in a criminal prosecution excluding all persons from the court-room, except those connected with the trial, in the absence of a showing to the contrary, will be presumed to have been assented to by the defendant. The phrase "public trial," in the constitutional provision guaranteeing to every one accused of crime the right to a public trial, is used in opposition to a secret trial. It does not mean that every person who sees fit shall in all cases be permitted to attend criminal trials. *People* v. *Swafford* (Cal.), II, 927.

40. MISCONDUCT OF DISTRICT ATTORNEY DURING ARGUMENT.—It is not misconduct sufficient to warrant a reversal for the district attorney to address the defendant personally during his argument, advance towards and point his finger at him, saying, "You sought this trouble with him [referring to the prosecuting witness], and made a cowardly attack upon him." *People* v. *Wheeler* (Cal.), II, 70.

41. INSTRUCTIONS—TESTIMONY OF DEFENDANT.—However incredible the testimony of a defendant in a criminal prosecution may be, he is entitled to an instruction based upon the hypothesis that his testimony is true. *People* v. *Keefer* (Cal.), II, 878.

42. AN INSTRUCTION IN REGARD TO THE FLIGHT of a person accused of crime is justified, when it appears that the defendant was absent from his home soon after the commission of the crime, and that some three weeks afterwards he was arrested in another county. *People* v. *Forsythe* (Cal.), II, 288.

4. JUDGMENT AND SENTENCE.

43. BATTERY—JUDGMENT IMPOSING FINE, WITH SUBSTITUTIONAL IMPRISONMENT.—A judgment of a justice of the peace imposing a fine upon a defendant convicted of battery, and ordering a substitutional imprisonment until such fine be paid, as provided in section 1446 of the penal code, can not direct that the defendant, while so imprisoned, perform labor on the streets, or other public works of the city of Los Angeles. Such judgment is not authorized by the act of February 20, 1872, amending the charter of said city. *Ex parte Kelly* (Cal.), II, 719.

44. THE SAME—DISCHARGE ON HABEAS CORPUS.—Such judgment is a unit, and if one portion of it is without the jurisdiction of the justice, the judgment is void, and on an application for a writ of *habeas corpus*, the defendant should be discharged. On such proceeding the supreme court can not exscind the void portion from the judgment, and order what remains to be carried into execution. *Id.*

45. TIME FOR SENTENCE—NO EXCEPTION IS ALLOWED BY STATUTE to the order of the court fixing the time for sentence, after a defendant has been convicted of a felony. No such exception being allowed, an order fixing the time for sentence on the twenty-seventh, when the verdict convicting the defendant was rendered on the twenty-fifth of the same month, is not reviewable in the supreme court. *People* v. *Mess* (Cal.), II, 758.

5. APPEALS AND WRITS OF ERROR.

46. NO APPEAL LIES TO THE SUPREME COURT IN CRIMINAL CASES, unless the same be prosecuted by indictment or information. *Tyler* v. *Connolly* (Cal.), I, 779.

47. A WRIT OF ERROR TO REVIEW THE JUDGMENT of the district court in criminal cases will be allowed only when the appellate court is satisfied, from an inspection of the transcript of the record, that error has been committed. *Donovan* v. *Territory* (Wy.), II, 66.

48. APPEAL FROM ORDER SUSTAINING A DEMURRER TO AN INDICTMENT.—An appeal lies on the part of the prosecution from an order sustaining a demurrer to an indictment when it is further ordered that the defendant be held in custody to await the action of the next grand jury. *People* v. *Hill* (Utah), II, 476.

49. DISCHARGE OF PRISONER—RESUBMISSION TO GRAND JURY—APPEAL.—Neither an order refusing to discharge a prisoner, after an order sustaining his demurrer to the indictment, nor an order resubmitting his case to the grand jury, are appealable. *Id.*

50. APPEALS IN CRIMINAL CASES—ENLARGEMENT OF TIME TO FILE TRANSCRIPT.—The provisions of section 531 of the civil code do not affect appeals in criminal cases. *State* v. *Bovee* (Or.), III, 553.

51. THE SAME.—Appeals in such cases, taken under chapter 22 of the criminal code, during a term of the supreme court, may, in its discretion, be heard and determined at the same time. *Id.*
52. THE SAME.—Any order enlarging the time within which the clerk of the circuit court must prepare and transmit the transcript on appeal, in a criminal case, to the supreme court, must be made by the court or judge thereof where the notice of appeal is filed. *Id.*
53. STAY OF EXECUTION PENDING APPEAL—CERTIFICATE OF PROBABLE CAUSE.—Where, after a conviction for battery by a justice of the peace, the defendant appeals to the superior court, although no certificate of probable cause is filed, the same effect will be given to a dismissal of the appeal, when the justice, sheriff, and defendant treated the appeal as staying execution, as would be given to it had there been a certificate of probable cause. *Ex parte Whitty* (Cal.), II, 732.
54. APPEAL FROM JUDGMENT—REVIEW OF EVIDENCE.—On an appeal from a judgment alone the appellate court will not examine the evidence as to its sufficiency to support the verdict. *Territory* v. *Young* (Mont.), IV, 468.
55. THE QUESTION WHETHER AN INDICTMENT DOES OR DOES NOT SUPPORT THE JUDGMENT can be raised in the appellate court for the first time. *Territory* v. *Young* (Mont.), IV, 468.

See APPEAL; ARREST AND BAIL; ARSON; ASSAULT WITH DEADLY WEAPON; BURGLARY; CONTEMPT; EMBEZZLEMENT; FALSE PRETENSES; FORGERY; FORNICATION; FUGITIVES FROM JUSTICE; GAMING; HABEAS CORPUS; INDIANS; JURY AND JURORS; JUSTICES' COURTS; KIDNAPING; LARCENY; MURDER AND MANSLAUGHTER; PERJURY; PROSTITUTION; RIOT; ROBBERY.

CROSS-ACTIONS.

See JUDGMENT, 60.

CROSS-COMPLAINT.

See PLEADING AND PRACTICE.

CROSS-EXAMINATION.

See MURDER AND MANSLAUGHTER, 82.

CUSTOM-HOUSE CERTIFICATE.

See CHINESE RESTRICTION ACT.

CUSTOM.

See NUISANCE, 10, 15.

DAM.

See WATER RIGHTS, 50.

DAMAGES.

1. COMPENSATORY DAMAGES, THE ELEMENTS OF, STATED.—A person receiving a willful injury from another is entitled to recover compensatory damages therefor, irrespective of the motive of the wrong-doer, or his own calling or condition in life. *Boyle* v. *Case* (U. S. Cir. Ct., Or.), I, 327.
2. PUNITIVE DAMAGES, WHEN ALLOWED in addition to compensatory damages, and what for. *Id.*
3. VIGILANCE COMMITTEE.—No plea of the public good or safety can justify a voluntary assemblage of people in inflicting a personal injury upon any individual, but in an action to recover damages therefor, the jury, in considering whether the plaintiff is entitled to punitive damages or not, may and ought to take into account the causes or motives which led the defendants to do the wrong complained of. *Id.*
4. DAMAGES WHICH ARE NOT THE USUAL AND NATURAL CONSEQUENCES of the wrongful act complained of can not be recovered unless specially pleaded. *Tucker* v. *Parks* (Col.), I, 264.

5. NEITHER PROBABLE PROFITS NOR PROSPECTIVE OR SPECULATIVE DAMAGES CAN BE RECOVERED in an action for the breach of a contract for the sale of milling machinery. *Jones* v. *Nathrop* (Col.), I, 279.
6. MEASURE OF DAMAGES IN AN ACTION FOR CUTTING TIMBER on the public lands, in case the trespass is inadvertent and not willful, is the value of the timber in the tree; but where the trespass is willful, the value of the labor put upon it by the trespasser must be added to the value in the tree, with interest thereon in either case. *United States* v. *Williams* (U. S. Cir. Ct., Or.), I, 100.
7. TRESPASS BY MISTAKE.—The defendant claimed to have taken up a homestead on the north-west quarter of section 22 of township 19, and while intending to cut saw-logs thereon with intent to dispose of the same, did by mistake cut said logs on the north-east quarter of said section: *Held*, that if the defendant had cut the logs on the north-west quarter, as he intended, it would have been a willful trespass, and therefore his mistake was immaterial, and he was liable to the United States for the value of said logs as a willful trespasser. *Id.*
7. DAMAGES—EVIDENCE—ADMISSIONS—PLEADINGS.—Evidence of the damages suffered by plaintiff, in an action for personal injuries, is admissible, notwithstanding the defendant's counsel states in open court that the allegations of the complaint in respect to damages are admitted by the answer, if such statement were not true. *Payne* v. *Kripp* (Cal.), III, 424.
8. BREACH OF CONTRACT—VALUE OF WORK—EVIDENCE.—In an action for breach of contract in refusing to allow the plaintiff to do the work contracted for, evidence of the expense of doing such work in a manner materially different from the mode provided by the contract, as a test of value, is immaterial. *Biggerstaff* v. *Briggs* (Cal.), III, 353.
9. AMOUNT OF DAMAGES TO BE AWARDED TO AN ACTION FOR A PERSONAL INJURY is in the sound discretion of the jury, whose verdict will not be disturbed, unless it appears that they were influenced by prejudice, misapprehension, or by some corrupt or improper consideration. *City of Denver* v. *Dunsmore* (Col.), II, 841.

See ADMIRALTY, 6; CONSPIRACY, 11; CONTEMPT, 6; CORPORATIONS, 36; EMINENT DOMAIN, 15, 18; JUDGMENT, 7; PATENTS, 13–17; REPLEVIN, 4, 5; STREETS AND HIGHWAYS, 5.

DEADLY WEAPON.

See ASSAULT WITH DEADLY WEAPON.

DEBRIS, MINING.

See ADVERSE POSSESSION, 9; NUISANCE.

DEBTOR AND CREDITOR.

See FRAUD, 18; MORTGAGE, 44; PAYMENT; REDEMPTION.

DECEASED PERSONS.

See ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS.

DECEIT.

1. DECEIT—STATUTE OF LIMITATIONS—PROMISSORY NOTE.—The maker of a promissory note, who falsely and fraudulently induces the holder thereof to surrender its possession, for the purpose of preventing an action thereon, is liable for such deceit, although the statute of limitations has run against the note at the time when such action is brought. *Cockrill* v. *Hall* (Cal.), III, 106.

DECISION.

See JUDGMENT, 62.

DECLARATIONS.

See EVIDENCE, 18–32.

DECREE.

See JUDGMENT.

DEDICATION.

1. THE MERE OFFER OF THE STATE TO DEDICATE A PORTION OF THE HARBOR OF THE CITY AND COUNTY OF SAN FRANCISCO to such city if the latter would deepen and improve it in a manner prescribed by the legislature, did not constitute a dedication *per se*. In order to complete the dedication, it was necessary for the city to accept such offer, and make the improvements. Until such acts were done, the state had the right to recall its offer in whole or in part, and to deal with the subject of it in the exercise of its sovereign powers. *People* v. *Williams* (Cal.), I, 572.
2. VOLUNTARY CONVEYANCE OF LAND TO A COUNTY BY DEED OF BARGAIN AND SALE which recites that such conveyance is made "for the purpose of erecting thereon county buildings, to which the same is hereby dedicated for the use and benefit of the party of the second part, its successors and assigns forever," vests as complete a title in the county, if the land is used for such purpose, as if it had obtained the same by purchase, without such words of dedication. *State* v. *Glenn* (Nev.), I, 50.
3. DEDICATION OF STREET—FINDINGS.—In an action to obtain a decree adjudging certain premises to be a public street, a finding that on a certain day such premises were dedicated by the owners as a public street is sufficient, without finding who such owners were, when it appears that neither the defendants nor their grantors have or had any interest in the premises, or any title thereto. *People ex rel. Harris* v. *Blake et al.* (Cal.), II, 140.
4. A FINDING THAT THE DEFENDANTS have and had no right or title to the land in controversy reviewed, and held supported by the evidence. *Id.*
5. DEDICATION OF STREETS—RIGHTS OF DITCH OWNERS.—Where a right of way for a water ditch had been acquired over a certain tract of land, the owners of which subsequently laid it out in lots, and dedicated the streets thus formed to the city of Denver, subject to the pre-existing right of way of the ditch, such city will be held to have accepted such dedication subject to such existing right of way, and must render passable such streets, and keep them in repair, without interfering with the rightful and accustomed use of said ditch. *Denver* v. *Mullin* (Col.), II, 582.
6. THE SAME.—In 1864 a company was incorporated for the construction of a water ditch through the city of Denver. Such ditch was completed during the following year. Long prior to the incorporation of such company, and the construction of such ditch, certain streets intersected by it were laid out on the map of said city, which map was recorded in the proper office of the county records. At this time the title to the lands included in the city of Denver, as so mapped, was in the United States, and part of the public domain. In pursuance of the act of congress of May 28, 1864, such lands were entered by the probate judge as a town site, and a certificate of entry thereof was issued to him on May 6, 1865, and a patent for the same was issued on June 8, 1868. The city of Denver was incorporated in 1861, and authorized to exercise general control over the streets, alleys, and highways within the city. *Held*, that the title of the city of Denver to the lands acquired by the entry of May 8, 1865, did not relate back to the date of the act of May 28, 1864, authorizing such entry, as such last-mentioned act was not in the nature of a grant, but simply a provision to enable the city to acquire title to land for a town site if it should elect to avail itself of the provisions of the act; that the authority conferred by the act of 1861 incorporating the city of Denver, in respect to controlling the streets of the city, can not be extended to invalidate the acquisition thereafter by the ditch company of a right of way through the public domain, to which the city had not as yet acquired title, although streets had been previously laid out thereon. *Id.*
7. PUBLIC STREET—ADVERSE POSSESSION—DEDICATION.—Title to lands can not be acquired by adverse possession after the same have been dedicated as a publict street. *City of Visalia* v. *Jacob* (Cal.), III, 408.

See CORPORATIONS, 17; EMINENT DOMAIN, 3.

DEED.

1. CONGRESSIONAL GRANT.—A grant of public land may be made so as to vest an indefeasible and irrevocable title by an act of congress, as well as by a patent issued in pursuance of such act. *Northern Pacific R. R. Co.* v. *Majors* (Mont.), II, 23.
2. ACT OF CONGRESS GRANTING LANDS TO THE NORTHERN PACIFIC RAILROAD CO.—CONSTRUCTION OF.—Section 3 of the act of congress granting lands to aid in the construction of the Northern Pacific Railroad, approved July 2, 1864, operated as a

conditional grant *in præsenti* of certain sections to be afterwards located. Such locations depended upon the route of the road, and until such route was designated in the manner prescribed by the act, the title of the company did not attach to any specific tracts. After such route was settled the location became certain, and the title of the company attached to the particular sections granted as of the date of the approval of the act, as fully as if such particular sections had been designated in such act. *Id.*

3. THE PROVISIONS OF SECTIONS 5, 6, 8, 9, AND 20 OF SUCH ACT, imposing certain conditions on the company, do not affect the creation or vesting of the estate granted by the act. They are simply conditions subsequent, which render the estate liable to be defeated for default on a breach in the performance of such conditions. Upon the breach of such conditions, congress alone has power to declare or take advantage of a forfeiture. *Id.*

4. SECTION 4 OF SUCH ACT, PROVIDING THAT WHEN "SUCH COMPANY shall have twenty-five consecutive miles of any portion of said railroad completed, * * * patents of deeds shall be issued to said company, confirming to said company the right and title to said lands," and "from time to time, whenever twenty-five additional consecutive miles shall have been constructed and completed, * * * then patents shall be issued to said company, conveying the additional sections of land," does not limit or restrict the estate granted by section 3 of such act. The effect of the patent issued in pursuance of such section is simply to confirm the title of the company as fast as certain portions of the road are completed, and render it absolute and unconditional. *Id.*

5. A GRANT OF PUBLIC LAND BY ACT OF CONGRESS IS THE HIGHEST EVIDENCE OF TITLE. It imports livery of seisin and possession, and is sufficient to sustain ejectment. *Id.*

6. CONVEYANCE—CONSIDERATION FOR.—A conveyance under seal is *prima facie* evidence of a sufficient consideration, and a mere stranger to the land can not question it. *West Portland Homestead Association* v. *Lownsdale* (U. S. Dist. Ct., Or.), II, 161.

7. CASE IN JUDGMENT.—G. and C. were tenants in common of a tract of land which was surveyed and platted as Carter's addition to Portland, and then partitioned between tenants in common by mutual conveyances; the one to C. containing a small park for the purpose of equalizing the partition, described therein as block 67; and afterwards changed by said survey so as to materially diminish said park; and at the same time G. surveyed a tract of land adjoining the tract held in common into lots and blocks, and together with his co-tenants platted the two tracts as one Carter's addition, and duly acknowledged and recorded the same, with a block numbered 67 in the G. tract, and the small park aforesaid, not numbered. *Held*, that the conveyance to C. of the park as block 67 did not affect the block 67 afterwards laid off in the G. tract, and that the assignee in bankruptcy of C. had no right, interest, or equity therein, and should be enjoined, at the suit of G.'s grantee, from selling the same as the property of C., and thereby casting a cloud on such grantee's title thereto. *Id.*

8. A RECITAL IN A DEED THAT THE CONSIDERATION THEREFOR WAS PAID by the grantee is presumptively true. Such presumption may be overcome by parol evidence, but to have that result, the evidence must be full, clear, and satisfactory. The evidence in this case, in support of a finding that the consideration for the conveyance of the property in question was not made by the grantee named in the deed, reviewed, and held not to comply with these requirements. *Anthony, Adm'x etc.*, v. *Chapman et al.* (Cal.), II, 68.

9. A FICTITIOUS GRANTEE RENDERS INOPERATIVE and void a conveyance purporting to be made to him. *Downing* v. *Bartels* (Col.), II, 506.

10. GRANTEE IS AS NECESSARY TO A CONVEYANCE AS A GRANTOR, and it follows that a United States land patent to a fictitious grantee is absolutely null and void. *U. S.* v. *Southern Col. etc. Co.* (U. S. Cir. Ct., Col.), I, 11.

11. NOTICE OF THE GRANTOR'S INTENTION TO RESCIND THE CONVEYANCE and demand a return of the property conveyed, on account of fraud in obtaining such conveyance, is not necessary where the grantee is a fictitious person. *Id.*

12. DEED—DELIVERY—INTENT.—A conveyance does not take effect as a deed until delivery with the intent that it shall so operate. Such intent is a question of fact, to be determined from the circumstances of the transaction, and can not always be determined as a matter of law. *Hibberd et al.* v. *Smith et al.* (Cal.), III, 446.

13. THE SAME.—Delivery of a deed is not complete until the grantor has so dealt with the instrument delivered as to lose all control over it. Whether he has so dealt

with it depends upon the intent to be deduced from all the surrounding circumstances. *Id.*

14. THE SAME—ASSENT OF GRANTEE.—The assent of the grantee is necessary to the delivery of a deed, whether such delivery is actual or constructive. *Id.*
15. DELIVERY TO THIRD PERSON—DEED—CONSENT OF GRANTEE—RELATION.—The delivery of a deed to a third person, not authorized by the grantee to receive it, and without his knowledge, can not operate to defeat the rights of creditors of the grantor, attaching subsequent to such delivery, and prior to the time when the grantee manifested his assent, although such deed was beneficial to the grantee. The subsequent assent of the grantee, under such circumstances, does not operate by relation, to pass the title as of the time of delivery to such third person. *Id.*
16. A DEED TAKES EFFECT ONLY FROM ITS DELIVERY.—If delivery is wanting, the deed is void *ab initio*. *Bank of Healdsburg* v. *Bailhace et al.* (Cal.), III, 140.
17. MARRIED WOMAN'S DEED—ACKNOWLEDGMENT—DELIVERY.—The deed of a married woman, until it is acknowledged and certified according to the formalities prescribed by sections 1186 and 1191 of the civil code, has no validity, and is not in a condition to be delivered and accepted. *Id.*
18. DELIVERY OF DEED—HANDING DEED TO DIRECTOR OF GRANTEE.—Handing a deed to one of the directors of the grantee, a bank, upon the condition that the same is not to be delivered until certain matters in dispute between the parties to the deed are settled, nor until the depositary is instructed to make such delivery, is not a delivery to the bank, nor can delivery be made until such instructions are given. *Id.*
19. MARRIED WOMAN'S DEED—ACKNOWLEDGMENT.—The deed of a married woman, acknowledged as the deed of a *feme sole*, conveys no title, and her subsequent proper acknowledgment of the same will not operate, by relation, to pass title as of the date of the first acknowledgment. *Durfee et al.* v. *Garvey* (Cal.), III, 356.
20. SHERIFF'S DEED UNDER VOID JUDGMENT—COLOR OF TITLE. — A sheriff's deed, although given under a void judgment, may give color of title to the purchaser. *Packard* v. *Johnson* (Cal.), III, 763; *Packard* v. *Moss* (Cal.), III, 769.
21. A QUITCLAIM DEED IS AS EFFECTUAL TO PASS title as a grant or bargain and sale. Such a deed gives color of title. *Id.*
22. GRANT OF LAND—DESCRIPTION BY GENERAL NAME—EXCEPTION FROM GRANT.—A grant of a tract of land with well-known boundaries, designated and known by a general name, passes all the land within the tract so named or designated; and, upon the same principle, where in the grant of a tract of land by metes and bounds there is excepted therefrom a portion of the tract with well-known boundaries, designated by a general name by which it is known, the tract so designated does not pass by the grant. *Truett* v. *Adams* (Cal.), IV, 633.
23. DOUBTFUL DESCRIPTION OF PREMISES—INTERPRETATION OF.—In determining what land was intended to be conveyed, where the description in the deed is doubtful, it is the duty of the court to assume as nearly as possible the position of the contracting parties, and to question the circumstances of the transaction between them, and then to read and interpret the words which they used in the light of these circumstances. *Id.*
24. THE SAME—EVIDENCE OF ACTS AND DECLARATIONS OF PARTIES.—Where the location of premises intended to be conveyed can be ascertained from the terms used in the instrument or conveyance, neither the acts nor declarations of the parties are admissible to show their understanding of the description contained in the conveyance. But where the terms used to describe the premises meant to be conveyed are equivocal, ambiguous, or insufficient, the subsequent acts of the parties while in interest, showing the practical construction put upon the terms of the description by them, may be resorted to for the purpose of ascertaining their intention. And where it is proved that a line has been agreed upon, either expressly or by long acquiescence, as the dividing line between two tracts of land, courts will not disturb the line. *Id.*
25. GRANT OF A PRIVATE RIGHT TO QUARRY ROCK ON THE GRANTOR'S LAND, with a right of way to and from the quarry for the purpose of its removal, does not give the grantee an exclusive right of possession, or a right to any possession disconnected with the purposes of the grant. Such grantee can not authorize a railroad to occupy such land for the ordinary purposes of its business, and if he does so, the grantor, as the owner in fee of the land, may maintain ejectment against it. *Snell* v. *Wasatch & Jordan Valley Railway Company* (Utah), I, 631.

26. ASSOCIATION, MEMBERS OF, AND INTEREST THEREIN.—Where W., by deed, conveyed certain real estate to "an association of persons," without naming all of the persons who composed that association at the date of the deed, the court will, upon issues raised thereon, inquire into and determine who composed the association at the time of the conveyance to it, and the interest which each member of the association took in the property conveyed to the association. *Pratt* v. *California Mining Company* (U. S. Cir. Ct., Or.), I, 87.
27. PRESUMPTIONS ARISING FROM A DEED MAY BE OVERCOME by evidence, clear and convincing, contradicting such presumptions. *Id.*
28. PARTIES, CONDUCT AND ACTION OF.—The contemporaneous and subsequent action of parties in disposing of property in which they are jointly interested, may be considered as illustrating and evincing their understanding of their rights and interests in that property at the time such interests were acquired therein. *Id.*
29. THE INSERTION OF THE NAME "THOMAS HEPTUM" IN A BOND FOR A DEED signed by Thomas Hepburn is immaterial. *Hall* v. *Rice* (Cal.), I, 346.

See BOUNDARIES; BONA FIDE PURCHASER, 2; CONSIDERATION, 1, 2; CORPORATIONS, 11, 18, 19; ESTOPPEL, 3–8; EVIDENCE, 34; FINDINGS, 25; FRAUD, 1, 8, 13; GIFT; MORTGAGE, 1–11; OREGON DONATION ACT; TRUSTS, 2.

DEFAULT.

1. GRANTEES OF A DEFENDANT IN THE SUBJECT-MATTER OF AN ACTION ARE HIS "LEGAL REPRESENTATIVES," as that phrase is used in section 473 of the code of civil procedure, and as such are entitled to represent him and defend said action in his name. *Plummer* v. *Brown* (Cal.), I, 255.
2. SUCH LEGAL REPRESENTATIVES OF A DEFENDANT ARE ENTITLED TO RELIEF from a default taken against their grantor, upon such terms as appear just to the court. *Id.*
3. THE TAKING OF A DEFAULT AGAINST THE DEFENDANT UPON FAILURE TO PLEAD IS A PRIVILEGE of the plaintiff, and if he chooses to waive it previous to trial it is not a matter of which the party in default can complain, nor can it affect the validity of the judgment. The only purpose of a default is to limit the time during which the defendant may file his answer, and such time never extends beyond a trial and judgment. *Manville* v. *Parks* (Col.), I, 603.

See DEMURRER, 17; PLEADING AND PRACTICE, 62; REMITTITUR, 1.

DELAY.

See EQUITY.

DELINQUENT TAXES.

See APPEAL, 77; CORPORATIONS, 58–60; TAXATION, 55.

DELIVERY.

See RELEASE.

DEMAND.

See INSOLVENCY, 10; REPLEVIN.

DEMURRER.

1. DEMURRER TO SEPARATE ALLEGATIONS IN PLEADING.—Disconnected averments in a pleading can not be separately demurred to. *Herefort* v. *Cramer* (Cal.), IV, 229.
2. A DEMURRER MUST BE DIRECTED TO THE WHOLE OF A PLEADING, or to a particular and separate statement of a cause of action or defense. It can not be directed to certain lines thereof. *Locke* v. *Peters* (Cal.), II, 725.
3. THE DEMURRER TOO BROAD.—When a complaint states a cause of action, some part of which is barred and some not barred, a demurrer to the whole complaint, on the ground that it does not state facts sufficient to constitute a cause of action, should be entirely overruled. *Clark* v. *Smith* (Cal.), IV, 91

4. DEFENDANT IN DEMURRING TO A COMPLAINT FOR FAILURE TO STATE FACTS SUFFICIENT to constitute a cause of action, and specifying in his demurrer certain grounds of insufficiency, can only rely upon the defects specified. It is otherwise if the demurrer is general, and without specification. *Lopez* v. *Central Arizona Mining Co.* (Ariz.), I, 41.
5. OBJECTION THAT AN ANSWER DOES NOT CONTAIN FACTS SUFFICIENT to constitute a defense may be made in the supreme court for the first time. If, however, the answer contains any defense, the objection must be overruled. *Caldwell* v. *Ruddy* (Idaho), I, 295.
6. OBJECTION THAT AN ANSWER CONTAINS INCONSISTENT DEFENSES CAN NOT BE MADE by demurrer, but by motion to strike out or to require the defendant to elect upon which he will stand. *Id.*
7. OBJECTION RAISED TO A COMPLAINT BY DEMURRING for a misjoinder of causes of action is waived by answering. *Hammersmith* v. *Avery* (Nev.), I, 662.
8. MISJOINDER OF CAUSES OF ACTIONS AND OF PARTIES ARE WAIVED unless objection thereto be taken by demurrer. *Learned* v. *Castle* (Cal.), III, 154.
9. DEMURRER—JOINDER OF CAUSES OF ACTION.—An objection that two causes of action are improperly united in one count can not be raised by demurrer. *Bernero* v. *Insurance Cos.* (Cal.), III, 292.
10. DEMURRER—MISJOINDER OF DEFENDANTS—IMMATERIAL ERROR.—Where certain persons are made defendants in an action to foreclose a mortgage, on the ground that they claim some right or interest in the land subsequent to the lien created by the mortgage, and they demur because of their misjoinder, the action of court in overruling such demurrer, although erroneous, will not warrant a reversal, if the court finds that they had not acquired any rights in the mortgaged premises. *Watt* v. *Wright* (Cal.), IV, 622.
11. DEMURRER TO COMPLAINT—MISJOINDER OF DEFENDANTS.—A demurrer to a complaint on the ground of a misjoinder of parties defendant should be disregarded, unless it specifies in what the misjoinder consists, and which of the defendants are misjoined. *Irwin et al.* v. *Wood et al.* (Col.), IV, 212.
13. JOINDER OF DEFENDANTS SEVERALLY LIABLE—FORM OF JUDGMENT.—Under section 13 of the code of civil procedure several promisors under a written contract, who promise to do certain acts, "each for himself and not for the others," may be joined in an action for a breach of such contract. The judgment in such action should be entered against the defendants severally, in proportion to their respective liabilities. *Id.*
14. JOINDER OF DEFENDANTS—INCONSISTENT DEMURRERS.—A defendant having demurred to a complaint, on the ground that his co-defendant was improperly joined, can not, after the complaint has been amended by omitting such party, demur thereto, on the ground that he should have been joined.—*James* v. *Leport* (Nev.), IV, 584.
15. QUESTION AS TO THE SUFFICIENCY IN LAW OF AN ANSWER IS RAISED by the filing of a demurrer to a replication. *Brown* v. *Tucker* (Col.), I, 489.
16. PLEADING.—When a special count of the declaration has been demurred to, and the demurrer sustained, and the plaintiff has thereupon filed other amended counts, upon which issue has been joined, it is error for the trial court, against an objection by the defendant, to submit to the jury any issues as arising on such original count, to which a demurrer had been sustained. *Luna* v. *Mohr* (N. M.), I, 673.
17. OVERRULING DEMURRER—NOTICE OF—APPEAL—DEFAULT JUDGMENT.—Failure of the plaintiff to notify the defendant of the overruling of his demurrer can not be taken advantage of by the latter on an appeal from a judgment against him, entered upon his default. Such error can only be reviewed upon an appeal from an order denying the defendant's motion to set aside the default. *Baily* v. *Sloan* (Cal.), III, 295.
18. DEMURRER TO COMPLAINT—OBJECTION TO OVERRULING, WHEN NOT WAIVED.—A plaintiff does not waive his objection to a wrongful ruling of the court in sustaining a demurrer to his complaint, by filing an amended complaint, when, in consequence of such ruling, judgment is given for the defendant. *Wood* v. *Mastick* (Wash.), II, 549.
19. OVERRULING DEMURRER—TIME TO ANSWER.—During the term the court may limit the time in which the defendant may answer, after a demurrer to the complaint has been overruled, to two days. *De Walt* v. *Hartzell* (Col.), IV, 572.
20. DEMURRER TO THE COMPLAINT HELD PROPERLY OVERRULED. *Samuels* v. *Younger and Wife* (Cal.), IV, 614.

21. DEMURRER HELD PROPERLY OVERRULED, and no error in refusing to set aside the judgment. *McCormick* v. *Fitzpatrick et al.* (Cal.), IV, 614.
22. JUDGMENT REVERSED, WITH DIRECTION TO SUSTAIN THE DEMURRER. *McFadden* v. *Mason et al* (Cal.), III, 30.

See APPEAL, 52, 84; CRIMINAL LAW AND PRACTICE, 7, 33; DENVER TOWN SITE; EMINENT DOMAIN, 5; FRAUD, 13-15, 19; GUARDIAN AND WARD, 1; JUDGMENT, 61; PLEADING AND PRACTICE.

DENVER TOWN SITE.

1. TITLE TO A LOT IN THE ORIGINAL TOWN SITE OF THE CITY OF DENVER, entered by James Hall, probate judge of Arapahoe county, on May 6, 1865, by virtue of the act of congress for the relief of the citizens of Denver, approved May 28, 1864 (13 Stats. at Large, 94), can be acquired only in the manner designated by such act and by the territorial acts carrying the same into effect. *Downing et al.* v. *Bartels* (Col.), II, 506.
2. THE SAME—VALIDITY OF DEED FROM PROBATE JUDGE—ATTACK ON.—The validity of a deed to a portion of such town site, executed by the successor in office of such probate judge, in pursuance of the territorial act of February 8, 1872, can not be attacked in a strictly legal action of ejectment, by evidence showing that the preliminary steps and conditions required to a valid conveyance had not been complied with by the grantee prior to the execution of the deed, when the deed is regular upon its face and purports to have been executed to the person found to be entitled thereto under the laws of congress and statutes of Colorado, and by the officer intrusted by the government with the legal title, and duly authorized to convey. In executing the authority vested in him by such act, the probate judge exercises judicial functions, and his voidable acts can only be impeached in direct proceedings to set them aside. *Id.*

See DEDICATION, 5.

DEPOSIT.

See PLEDGE, 3, 4; STATUTE OF LIMITATIONS, 13, 14; TAXATION, 51.

DEPOSITIONS.

1. SUBPŒNAS ISSUED BY A NOTARY PUBLIC IN PROCEEDINGS BEFORE HIM, to take the depositions of witnesses, can not be quashed by the court on the ground that the affidavit upon which they were issued was not sufficient. *Pfister* v. *Superior Court* (Cal.), I, 134.
2. PARTY DESIRING HAS THE RIGHT TO TAKE DEPOSITIONS, and the adverse party may object to them when the same are offered in evidence, if the proceedings are irregular. *Id.*
3. DEPOSITIONS TAKEN IN AN ACTION IN ANOTHER COURT BETWEEN THE SAME PARTIES, and in regard to the same subject-matter, are admissible in evidence upon parol proof of the existence of such former action. *Ayers* v. *Chisum* (N. M.), I, 520.
4. DEPOSITION—ADMISSIBILITY OF, AT SUBSEQUENT TRIAL.—A deposition taken pending the action is admissible at the trial thereof, although subsequent to the taking of such deposition the complaint has been amended, provided the subject-matter of the action and the issues therein have remained substantially the same. *Anthony et al.* v. *Savage* (Utah), II, 674.

See CRIMINAL LAW AND PRACTICE, 12.

DERELICT.

See ADMIRALTY, 21.

DESCRIPTION.

See BOUNDARIES; DEEDS; GUARDIAN AND WARD, 8.

DESERTION.

See MARRIED WOMEN, 7, 8.

DETAINER.

See FORCIBLE ENTRY AND DETAINER.

DEVISE.

See WILLS.

DIRECTORS.

See CORPORATIONS.

DISBURSEMENTS.

See COSTS.

DISCHARGE OF MORTGAGE.

See MORTGAGE.

DISCLAIMER.

See PLEADING AND PRACTICE.

DISMISSAL OF ACTION.

1. DISMISSAL OF ACTION—ANSWER CLAIMING AFFIRMATIVE RELIEF.—A plaintiff can not, of his own motion, dismiss, before trial, an action in which the answer of the defendant claims affirmative relief. *Thompson et al.* v. *Spray* (Cal.), III, 433.
2. A PLAINTIFF CAN NOT DISMISS his action where the answer prays for affirmative relief. *Robinson* v. *Placerville and Sacramento R. R. Co.* (Cal.), III, 23.

DISMISSAL OF APPEAL.

See APPEAL, 75–96; JUDGMENT, 18.

DISQUALIFICATION OF JUDGE.

See JUDGE, 1; VENUE, 14, 17.

DISTRICT ATTORNEYS.

See TAXATION, 70.

DISTRICT COURT.

See ARREST AND BAIL, 6.

DITCH.

See DEDICATION, 5; NUISANCE, 18.

DIVORCE.

1. LEGISLATIVE DIVORCE—VALIDITY OF.—The territorial legislature of Oregon had power, under the organic act of congress creating the territory, to grant special divorces. The exercise of such power is not in conflict with the provision of the United States constitution prohibiting states from passing laws impairing the obligations of contracts; nor by the last clause of article 2 of the ordinance of 1787 for the government of the terrritory north-west of the river Ohio, providing "that no law ought ever to be made or have force in said territory that shall in any manner whatsoever interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed;" nor by article 4 of said ordinance prohibiting the territorial legislatures from interfering "with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may

find necessary for securing the title in such soil to the *bona fide* purchasers." *Maynard* v. *Valentine* (Wash.), I, 840.

2. THE RIGHT OF A WIFE TO LAND CLAIMED UNDER THE OREGON DONATION LAW does not become perfect until the residence and cultivation thereon by her husband, as her husband, is complete. Such act contemplates a common residence and settlement by both husband and wife. Consequently, an act of the legislature of Oregon, divorcing a husband, who had located a section of land under such act, from his wife, who had never been a resident of Oregon, does not impair any of the wife's right of property in such land which the legislature was prohibited from impairing by the United States constitution. *Id.*
3. LEGISLATURE OF COLORADO HAS NO POWER, UNDER THE CONSTITUTION, TO GRANT DIVORCES, nor can it validate a decree for divorce which was absolutely void for want of jurisdiction of the court over the person against whom it was rendered. *Israel* v. *Arthur* (Col.), I, 286.
4. THE ACT OF THE TERRITORIAL LEGISLATURE OF 1852, IN SO FAR AS IT GRANTED TO THE PROBATE COURTS jurisdiction in cases of divorce for statutory causes, is valid. *Whitmore* v. *Harden* (Utah), I, 424.
5. NO JUDICIAL TRIBUNAL IN THIS COUNTRY CAN TAKE JURISDICTION OF DIVORCE CASES without the authority of a statute. Such cases are *sui generis*, and are neither intrinsically actions at law nor suits in equity. *Id.*
6. THE GRANTING OF DIVORCES IS NOT NECESSARILY A JUDICIAL ACT, and consequently the legislature may grant divorces, in the absence of express constitutional provisions to the contrary, although all judicial power has been conferred upon another department of the government. *Id.*
7. AFTER THE HAPPENING OF THE CONTINGENCY UPON WHICH THE INTEREST OF A DIVORCED WIFE in the property of her husband set apart to her has ceased, the court can not so modify the decree of divorce as to cut off the lien of a mortgage which has attached against the property of the former husband, subsequent to the happening of such contingency. *Id.*
8. EXTREME CRUELTY TO WARRANT A DIVORCE ON SUCH GROUND need not be accompanied by physical violence, but must be such as to occasion danger to life, limb, or health, or the reasonable apprehension of such danger. *Kelly* v. *Kelly* (Nev.), I, 143.
9. FALSE ACCUSATIONS OF MARITAL INFIDELITY ON THE PART OF THE HUSBAND, made by the wife, may in certain cases constitute such extreme cruelty as to entitle him to a divorce. *Id.*
10. DECEASE OF THE HUSBAND AFTER A DECREE OF DIVORCE HAS BEEN GRANTED in his favor, and before proceedings in error thereon are instituted, does not operate to prevent a review and reversal of such decree. *Israel* v. *Arthur* (Col.), I, 289.
11. DIVORCE—DIVISION OF PROPERTY—DISCRETION OF COURT.—After a divorce has been granted, the division of the property is left to the discretion of the trial court, and the exercise of such discretion will not be interfered with by the appellate court unless the same has been abused. *Lake* v. *Lake* (Nev.), IV, 159.

See ABATEMENT, 1; CONSIDERATION, 4; JUDGMENT, 13; MARRIED WOMEN, 8; NEW TRIAL, 45; SUMMONS, 4.

DOMICILE.

See JUSTICES' COURTS, 9.

DRUNKENNESS.

See CRIMINAL LAW AND PRACTICE, 19; FORGERY, 4.

DUE BILLS.

See JUSTICES' COURTS, 9.

DUELING.

See MURDER AND MANSLAUGHTER, 4.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 9; NUISANCE, 7; SWAMP LANDS, 1.

DUPLICITY.

1. DUPLICITY IN PLEA IN EQUITY.—Duplicity and multifariousness in a plea, in a suit in equity, renders it bad. *Sharon* v. *Hill* (U. S. Cir. Ct., Cal.), IV, 199.

DUTIES ON IMPORTS.

1. RULES OF SECRETARY OF TREASURY INCONSISTENT WITH STATUTE VOID.—A rule prescribed by the secretary of the treasury for the guidance of collectors of ports, making a certificate of the owner of the spring producing natural mineral water the only evidence that the waters are natural and not artificial mineral waters, is not conclusive upon the rights of the importer, who sues to recover an excess of duties exacted and collected in obedience to such rule, on natural mineral waters imported by him. *Pascal et al.* v. *Sullivan, Collector, etc.* (U. S. Cir. Ct., Cal.), III, 663.
2. SAME.—Such a rule, if conclusive on the rights of the importer, would, in effect, change the rate of duties prescribed by the act of congress, and therefore be inconsistent with the law and void. *Id.*
3. REVISED STATUTES.—Section 251 of the revised statutes considered. *Id.*
4. GRAIN BAGS MANUFACTURED IN THE UNITED STATES, RETURN OF, FREE OF DUTY.—Under section 9 of the act of congress of February 8, 1875, grain bags manufactured in the United States, when exported filled with American products, may be returned to the United States free of duty, notwithstanding such bags were manufactured from foreign material, and at the time of exportation the manufacturers were paid a "drawback" for duties on such material. *Balfour et al.* v. *Sullivan, Collector, etc.* (U. S. Cir. Ct., Cal.), II, 228.
5. THE PROVISION OF SUCH SECTION authorizing the return, "under such rules and regulations as shall be prescribed by the secretary of the treasury," does not authorize that officer to prohibit the return unless duties are paid. *Id.*

DYING DECLARATIONS.

See MURDER AND MANSLAUGHTER, 59, 60, 66.

EASEMENTS.

1. THE OWNER OF AN EASEMENT OF WAY HAS NO RIGHT TO POSSESS THE LAND as such upon which it is imposed. He has a right merely to enjoy the way. The owner of the land burdened with the easement is, in law, in possession of the land. Consequently the mere exercise of the right of way, either by the owner thereof or his tenants, will not give him actual possession of the land upon which it is imposed. *Lachman et al.* v. *Barnett et al.* (Nev.), II., 259.
2. THE OWNER OF SUCH EASEMENT IS NOT JUSTIFIED IN TAKING FORCIBLE POSSESSION of the land upon which it is imposed, from the fact that the owner of such land has obstructed his right of way. *Id.*
3. RIGHT OF WAY OF THE NORTHERN PACIFIC RAILROAD THROUGH THE PUBLIC LANDS IS AN EASEMENT therein, and such an interest in the land, that personal articles attached to the soil and annexed to the easement within the boundaries of the right of way become a part of the land, and therefore partake of and are included in the exemption from taxation that belongs to the right of way, and hence a tax levied upon "twenty miles of railroad" constructed upon, over, or through such right of way, in the territories of the United States, is a tax levied upon property that is exempt from taxation, and therefore void. *N. P. R. R. Co.* v. *Carland* (Mont.), II, 326.
4. ANY ENCROACHMENT UPON THE QUIET ENJOYMENT OF AN EASEMENT, whether created by grant or prescription, will be prevented by injunction. *Id.*
5. EASEMENT TO FLOW WATER ON LAND OF ANOTHER.—Where by reason of the positions of two tracts of land one owes a servitude to the other to receive surface water naturally flowing therefrom, the water can not be forced back by any act of the owner of the servient tenement. *West* v. *Girard* (Cal.), III, 648.

EDUCATION.

See BOARD OF EDUCATION.

EJECTMENT.

1. EJECTMENT.—The action of ejectment, as defined and regulated by the Oregon code of civil procedure (c. 4, tit. 1), is a possessory action, and although the estate or interest of the parties in the premises may be ascertained by the verdict therein, yet the plaintiff can only have judgment for the possession wrongfully withheld from him, with damages for such detention and costs; and the defendant can only have judgment for costs. *Goldsmith* v. *Smith et al.* (U. S. Cir. Ct., Or.), IV, 7.
2. IDEM.—BETWEEN TENANTS IN COMMON.—A co-tenant can not maintain the action against his co-tenant, unless the possession is actually and wrongfully withheld from him or his right thereto wholly denied. *Id.*
3. CO-TENANTS—ADVERSE CLAIM BY ONE AGAINST THE OTHER.—Where a co-tenant is in possession, and another co-tenant claims an estate or interest in the premises held in common, adverse to him, his remedy is by a suit in equity for the purpose of determining such adverse claim, as provided in section 500 of the Oregon code of civil procedure. *Id.*
4. TITLE FROM COMMON GRANTOR—EJECTMENT.—In an action of ejectment, where both plaintiff and defendant deraign title from a common grantor, such grantor's right of possession can not be denied by either. *Rego* v. *Van Pelt* (Cal.), II, 903.
5. QUITCLAIM DEED—EFFECT OF.—A quitclaim deed, even prior to the act of February 22, 1854, operates as a conveyance in California, although there was no precedent estate or interest in the grantee, and enables him to maintain ejectment if his grantor could have done so. *Id.*
6. EJECTMENT BY TENANT IN COMMON—PLEADING OUSTER.—The complaint in an action of ejectment by a tenant in common against his co-tenant, which avers that the latter is in possession of the common property, and the whole thereof, withholds the possession of the whole thereof from plaintiff, and excludes him from the same, sufficiently alleges an ouster. *Id.*
7. ACTION FOR REALTY—DEFENSE.—A defendant in an action for the possession of real estate, when he claims only a part of the tract sued for, must show what part he claims. *Cræsus Mining etc. Co.* v. *Colorado Land etc. Co.* (U. S. Cir. Ct., Col.), I, 451.
8. JUDGMENT FOR THE DEFENDANT IN AN ACTION OF EJECTMENT WILL BE AFFIRMED where the findings do not show that the plaintiff ever had any title to or estate in the lands sought to be recovered. *Hodgdon* v. *Underhill* (Cal.), I, 343.
9. DEFENSES OF POSSESSION UNDER A WRITTEN CONTRACT OF SALE, WITH PAYMENT of the purchase money, and matters constituting an estoppel *in pais*, can not be relied on in an action of ejectment; but the refusal of the court to strike out such defenses will not warrant a reversal where the jury specially find that the defendant was the owner in fee and entitled to the possession of the land in dispute. *Newby* v. *Rowland* (Or.), I, 521.
10. JUDGMENT IN AN ACTION OF EJECTMENT SHOULD BE FOR THE PLAINTIFF when the defendant has no claim to the demanded premises beyond what his naked possession gave him, and at the time of the commencement of the action the plaintiff had the legal title, and was entitled to the possession. *Shaeffer* v. *Matzen et al.* (Cal.), II, 129.
11. EJECTMENT—FINDINGS—EVIDENCE.—A finding for the plaintiff in an action of ejectment is supported by the evidence, when the defendant offers no evidence, and the plaintiff gives in evidence a judgment roll showing a judgment in his favor, and against the defendant, an execution duly issued thereon, a sale of the demanded premises to him; also a writ of attachment and a sheriff's return, showing a levy thereunder, which had never been released, and evidence that subsequent to the levy of the attachment, and prior to the judgment, defendant was in possession of the premises. *Royon* v. *Guillee* (Cal.), II, 759.
12. EJECTMENT—FORECLOSURE DECREE, WHO BARRED BY.—In an action of ejectment by the owner of a leasehold, after the plaintiff has proved *prima facie* his right to recover the demanded premises, a defendant who claims under a foreclosure decree against the owner in fee must show affirmatively that the plaintiff or his assignors were barred by such decree. *Enos* v. *Cook et al.* (Cal.), II, 733.
13. TRESPASS FOR MESNE PROFITS—EJECTMENT—JUDGMENT.—Damages for withholding real property, or for the rents and profits thereof, can not be recovered in an action of ejectment unless judgment is also given for the recovery of the possession. *Locke* v. *Peters* (Cal.), II, 725.

See ADVERSE POSSESSION, 3, 5, 6; CANCELLATION, 7; DEED, 5, 25; DENVER TOWN SITE, 2; FORCIBLE ENTRY AND DETAINER, 7; GROWING CROPS, 3; HUSBAND AND WIFE, 4; JUDGMENT, 33; TENANTS IN COMMON.

ELECTION OF OFFICERS.

1. ACT PROVIDING FOR SPECIAL ELECTION.—Where an act of the legislature providing for a special election on the question of the removal of a county seat designates that such election shall be conducted, and the votes cast thereat shall be counted and returned, by certain officers and boards named therein, but fails to state the individuals who shall constitute the same, it will be presumed that the legislature referred to the officers and boards of the same name existing under the general election laws. *Wells et al.* v. *Taylor et al.* (Mont.), II, 252.
2. DISQUALIFICATION OF ELECTION OFFICERS, EFFECT OF.—Where no question is raised as to the fairness of the vote and the honesty of the count, an election will be valid although the officers conducting the same were not duly sworn or chosen, and did not possess the qualifications requisite for their office. *Id.*
3. BRIBERY OF VOTERS, WHAT IS.—An election to determine the removal of a county seat will not be invalidated by the fact that prior to the election certain inhabitants of the county presented an offer to the voters, in the form of a bond, conditioned for the building of certain county buildings at a designated place, provided a majority of the votes cast were in favor of changing the county seat to such place. Such an offer was not bribery *Id.*
4. REMOVAL OF COUNTY SEAT OF JEFFERSON COUNTY.—Where a majority of the votes cast on the election to determine the question whether the county seat of Jefferson county should be removed from Radersburg to Boulder City were in favor of such latter place, the officers of such county may make such removal, although the county commissioners failed to make the order contemplated by section 6 of the act of 1883, causing the books, records, papers, and effects of the county to be removed. *Id.*
5. ADMISSION OF VOTERS, EVIDENCE OF.—In an action to determine the result of an election, the admissions of certain voters, made after the election, to the relator, touching their qualifications as electors, are not competent evidence. *People ex rel. Dean* v. *Commissioners of Grand County* (Col.), II, 113.
6. ELECTION TO DETERMINE THE REMOVAL OF COUNTY SEAT.—In the election to determine the removal of the county seat of Grand county from Hot Sulphur Springs to Grand Lake, the votes cast by the local voters at such latter place in favor of Grand Lake, west side, should be counted for Grand Lake. *Id.*
7. FINDINGS OF THE LOWER COURT in an action to determine the result of such election reviewed, and held supported by the evidence. *Id.*
8. ELECTION OF SENATORS FROM ODD-NUMBERED DISTRICTS.—Under section 5, article 4, of the constitution of 1879, senators elected in 1882, from districts designated by odd numbers only hold their offices for two years. Their successors, to be elected at the election of 1884, only hold offices until the election of 1886, under the act of 1883. *McPherson* v. *Bartlett et al.* (Cal.), III, 685.
9. CONTESTED ELECTION—TIE VOTE—COSTS.—In a contested election case, where the vote as between the contestant and respondent is a tie, the respondent is not entitled to his costs. *Soto* v. *Vanoy* (Cal.), III, 48.
10. JUDGMENT AFFIRMED on authority of *Staude* v. *Election Commissioners*, 10 Pac. C. L. J. 29. *People* v. *Greenlaw* (Cal.), III, 435.
11. ELECTION OF OFFICERS—CONSTRUCTION OF CONSTITUTION.—Under the constitution all necessary state, county, and township officers must be elected by the people of the locality immediately concerned. *State ex rel. Perry* v. *Commissioners of Eureka County* (Nev.), IV, 121.
12. THE SAME—ELECTION OF COUNTY ASSESSORS—EXTENSION OF TERM.—County assessors are necessary officers within the meaning of the constitution, and must be elected by the people. The legislature has no power to extend the terms of such officers beyond the time for which they were elected, except in cases of emergency. *Id.*
13. IN AN ACTION TO CONTEST THE RIGHT OF A DEFENDANT TO AN OFFICE to which he has been declared elected, if the evidence satisfied the court that the ballots from certain precincts had not been tampered with, it should adopt the result of such ballots as recounted, and not as returned by the officers of the election. *Coglan* v. *Beard* (Cal.), I, 862.
14. IN SUCH AN ACTION THE RETURNS SHOULD BE RECEIVED AS PRIMA FACIE TRUE, and the ballots are not better evidence to overcome the returns, unless the contestant shall affirmatively prove that the ballots remained in the same condition as they were when delivered to the proper custody by the judges of election. *Id.*

See CORPORATIONS, 39; JUSTICES' COURTS, 11.

EMBEZZLEMENT.

1. INDICTMENT FOR EMBEZZLEMENT BY A BAILEE.—The sufficiency of an indictment is to be tested by the requirements of the criminal practice act, and not by the rules of the common law. Under such act an indictment for embezzlement by a bailee is sufficient which charges that the defendant, on a day and at a place certain, "having been intrusted as bailee by one Hill with two certificates of deposit of money in a certain bank, to wit, one for the sum of five thousand dollars and the other for the sum of four thousand dollars, both payable to the order of and both being the property of said Hill, did collect and receive thereon and therefor from said bank, and as bailee was by said bank and said Hill intrusted to carry and convey from said bank to said Hill money to the amount and value of nine thousand dollars, proceeds of said two certificates; and said defendant being so as aforesaid intrusted as bailee with said certificates and said money to said amount of nine thousand dollars, the property of said Hill, afterward on, etc., at, etc., did fraudulently and feloniously convert the same and the proceeds thereof to his own use, contrary," etc. Such indictment does not charge more than one offense, and need not specify the nature of the bailment. *People* v. *Hill* (Utah), II, 476.
2. INFORMATION CHARGING THE DEFENDANT WITH THE CRIME OF EMBEZZLEMENT is not demurrable for describing him as a "*bailee accommodatum*," if otherwise unobjectionable. *People* v. *Flores* (Cal.), I, 137.
3. INFORMATION FOR EMBEZZLEMENT BY POSTMASTER.—The circuit court has jurisdiction to try offenders for misdemeanors and offenses not capital or otherwise infamous, such as embezzlement by a postmaster, under section 5483 of the revised statutes, upon informations filed by leave of the court. Whether an information presents a proper case for granting leave to the United States attorney to file it, is a question for the exercise of a sound discretion by the court. *United States* v. *Reilley* (U. S. Cir. Ct., Nev.), II, 688.
4. AN INFORMATION FILED BY LEAVE OF THE COURT WILL NOT BE STRICKEN from the files where it is verified by the direct positive affidavit of the United States attorney, and upon being arrested upon a warrant issued thereon, the prisoner has been examined and held to answer for the offense charged therein. *Id.*

EMINENT DOMAIN.

1. THE JURISDICTION OF THE COUNTY COURT TO HEAR AND DETERMINE A PROCEEDING FOR THE CONDEMNATION OF LAND for the use of a railroad is primarily determined by the allegations of the petition. When, however, the award of the jury shows that the amount of compensation to be paid to the owner exceeds the amount to which the jurisdiction of such court is limited, the apparent jurisdiction thereof no longer exists, and the court should dismiss such proceeding at the cost of the petitioner. Nor is jurisdiction regained by the action of the court in setting aside the verdict as a prelude to the dismissal. *Denver, Western & Pacific R'y Co.* v. *Church* (Col.), I, 611.
2. CONDEMNATION OF LAND—JURISDICTION OF COUNTY COURT OVER.—When the award of the jury, in a proceeding for the condemnation of land, shows that the amount of compensation to be paid the owner exceeds the amount to which the jurisdiction of the county court is limited, the court must dismiss such proceedings at the costs of the petitioner. *Denver & Rio Grande Railway Co.* v. *Otis* (Col.), II, 120.
3. CONDEMNATION OF LAND—PLEADING—EVIDENCE.—In an action to condemn a parcel of land for a public street, when the complaint alleges that the defendants are the owners of the land sought to be condemned, the plaintiffs can not give evidence that the defendants had already dedicated such land as a street, for the purpose of affecting the question of damages. *City of San Jose* v. *Reed et al.* (Cal.), II, 883.
4. THE NECESSITY FOR A CONDEMNATION OF PROPERTY FOR A MUNICIPAL OR PUBLIC USE IS SUFFICIENTLY SHOWN by an allegation in the complaint which sets forth the ordinance of the city council authorizing such condemnation, and avers "that it is now necessary to condemn said land for public use agreeably to the provisions of said ordinance." *Los Angeles* v. *Waldron* (Cal.), I, 335.
5. NOTICE OF THE PRESENTATION TO THE COURT OF A PETITION FOR THE CONDEMNATION OF LAND, required to be published by the charter of the city of Los Angeles, is in the nature of a summons, which is waived by the defendants appearing and demurring to the petition. *Id.*
6. ORDINANCE PROVIDING FOR A REMONSTRANCE AGAINST A PROPOSED ASSESSMENT, by the owners of property within the limits to be assessed, and which describes such

limits as extending "on both sides of Main street, from Washington street to Adams street," is sufficiently definite. *Id.*

7. DESCRIPTION IN THE COMPLAINT OF LANDS SOUGHT TO BE CONDEMNED held sufficient. *Id.*
8. CONDEMNATION OF LAND, ORDINANCE FOR—PLEADING.—The necessity for a condemnation of property for a municipal or public use is sufficiently shown by an allegation in the complaint, which sets forth the ordinance of the city council authorizing such condemnation, and avers "that it is now necessary to condemn said land for public use agreeable to the provisions of said ordinance." The existence of such ordinance is sufficiently shown by an allegation that the same was "duly passed and adopted," and which sets forth the ordinance. *City of Los Angeles* v. *Waldron et al.* (Cal.), III, 42.
9. ORDINANCE PROVIDING FOR A REMONSTRANCE AGAINST A PROPOSED ASSESSMENT, by the owners of property within the limits to be assessed, and which describes such limits as extending "on both sides of Main street from Washington street to Adams street," is sufficiently definite. *Id.*
10. DESCRIPTION IN THE COMPLAINT OF LANDS SOUGHT TO BE CONDEMNED held sufficient. *Id.*
11. CONDEMNATION OF LAND—JUDGMENT—EXECUTION.—The defendant, in an action for the condemnation of land for the use of a railroad, in whose favor judgment is given for the cost of fences and cattle-guards along the line of plaintiff's road, is entitled to an execution to enforce the payment of the amount adjudged it, if the plaintiff, after electing to build such fences and cattle-guards, fails to execute to the defendant a bond with sureties in double the assessed cost of the same. A bond which has, in the aggregate, but one surety in double such assessed cost is insufficient. *California Southern R. R. Co.* v. *Southern Pacific R. R. Co.* (Cal.), III, 49.
12. ACTION FOR CONDEMNATION OF LAND—FORM OF VERDICT.—In an action for the condemnation of land for the use of a railroad, a verdict is sufficient in form which finds in effect that the defendants are entitled to damages in the sum named therein. *Oregon Railway Co.* v. *Bridwell et al.* (Or.), II, 821.
13. THE SAME—FORM OF JUDGMENT.—In such action, no judgment *in personam* against the plaintiff can be rendered. The judgment should appropriate the right of way to the plaintiff's use after payment of the damages assessed by the jury. *Id.*
14. THE COMPLAINT IN AN ACTION AGAINST A CORPORATION FOR THE CONDEMNATION OF A STRIP OF LAND for the right of way for a railroad sufficiently complies with the requirements of the code of civil procedure, section 1244, subdivision 2, when it states the name of the defendant, and shows that it was the known owner and claimant of the land sought to be condemned. *California Southern R. R. Co.* v. *Colton Land and Water Co.* (Cal.), I, 470.
15. THE COMPENSATION TO WHICH THE OWNER OF LAND IS ENTITLED, in a proceeding to condemn the same for the use of a railroad, is the market value of such land at the time of making the assessment, and not such value at the time of issuing the summons. *Id.*
16. AN ACTION FOR THE CONDEMNATION OF LAND MUST BE BROUGHT and tried in the county in which the land is situated. *California Southern R. R. Co.* v. *Southern Pacific R. R. Co.* (Cal.), III, 357.
17. PROCEEDINGS FOR THE CONDEMNATION OF LAND SHOULD BE BROUGHT, and, it seems, prosecuted, in the county in which the land is situated. *California Southern R. R. Co.* v. *Southern Pacific R. R. Co.* (Cal.), III, 301, 302.
18. WHAT CONSTITUTES A "TAKING" OR "DAMAGING" OF PRIVATE PROPERTY, within the meaning of the constitution, stated, and the distinctions between commented upon and explained. *Denver* v. *Bayer* (Col.), I, 505.
19. JUDGMENT AFFIRMED on authority of *California Southern R. R. Co.* v. *Kimball*, 61 Cal. 90. *California Southern R. R. Co.* v. *Colton Land and Water Co.* (Cal.), III, 377.

See APPEAL, 18; CERTIORARI, 14; NUISANCE, 4; REMOVAL OF CAUSES, 2, 3.

ENDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 15, 16.

ENTRY.

See FORCIBLE ENTRY AND DETAINER.

EQUITY.

1. THE SUPERIOR COURT HAS JURISDICTION OF AN EQUITABLE ACTION BROUGHT TO COMPEL AN ASSIGNEE IN INSOLVENCY to perform his trust, and account for the property assigned. The remedy afforded creditors in such cases, under the law regulating insolvency proceedings, is not exclusive. *Sanderson* v. *McIntosh* (Cal.), I, 784.
2. A COURT OF EQUITY WILL NOT SET ASIDE A JUDGMENT OF A COURT OF LAW, and subsequent proceedings thereunder, for the reason that the complaint in the action in which such judgment was rendered was filed on a legal holiday, when there is nothing in the record to indicate that the debt for which such action was brought was not justly due, especially when the party seeking equitable relief negligently omitted to avail himself of such defense in the action at law. *Peterson* v. *Weissbein Bros. & Co.* (Cal.), I, 853.
3. A SUIT IN EQUITY FOR THE PURPOSE OF DETERMINING AN ADVERSE CLAIM, estate, or interest in real property, under section 500 of the code of civil procedure, can not be brought by a person not in possession. Such section has no effect upon the ordinary jurisdiction of courts of equity as to cases not within the scope of its operation. Its purpose is to enlarge, not to impair, such jurisdiction. *Coolidge* v. *Forward* (Or.), I, 832.
4. EQUITY WILL INTERFERE TO PROTECT RIGHTS WHEN it sufficiently appears that the evidence by which such rights can be established is liable to be lost. *N. P. R. R. Co.* v. *Carland* (Mont.), II, 326.
5. STATE DEMANDS—EQUITY MAY REFUSE TO ENTERTAIN.—A court of equity may refuse to entertain a suit, brought after unreasonable delay, although the defendant has not in his answer alleged that the claim is stale. A delay of more than twenty years in bringing this action held unreasonable. *Harris et al* v. *Hillegass, Administratrix, etc., et al.* (Cal.), IV, 355.

See BONA FIDE PURCHASERS; CANCELLATION; CONSIDERATION, 1; CORPORATIONS, 47, 49; DUPLICITY; ESTOPPEL, 4; EVIDENCE, 13; FORCIBLE ENTRY AND DETAINER, 1; FRAUD, 3–6; INFANTS, 6; INJUNCTION; LACHES, 1, 4; MISTAKE; SPECIFIC PERFORMANCE; TRESPASS, 1; UNITED STATES COURTS, 1.

ESCAPE FROM STATE PRISON.

1. OVERT ATTEMPT TO ESCAPE FROM STATE PRISON—EVIDENCE OF PUNISHMENT AFTER CAPTURE—INDICTMENT.—An indictment for an overt attempt to escape from the state prison is sufficient if it alleges that the defendant, while lawfully confined in state prison under a judgment of a competent court, for the crime of burglary, did make an overt attempt to escape therefrom; that he did unlawfully, forcibly, and feloniously break out of the cell in said prison, in which he was confined, and out of the building in which said cell was and is. It is unnecessary to aver that a certified copy of the judgment against the defendant, for burglary, has been delivered to the warden of the state prison. At the trial of such indictment evidence of the punishment received by the defendant at the hands of the prison authorities after his recapture is immaterial. *State* v. *Angelo* (Nev.), IV, 482.

ESTATES OF DECEASED PERSONS.

1. THE PROBATE COURT HAVING ONLY AN INFERIOR AND LIMITED JURISDICTION conferred by express provisions of statutes, jurisdiction must appear affirmatively upon its record; it can not be presumed. *Chaves* v. *Perea* (N. M.), I, 807.
2. THE PROBATE COURT HAS NO JURISDICTION TO PASS UPON A CLAIM against the estate of an intestate, presented to it for allowance, unless the administrator of such estate be present in court while the evidence is being taken and the claim passed upon, or has had an opportunity to be present and to be heard by having a citation to appear served on him. Unless such requirements have been complied with, an appeal from the judgment of the probate court allowing or rejecting a claim must be dismissed. *Id.*
3. THE DISTRICT COURT OF A TERRITORY IS NOT A UNITED STATES DISTRICT OR CIRCUIT COURT.—When the United States comes into court to enforce its rights, it must come in as any other suitor, and the proceedings in such action must be in accordance with local laws in force at the time in the state or territory where such action is pending. *United States* v. *Hailey, Administrator, etc.* (Idaho), II, 324.

4. IN PROSECUTING A CLAIM AGAINST AN ADMINISTRATOR, THE PROBATE LAWS IN FORCE where the action is pending must govern and determine the method of procedure. *Id.*
5. A CLAIM IN FAVOR OF THE UNITED STATES AGAINST THE ESTATE OF A DECEASED PERSON must be presented for allowance before an action can be maintained thereon. *Id.*
6. THE CIRCUIT COURT HAS NO JURISDICTION OF AN ACTION BROUGHT BY AN ADMINISTRATOR against a former administrator of the same estate, who had been removed from his office, to obtain an accounting and a judgment for the balance of the property of such estate in the hands of the latter. Such an action is within the exclusive jurisdiction of the county court. *Adams, Adm'r, etc.*, v. *Petrain et als.* (Or.), II, 198.
7. UNDER THE MEXICAN LAW, WHERE A FATHER DIES, HAVING DEVISED HIS ESTATE to his wife and children in certain proportions, and after his death, but before the death of their mother, certain of such children die intestate, the interests so devised to such deceased children vest in their mother, and not in their surviving brothers and sisters. *Emeric* v. *Alvarado* (Cal.), I, 708.
8. ESTATE OF DECEDENTS—DISTRIBUTION UNDER MEXICAN LAW—SALE OF LAND UNDER ORDER OF PROBATE COURT — ACT OF APRIL 22, 1850, CONSTRUED — STATUTE OF LIMITATIONS.—The estate of a person dying intestate, after the organization of the state government and before there was any legislation by the state regulating the administration, descent, and distribution of estates, descended and was subject to the operation of the Mexican law in existence at the time of the cession of California to the United States. Under such law, on the death of an intestate his heirs succeeded immediately to the estate and became personally responsible for the debts of the deceased. No administration of such estate, in the common-law sense, was needed or could be had. It was not subject to the administration of the alcaldes' courts or court of first instance, nor to the operation of the probate law subsequently passed. An order of the probate court, made after the passage of the act of April 22, 1850, authorizing the persons appointed by the alcalde as administrators of such estate to sell the real estate of such intestate would be void for want of jurisdiction. That act had no application to the estates of persons who died before its passage. Section 1573 of the code of civil procedure, limiting the time within which an heir or his grantee can maintain an action for the recovery of real estate sold by an executor or administrator to three years, has no application to such void sale. *McNeil et al.* v. *First Congregational Society* (Cal.), IV, 421.
9. ESTATE OF DECEASED PERSON — CLAIM BARRED BY STATUTE OF LIMITATIONS—ALLOWANCE OF.—An administrator has no authority to allow a claim against the estate based on a loan which has become barred by the statute of limitations. *Doland* v. *Doland* (Cal.), IV, 611.
10. ATTORNEYS' FEES PAID BY AN ADMINISTRATOR IN CONTESTING THE PROBATE of the alleged will of his deceased intestate can not be charged against the estate. *In re Estate of Parsons* (Cal.), II, 875.
11. IN SETTLING THE ACCOUNT OF AN ADMINISTRATOR the court may adjudicate upon certain items, such as clerks' fees, in anticipation of payment. *Id.*
12. SETTLEMENT OF ADMINISTRATOR'S ACCOUNT.—Items not found in the account of an administrator, nor in the report accompanying the same, can not be settled by the court. *Id.*
13. REVOCATION OF PROBATE—APPOINTMENT OF SPECIAL ADMINISTRATOR—APPEAL. An appeal by an executor from an order or judgment annulling and revoking the probate of a will does not divest the court of jurisdiction to appoint a special administrator. Such appointment is not a proceeding upon the order of revocation, or upon matters embraced therein, but an independent order, which is itself appealable. *Estate of Crozier* (Cal.), III, 157.
14. ESTATE OF DECEASED—SETTLEMENT OF ACCOUNTS—DISTRIBUTION.—When an executrix dies without having rendered to the probate court any account, report, or exhibit of the estate, or of its management by her, a court of equity alone has power to adjust her accounts with the estate of which she was executrix; and when the executrix is also an heir, a settlement of her accounts is a prerequisite to a distribution of the estate. *Estate of Curtiss, Deceased* (Cal.), III, 682.
15. ORDER SETTLING THE ACCOUNT OF AN EXECUTOR REVERSED for erroneous findings. *Estate of Freeley* (Cal.), III, 25.
16. JUDGMENT AGAINST EXECUTOR—PAYMENT IN DUE COURSE OF ADMINISTRATION—PRESENTATION OF CLAIM.—Where an executrix becomes a party to an action, and

prosecutes a motion for a new trial, the notice for which had been given by her testator before his death, with the result of securing a modification of the judgment, the judgment as modified must be payable in due course of administration, and need not be presented as a claim against the estate. *Estate of Brennan, Deceased* (Cal.), III, 631.

17. NON-RESIDENT ALIEN HEIRS—INHERITANCE BY.—Section 17, article 1, of the constitution does not inhibit the legislature from extending the right of succession or inheritance to non-resident alien heirs. *Estate of Billings* (Cal.), III, 774.
18. THE SAME—NON-RESIDENT BROTHERS AND SISTERS.—The non-resident alien brothers and sisters of an intestate, who dies leaving no wife, no descendants, and no father or mother, are entitled to share in the estate of such intestate equally with the resident alien brothers or sisters. *Id.*

See ACCOUNTING, 5; APPEAL, 5, 25, 26; CANCELLATION, 2; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD, 4; HOMESTEAD, 1.

ESTOPPEL.

1. AN ESTOPPEL CAN NOT BE FOUNDED UPON WORDS, ACTS, OR SILENCE, unless they were intended to lead the party who seeks to set up the estoppel to act upon them, and he did so act to his injury. *Hallack* v. *Bresnahen* (Wy.), II, 60.
2. AN EXECUTOR WHO STATES in his petition for letters testamentary, and in the inventory of the estate, that certain property belonged to the testator, is not estopped from afterwards claiming such property as his own. *Anthony* v. *Chapman* (Cal.), II, 66.
3. DESCRIPTION BY REFERENCE TO MAP—ESTOPPEL.—One who records his claim to certain real estate, describing the same as bounded by a certain street as shown upon a recorded map, and who afterwards receives a deed to such property by the same description, is estopped to deny the existence of the street as shown by such map. *Walla Walla* v. *Moore* (Wash.), II, 214.
4. A GRANTEE IN A DEED WHICH RECITES THAT THE SAME IS GIVEN IN LIEU of a previous deed for different premises, who accepts the same in lieu thereof, is estopped from claiming under such previous deed. Whether such grantee is divested of the title conveyed to him by the previous deed, without a reconveyance, *quære*. Equity might compel such reconveyance, unless the rights of innocent purchasers had intervened. *Emeric* v. *Alvarado* (Cal.), I, 708.
5. PARTY IS ESTOPPED FROM TAKING ADVANTAGE OF AN ERROR IN THE ORDER of the introduction of evidence, for which he is himself responsible. *Richardson* v. *Bricker* (Col.), I, 270.
6. UNITED STATES CAN NOT BE ESTOPPED BY THE FRAUDS or crimes of its public officials. *United States* v. *Southern Col. etc. Co.* (U. S. Cir. Ct., Col.), I, 11.
7. OWNER OF PERSONAL PROPERTY IS NOT ESTOPPED FROM ASSERTING HIS RIGHTS THERETO as against a purchaser from one having the ostensible ownership, if such purchaser had notice of his title. *Sacalaris* v. *Eureka etc. R. R. Co.* (Nev.), I, 398.
8. PURCHASE OF REAL ESTATE — TRUST — CORPORATION — ESTOPPEL. — One who purchases real estate in his own name, although representing himself to the vendor as acting in behalf of a corporation, is not estopped from disputing the right of the corporation to hold him as a trustee of the property bought, if such purchase were made without the authorization of the corporation. *Kelly* v. *Ruble* (Or.), III, 737.

See ARBITRATION AND AWARD, 8; ASSIGNMENT, 4; CONTRACT, 14; CORPORATIONS, 19, 51, 52; EJECTMENT, 10; NEGLIGENCE, 34; OREGON DONATION ACT, 2; RELEASE, 2; WATER RIGHTS, 46.

ESTRAY.

1. NO ONE BUT A HOUSEHOLDER CAN TAKE UP AN ESTRAY ANIMAL under the Colorado statute, and he only when it is found in the vicinity of his residence. *Webber* v. *Hartman* (Col.), I, 272.
2. WHETHER THE TAKING UP OF AN ESTRAY ANIMAL BY AN EMPLOYEE OF A HOUSEHOLDER, without his knowledge or direction, can be subsequently ratified by him, *quære*. *Id.*
3. TAKER-UP OF AN ESTRAY ANIMAL FORFEITS ALL CLAIM TO COMPENSATION, and can not defeat an action for the possession of the property brought by the owner, if the taking up was originally unlawful, or if it has subsequently become unlawful by an abuse of the authority vested in him by statute. *Id.*

4. TAKER-UP OF ESTRAY HORSES CAN NOT USE THEM FOR THE PURPOSE OF GENERAL LIVERY, and if he does so, such use is tortious, and the taker-up forfeits his claim to compensation. *Id.*

EVIDENCE.

1. BURDEN OF PROOF.
2. PAROL EVIDENCE.
3. DECLARATIONS.
4. EXPERT AND OPINION EVIDENCE.
5. EVIDENCE IN PARTICULAR CASES.
6. ADMISSION AND REJECTION OF EVIDENCE, AND OBJECTIONS THERETO.

1. BURDEN OF PROOF.

1. BURDEN OF PROOF IS ON THE PLAINTIFF TO PROVE THE ALLEGATIONS of his complaint essential to his recovery; but he need not prove the negative of facts that go merely to support the defense, although he has himself alleged them. *Gilson* v. *Price* (Nev.), I, 373.
2. IT IS NOT ERROR FOR A COURT TO PERMIT THE PLAINTIFF TO ANTICIPATE THE DEFENSE of a prior recovery by introducing evidence in the opening of his case tending to show that the cause of action in such case was not identical with that in issue and determined at a prior date. *Id.*
3. BURDEN OF PROOF IS ON THE COMPLAINANT TO SHOW THAT NEGATIVE ALLEGATIONS are at least *prima facie* true when such allegations are made the basis of his suit. *United States* v. *Southern Col. etc. Co.* (U. S. Cir. Ct., Col.), I, 11.
4. PROOF OF THE NON-EXISTENCE OF PERSONS NAMED IN UNITED STATES PATENTS AS GRANTEES may be made by the evidence of witnesses who lived in the neighborhood of the lands granted, and who would probably have known such grantees if they had lived at the time and in the place in question. *Id.*
5. AMOUNT OF EVIDENCE REQUIRED TO SUPPORT A NEGATIVE ALLEGATION, and to shift the burden of proof, varies according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into. *Id.*
6. COMPLAINANT IN A SUIT TO SET ASIDE CERTAIN LAND PATENTS alleged to have been obtained through a fraudulent conspiracy between the officers of the land office and others need not call such persons as witnesses to prove the fraud if he can make out a *prima facie* case without doing so. On the other hand, the failure of the respondents to call such persons to disprove the fraud, when no reason appears for not having done so, is a strong circumstance of suspicion. *Id.*

2. PAROL EVIDENCE.

7. EVIDENCE OF PAYMENT IS ADMISSIBLE UNDER THE PLEA of *non assumpsit*, in an action on a promissory note. *Staab* v. *Jaramillo* (N. M.), I, 57.
8. A PARTIAL FAILURE OF THE CONSIDERATION UPON WHICH A PROMISSORY NOTE WAS GIVEN may be shown in an action thereon by the payee, under a plea of the general issue. *Staab* v. *Ortiz* (N. M.), I, 516.
9. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A PROMISSORY NOTE SUED ON WAS DELIVERED AT A DATE other than that which it bears on its face; but a refusal to admit such evidence is not error when the same would have been immaterial. *Paige* v. *Carter* (Cal.), I, 558.
10. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CERTAIN PROMISSORY NOTES SUED ON WERE GIVEN by the maker to the payee in pursuance of an agreement between them, whereby the latter conveyed to the former certain lands in consideration of the grantee's giving him a home and supporting him during the residue of his life, and that such notes were given by the maker to secure the performance of said agreement on his part and that he had performed the same. *Howard* v. *Stratton* (Cal.), I, 562, 563.
11. THE ADMISSION OF SUCH EVIDENCE WOULD NOT VIOLATE THE RULE forbidding the introduction of parol evidence to vary or contradict a written contract, as parol evidence is admissible to prove that a written agreement has been totally discharged. *Id.*
12. A WRITTEN INSTRUMENT PURPORTING TO BE AN AGREEMENT between parties, but understood and intended to be a mere form, and never delivered to take effect as an actual agreement, is of no force as between such parties, and parol evidence is admissible to prove such facts. *Branson* v. *Oregonian R'y Co.* (Or.), I, 624.

13. UNITED STATES LAND PATENT IS IN GENERAL THE HIGHEST EVIDENCE OF TITLE, and can not be varied, contradicted, or controlled by extrinsic evidence; but upon a proper presentation of adequate facts, with a prayer for equitable relief, a court of equity may control the legal title conveyed thereby, and compel the grantee to convey the same to his *cestui que trust*, ward, or other person equitably entitled to the same. *Kimball* v. *McIntyre* (Utah), I, 316.
14. PAROL EVIDENCE IS ADMISSIBLE FOR THE IDENTIFICATION OF THE SUBJECT-MATTER of a contract for the sale of land where there is no uncertainty as to the intention of the parties on the face of the contract. *Richards* v. *Snider* (Or.), II, 282.
15. THE CIRCUMSTANCES SURROUNDING THE EXECUTION OF A WRITTEN CONTRACT may be shown by parol evidence. *Held*, therefore, in this case, that where a written contract was executed by a woman in her own name, parol evidence was admissible to show that she executed the same as an executrix. *Brewster* v. *Baxter* (Wash.), II, 791.
16. SECONDARY EVIDENCE OF THE CONTENTS OF A CERTIFIED COPY OF AN ANSWER is admissible upon proof of the loss of the original and of such copy. *Williams* v. *Gallick* (Or.), II, 537.
17. ASSAY VALUE OF ORES.—In an action to recover for the reduction of ores, under a contract by the terms of which the defendant agreed to pay the plaintiff "sixty-five per cent of the assay value of said ores, such assay to be made from said ores taken from the battery samples," evidence is admissible to show the true value of such ores, and that, by reason of fraud or mistake on the plaintiff's part, the battery samples did not correctly show such value. *Phipps* v. *Hully* (Nev.), I, 382.

3. DECLARATIONS.

18. DECLARATIONS OF PARTY IN POSSESSION, WHEN ADMISSIBLE.—Declarations of the party in possession of personal property explanatory of his possession, or of the title he is claiming, may be given in evidence by himself, or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, or what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible. *Stone* v. *O'Brien* (Col.), IV, 243.
19. DECLARATIONS OF A VENDOR, AFTER HE HAS PARTED WITH HIS INTEREST and in respect thereto, are not evidence against his grantee. *Packard* v. *Johnson* (Cal.), III, 763; *Packard* v. *Moss* (Cal.), III, 769.
20. DECLARATIONS OF A VENDOR, AFTER HE HAS PARTED WITH HIS INTEREST and possession, in the absence of fraud or collusion, are inadmissible to impeach the title of his vendee. *Krewson* v. *Purdom* (Or.), III, 85.
21. DECLARATION OF A PARTY IN POSSESSION AND CLAIMING TITLE to a mining claim, made before parting with his interest, against the validity of the location of such claim, are admissible in evidence against the grantee of the declarant. *Harrington* v. *Chambers* (Utah), I, 63.
22. DECLARATIONS OF AN AGENT MADE IN THE COURSE OF THE TRANSACTION out of which the action arose are admissible in evidence against his principal. *Sacalaris* v. *Eureka etc. R. R. Co.* (Nev.), I, 398.
23. DECLARATIONS OF AN AGENT ARE ADMISSIBLE IN EVIDENCE against his principal. Whether the person making the declaration is an agent is a question for the jury. *Biggerstaff* v. *Briggs* (Cal.), III, 353.
24. DECLARATIONS OF AGENT—HEARSAY EVIDENCE.—Where issue is joined as to the price for which certain flour was sold, evidence obtained by the party making the sale, from the declarations of his agent, is inadmissible in his own behalf. Such evidence is hearsay. *Jones* v. *Kearns* (Or.), II, 820.
25. DECLARATIONS OF AN AGENT ARE NOT ADMISSIBLE IN EVIDENCE to prove the agent's authority. *Savings and Loan Society* v. *Gerichten* (Cal.), I, 591.
26. DECLARATIONS OF PARTIES WHICH FORM NO PART OF THE RES GESTÆ are hearsay, and not admissible. *Emeric* v. *Alvarado* (Cal.), I, 708.
27. DECLARATIONS OF A PERSON NOT A PARTY TO THE RECORD, and having no connection with the controversy, are hearsay and inadmissible. *Wells* v. *Adams* (Col.), I, 496.
28. DECLARATIONS OF A TESTATOR, WHILE OF UNSOUND MIND, TO THE EFFECT THAT HE was of unsound mind and under the undue influence of his wife at the time of the execution of a prior will, do not prove, or tend to prove, the truth of the matters declared by him. *Estate of Lang* (Cal.), I, 773.

29. AGE OF WITNESS—DECLARATIONS OF MEMBERS OF FAMILY.—A witness may testify as to her age at a given time, although the knowledge of such fact was derived from statements made to her by members of her family. *Morrill* v. *Morgan* (Cal.), III, 683.
30. A PARTY CAN NOT TESTIFY AS TO A CONVERSATION HAD BETWEEN HIMSELF AND A WITNESS in regard to what he expected such witness would testify. *Weidekind* v. *Tuolumne County Water Co.* (Cal.), III, 376.
31. EVIDENCE OF LOST WRITING—HEARSAY—DECLARATIONS.—A witness who can neither read nor write can not testify as to the contents of a lost instrument in writing. Evidence of declarations made to him by another as to such contents is hearsay. *Russell* v. *Brosseau* (Cal.), III, 781.
32. REFUSAL OF THE COURT TO ALLOW A WITNESS TO TESTIFY TO CERTAIN DECLARATIONS and conversations made by and between the parties to the action, although erroneous, will not warrant a reversal when the defeated party was not prejudiced thereby. *Kelley* v. *Fitzell* (Cal.), II, 132.

4. EXPERT AND OPINION EVIDENCE.

33. MEANING OF EXPRESSION USED IN CONVERSATION—OPINION OF WITNESS—EXPERT TESTIMONY.—A witness can not give his opinion as to the meaning of an expression used by another in a conversation with himself, when the expression is not a matter for expert testimony. Such meaning is for the jury to determine, from the relation of the parties, the language employed, and all the surrounding circumstances. *People* v. *Moan* (Cal.), III, 632.
34. EFFECT OF INJURY—EVIDENCE OF, BY NON-MEDICAL EXPERT.—A person, not a medical expert, who has been injured through the negligence of a railroad, may testify as to the consequences of the injuries received, as, for example, that he had lost a leg, with reference to the construction of an artificial leg used by him, and as to the effect upon the stump of a blow or jar. He may also state the consequences immediately following the injury upon other organs of his body. *Staud* v. *S. P. R. R. Co.* (Cal.), IV, 78.
35. HYPOTHETICAL QUESTIONS CONTAINING ERRONEOUS RECITALS OF FACTS CAN NOT BE ASKED of an expert witness, for the purposes of determining the value of such services. *Wells* v. *Adams* (Col.), I, 496.
36. AN OBJECTION TO A HYPOTHETICAL QUESTION, not made in the lower court, can not be raised on appeal. *People* v. *Moan* (Cal.), III, 632.

5. EVIDENCE IN PARTICULAR CASES.

37. MARKET VALUE OF STOCK, HOW SHOWN—REPORTS OF SALES BY EXCHANGE BOARD. The market value of shares of stock can not be shown by evidence of the "report of sales" made by a stock exchange board, in the absence of evidence showing how such "reports of sales" were made up, where the information they contained was obtained, and whether the quotations of prices made were derived from actual sales or otherwise. *Vogt* v. *Cope et al.* (Cal.), IV, 222.
38. EXISTENCE OF FOREIGN COURT, HOW PROVED—EVIDENCE OF FOREIGN STATUTE.—The law establishing a court in another state, and conferring general jurisdiction thereon, may be proved by a book purporting to contain the laws of such state, under section 387 of the civil code. *Bruckman* v. *Taussig* (Col.), IV, 670.
39. AN AUTHENTICATED COPY OF THE RECORD OF A DEED IS PRIMA FACIE EVIDENCE of the genuineness, due execution, and delivery of the original deed. *Anthony* v. *Chapman* (Cal.), II, 66.
40. A COPY OF A FORTHCOMING BOND IS ADMISSIBLE IN EVIDENCE upon proof of the loss of the original and the correctness of the copy. *Wagner* v. *Romero* (N. M.), II, 269.
41. A LETTER-PRESS COPY OF A NOTICE IS PRESUMPTIVELY a true copy thereof. *Chung Yow* v. *Hop Chong* (Or.), III, 325.
42. THE CONTENTS OF A LOST ORIGINAL PUBLIC DOCUMENT CAN ONLY BE PROVED by a copy or by parol evidence. It can not be proved by a writing purporting to be a copy of a certified copy of such lost instrument. *Dyer* v. *Hudson* (Cal.), III, 206.
43. THE PROTEST OF A NOTARY PUBLIC IS ONLY PRIMA FACIE EVIDENCE of the facts recited therein, and evidence is admissible to overcome and contradict the same. *Appelgarth* v. *Abbott* (Cal.), I, 469.
44. THE GENERAL ISSUE.—The defense that the defendant is not liable on the bill of exchange in suit, because not a party thereto, is admissible under the general issue, which was pleaded; and his unverified special plea, in substance "that the said

supposed bill of exchange is not his deed, and that he never executed the said instrument nor authorized any person to execute it, and that the signature thereto is not his signature," is mere surplusage and immaterial, and may be rejected. *Luna* v. *Mohr* (N. M.), I, 673.

45. ADMISSION OF EVIDENCE AS TO THE VALUE OF SERVICES other than those sued for is error. *Wells* v. *Adams* (Col.), I, 496.

46. PAPER NOT OTHERWISE PROPER IN A CASE CAN NOT BE ADMITTED for a comparison of handwriting. The admission in evidence of such paper, if calculated to deceive and mislead the jury, is error sufficient to authorize a reversal of the judgment. *Staab* v. *Jaramillo* (N. M.), I, 57.

47. SECONDARY EVIDENCE OF THE CONTENTS OF AN IMPORTANT DOCUMENT IS INADMISSIBLE, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found, if the circumstances admit of such proof. The mere statement that diligent search had been made in the plaintiff's office, and the same was unsuccessful, is not sufficient. *Wells* v. *Adams* (Col.), I, 496.

48. ARTICLES OF PERSONAL APPAREL, INTRODUCED IN EVIDENCE AS EXHIBITS, may be taken by the jury to their consultation room. Section 231 of the code of civil procedure does not prohibit such taking. *Doctor Jack* v. *Territory* (Wash.), II, 780.

49. COURTS WILL TAKE JUDICIAL NOTICE OF THE GENERAL SYSTEM OF SURVEYS adopted by the United States. *Richards* v. *Snider* (Or.), II, 282.

45. A WITNESS MAY REFRESH HIS MEMORY BY REFERRING TO A MEMORANDUM, ALTHOUGH THE SAME WAS NOT MADE BY HIM, nor at the time of the transactions testified to, if it was made under his direction, at any time while the facts were fresh in his memory. *Paige* v. *Carter* (Cal.), I, 558.

46. A WITNESS, IN TESTIFYING TO A CERTAIN CONVERSATION, MAY REFRESH HIS MEMORY by referring to and reading from a memorandum of such conversation taken down by him at the time. *Pinschower* v. *Hanks* (Nev.), I, 360.

6. ADMISSION AND REJECTION OF EVIDENCE, AND OBJECTIONS THERETO.

47. PAROL EVIDENCE—STATUTE OF FRAUDS—OBJECTION IN SUPREME COURT.—An objection to parol evidence of an agreement required to be in writing by the statute of frauds can not be made in the supreme court for the first time. *Sweetland* v. *Shattuck* (Cal.), IV, 223.

48. OBJECTION TO EVIDENCE—CAN NOT BE MADE IN SUPREME COURT FOR FIRST TIME. An objection to evidence can not be made in the supreme court for the first time, which might have been removed by the party offering it had the objection been made in the lower court. *McKay* v. *Riley* (Cal.), IV, 47.

49. REJECTION OF IMMATERIAL EVIDENCE IS NOT ERROR. *Corkins* v. *Prichard* (N. M.), III, 82.

50. AN ERROR IN THE ADMISSION OR REJECTION OF TESTIMONY, IF WITHOUT PREJUDICE to the defeated party, is not ground for reversal. *Stepy* v. *Stark* (Col.), IV, 663.

51. ERROR IN THE ADMISSION OF EVIDENCE WILL NOT WARRANT A REVERSAL when the party complaining was not prejudiced thereby. *Leitensdorfer* v. *King* (Col.), III, 135.

52. IMMATERIAL ERROR—QUESTION TO WITNESS.—The refusal of the court to allow a question, when such ruling could not, on any reasonable hypothesis, have resulted in injury to the defeated party, is not ground of reversal. *People* v. *Moan* (Cal.), III, 632.

53. ERROR IN ADMITTING AS EVIDENCE IN REBUTTAL TESTIMONY WHICH IS NOT TECHNICALLY SO ADMISSIBLE is not sufficient to reverse the judgment, as such evidence might have been received in the sound discretion of the court. *Harrington* v. *Chambers* (Utah), I, 63.

54. REFUSAL OF THE TRIAL COURT TO ALLOW THE DEFENDANTS TO DISPROVE NEW MATTERS first introduced by the plaintiffs in their rebuttal testimony is error. *Chamberlain* v. *Raymond* (Utah), I, 522.

55. THE ERRONEOUS ADMISSION IN EVIDENCE OF A DOCUMENT which did not tend to injure any party furnishes no ground for a reversal. *Emeric* v. *Alvarado* (Cal.), I, 708.

56. THE ADMISSION OF IMMATERIAL EVIDENCE, WHICH COULD NOT HAVE PREJUDICED the beaten party, is not sufficient to warrant a reversal. *Phipps* v. *Hully* (Nev.), I, 382.

57. ERROR IN OVERRULING AN OBJECTION TO A QUESTION ASKED A WITNESS can not be taken advantage of when the answer was favorable to the appellant. *Sweetser* v. *Dobbins* (Cal.), II, 145.
58. A MORTGAGE EXECUTED BY THE DEFENDANT MAY BE INTRODUCED IN EVIDENCE in an action to reform a subsequent deed, when the two instruments form parts of the same transaction. *Id.*
59. IN SUCH ACTION THE SCRIVENER MAY TESTIFY AS TO THE DATA FURNISHED HIM for drafting such mortgage, and that he had compared the same with the *data*. *Id.*
60. THE COURT HAS DISCRETION TO REFUSE A FURTHER EXAMINATION of the same witness on a point on which he has already been examined. *Id.*
61. IMMATERIAL DISCREPANCIES IN TESTIMONY.—An instruction that "immaterial discrepancies between the testimony of witnesses to the same point do not necessarily show that one had sworn falsely, and you [the jury] should not regard mere slight variances between witnesses as showing that they have not spoken the truth," is erroneous, as such variances may be sufficient to enable the jury to determine the degree of credit to which each is entitled, and answer such purpose equally as well as contradictions of a graver character. *State* v. *Swayze* (Or.), II, 669.
62. REFUSAL TO ADMIT IMMATERIAL TESTIMONY, and striking out such testimony if already admitted, is not error. *Lachman* v. *Barnett* (Nev.), II, 259.
63. INTRODUCTION OF EVIDENCE—ORDER OF.—It is not error authorizing a reversal for the trial court, after the defendant has closed, to permit the plaintiff to introduce evidence not in rebuttal, if the defendant makes no effort to contradict the same. *City of Denver* v. *Dunsmore* (Col.), II, 841.
64. WHERE THE RECORD SHOWS THAT THE LOWER COURT EXCLUDED EVIDENCE WHICH SHOULD HAVE BEEN ADMITTED, an appellate court will not presume that it was considered by such court in arriving at its decision. *Jones* v. *Snow* (Cal.), I, 465.
65. WHERE THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE, A VERDICT WILL NOT BE DISTURBED, on the ground that the evidence was not sufficient to sustain it. *Pinschower* v. *Hanks* (Nev.), I, 369.
66. EVIDENCE HELD SUFFICIENT TO JUSTIFY THE VERDICT, and no error found in the instructions or in the question asked the defendant. *People* v. *Carlton* (Cal.), IV, 108.
68. WHEN THE EVIDENCE IS CONFLICTING, A VERDICT will not be disturbed. *Barth* v. *Jones* (Col.), IV, 214; *People* v. *Carlton* (Cal.), IV, 108.
69. A VERDICT OF THE JURY WILL NOT BE DISTURBED when the evidence is conflicting. *Ralph* v. *Weary* (Col.), II, 324.
70. VERDICT WILL NOT BE DISTURBED when there is a substantial conflict of evidence. *Leahy* v. *S. P. R. R. Co.* (Cal.), II, 693.
71. JUDGMENT OF THE LOWER COURT REVERSED upon a review of the evidence. *Martin* v. *Victor Mill and Mining Company* (Nev.), II, 666.
72. AN ORDER GRANTING A NEW TRIAL WILL NOT BE REVERSED when there is a substantial conflict of evidence. *Doolittle et al.* v. *Woodcock et al.* (Cal.), II, 897.
73. WHEN AN OBJECTION TO CERTAIN EVIDENCE AS INCOMPETENT is overruled, it can not always be presumed that if the ruling had been against the offered evidence, the party offering it might not have proved the same fact by other evidence. *Id.*
74. THE COURT MAY OF ITS OWN MOTION PREVENT THE INTRODUCTION of irrelevant testimony, although no objection is made thereto by the opposite side. *People* v. *Turcott* (Cal.), II, 490.
75. THE COURT MAY CAUTION A WITNESS NOT TO GIVE EVIDENCE OF FACTS based on knowledge derived from his client, or by hearsay from others; and may strike out such evidence already given. *Sweetser* v. *Dobbins* (Cal.), II, 145.
76. THE REJECTION OF IMMATERIAL EVIDENCE is not error. *Id.*
77. CROSS-EXAMINATION MAY INCLUDE THE ORIGINAL COMPLAINT, although an amended complaint has been filed. *Id.*
78. CONFLICT OF EVIDENCE—REVIEW OF AN APPEAL.—Where there is material evidence tending to prove the prisoner's guilt before the jury, and the trial court refuses to set aside their verdict, the appellate court will not reverse their action. It will examine the records to see whether there is evidence upon which a verdict of guilt might reasonably be founded, and being satisfied on that point, will refuse to interfere, whatever may be its own opinion of the weight or preponderance of the evidence. *Cornish* v. *Territory* (Wy.), III, 89.
79. WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE, a verdict will not be disturbed, except for error in law occurring upon the trial. *Corkins* v. *Prichard et al.* (N. M.), III, 82.

80. WITNESS SWEARING FALSELY—EFFECT OF TESTIMONY—INSTRUCTION.—The court may instruct the jury that "if any witness has, in their opinion, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution." *People* v. *Sighetti* (Cal.), IV, 606.

See ACCOUNT STATED; ADVERSE POSSESSION, 8; APPEAL, 45, 63, 64, 71; ARBITRATION AND AWARD, 6, 7; ATTACHMENT, 4; ATTORNEYS, 2; BILL OF EXCEPTIONS, 2, 8, 9; BOUNDARIES; CANCELLATION, 4, 5, 7; CHINESE RESTRICTION ACT; CLAIM AND DELIVERY, 2; CONSIDERATION, 2; CONTINUANCE, 4–6; CONVERSION, 5; CORPORATIONS, 14–16, 44, 45; COUNTER-CLAIM; CRIMINAL LAW AND PRACTICE, 11–26; DEEDS, 6–8, 24, 26–28; DENVER TOWN SITE; DEPOSITIONS; EJECTMENT, 8; ELECTION, 13, 14; EMINENT DOMAIN, 3; EQUITY, 4; ESTOPPEL, 5; ESCAPE FROM STATE PRISON, 1; EXECUTIONS, 1–3; FINDINGS; FORGERY, 2, 4; GROWING CROPS, 2; GUARDIAN AND WARD, 2; INJUNCTION, 11; INSANE PERSONS, 3; INSTRUCTIONS; INSURANCE, 1, 2; INTERPRETER, 1; JUDGMENT, 14, 24, 43, 46–51; JURY AND JURORS, 31, 41; LANDLORD AND TENANT, 9, 10; LARCENY, 15, 16, 18; MALICIOUS PROSECUTION, 7; MINES AND MINING, 5, 6; MISTAKE, 5; MORTGAGE, 1–8; MURDER AND MANSLAUGHTER, 59–94; NEGOTIABLE INSTRUMENTS, 24; NEW TRIAL, 34–43; PARTNERSHIP, 10–12; RIOT; ROBBERY, 3; SALES, 5; STATUTE OF LIMITATIONS, 9, 20; SURETIES, 13; SURVIVORSHIP, 1; SWAMP LANDS, 16; TRESPASS, 5; TRUSTS, 2; VARIANCE; VENDOR AND VENDEE, 1–3; WILLS, 2, 14.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTIONS.

1. ORDER OF THE LOWER COURT REFUSING TO SET ASIDE A SALE UNDER EXECUTION of four ditches, and the water rights connected therewith, which were sold in one parcel, will not be reversed when the evidence as to whether such ditches constituted a single system of water supply or not was conflicting. *Gleason* v. *Hill* (Cal.), I, 770.
2. SEIZURE OF PROPERTY EXEMPT FROM EXECUTION.—In an action against an officer for taking, under execution, the implements of trade of the plaintiff, a barber, exempt from execution, evidence of the customary wages of barbers for the period of time between the seizure and plaintiff's employment is inadmissible to establish the damages resulting by reason of the interruption to plaintiff's business. *Hammersmith* v. *Avery* (Nev.), I, 662.
3. EVIDENCE OF AN OFFER MADE TO THE PLAINTIFF FOR THE PROPERTY SO TAKEN is inadmissible to show the value thereof. *Id.*
4. THE RIGHT TO THE EXEMPTION OF PROPERTY FROM EXECUTION IS A PERSONAL PRIVILEGE, which, if not claimed, is waived by the debtor; and therefore an officer who sezies property exempt from execution is not a trespasser *ab initio*. *Id.*
5. TWO HORSES USED BY A JUDGMENT DEBTOR IN CARRYING ON A FARM ARE EXEMPT from execution, although their owner does not devote himself exclusively to husbandry, and may sometimes use them for purposes other than that of farming. *McCue* v. *Tunstead* (Cal.), II, 896.
6. STALLION—EXEMPTION FROM EXECUTION—A stallion, used for the purposes of husbandry by a judgment debtor, whose farm is his main reliance for support, may be exempt from execution, although the principal use of such stallion is for the breeding of mares. *McCue* v. *Tunstead* (Cal.), III, 576.

See APPEAL, 24, 47; BILL OF EXCEPTIONS, 4; BONA FIDE PURCHASER, 7; CONVERSION, 1; COSTS, 2; EMINENT DOMAIN, 11; HOMESTEAD, 5–7; INJUNCTION, 1, 2; JUDGMENT, 41, 60; MANDAMUS, 7; PLEDGE, 2; PUBLIC LANDS, 21; QUIETING TITLE, 3; SHERIFFS' SALES; SUPPLEMENTAL PROCEEDINGS.

EXECUTORS AND ADMINISTRATORS.

1. AN ADMINISTRATOR IS NOT AUTHORIZED TO ERECT A DWELLING-HOUSE with the assets of the estate to be occupied by him, or for any other use or purpose; nor is money borrowed for such purpose a charge against the estate, although it may be against the administrator individually. *Ralfson* v. *Cannon* (Utah), I, 696.
2. PURCHASE OF TRUST ESTATE BY EXECUTOR OF CESTUI QUE TRUST.—The maker of a promissory note secured by a trust deed of land which authorizes the trustee to

sell such lands upon a default in the payment of the note can not object to a purchase at such sale by the executor of the beneficiary under the trust deed when such purchase resulted greatly to his advantage. *Dusing* v. *Nelson* (Col.), II, 110.

3. EXECUTOR CAN NOT PURCHASE FOR THE ESTATE at execution sale of realty sold to satisfy judgment in favor of the estate. *Sedgwick, Ex'x*, v. *Sedgwick* (Cal.), III, 634.
4. SAME—SUCH SALE BEING VOID, it can not be the basis of an action for damages against the estate by reason of such sale. *Id.*
5. EXECUTOR'S COMMISSIONS—PART PAYMENT OF LEGACY.—It is not error for the court in which the administration of a decedent's estate is pending to allow to a legatee a portion of his legacy, under section 1661 of the code of civil procedure, when the actual money in the hands of the executors is no more than the amount which may be allowed them as commissions under section 1618, provided the remaining assets of the estate, such as the realty, are sufficient to satisfy such commissions and all the claims and all the devisees and legatees. *Estate of Dunne, Deceased* (Cal.), III, 314.
6. ADMINISTRATOR—GRATUITOUS SERVICES—COMMISSIONS. — An executor or administrator may renounce his claim to compensation for performance of the duties of his trust, and a promise made by him before his appointment to one who had a prior right to administrate, which was relinquished in his favor, that he would not charge for his services, will be regarded as a renunciation of his claim. *Estate of Davis* (Cal.), III, 61.
7. FOR VOLUNTARY SERVICES, however great the benefit conferred, no recovery can be had. *Id.*
8. CAUSE OF ACTION—WHEN AND WHERE IT ARISES. — A cause of action given by statute to an administrator to recover damages for the death of his intestate arises out of such death, and where it occurred, and not the appointment of the administrator, or the place where it was made. *Lung Chung* v. *N. P. R'y Co.* (U. S. Dist. Ct., Or.), II, 88.
9. NEITHER AN EXECUTOR NOR ADMINISTRATOR IS LIABLE TO PROCESS of garnishment; nor can an allowed and approved claim against the estate of the deceased be levied upon and sold under an execution against the claimant. *Norton, Ex'r etc.*, v. *Haydon* (Nev.), II, 41.
10. PROBATE COURTS—ACTIONS AGAINST ADMINISTRATOR.—Whether a probate court has jurisdiction of an action at law to recover a judgment against an administrator, and to enforce the same by execution, *quære*. *Pirea, Adm'r etc.*, v. *Gallegos* (N. M.), II, 423.
11. SUBSTITUTION OF ADMINISTRATOR—MANDAMUS TO COMPEL. — *Mandamus* does not lie to compel the substitution of an administrator in the place of a deceased plaintiff, and to obtain a retrial of an action in which a judgment of nonsuit was entered after the death of the plaintiff. Such judgment is not void on its face, and should be set aside before an application for *mandamus* is made by the administrator. *Elliot, Adm'r etc.*, v. *Paterson, Judge etc.*, (Cal.), II, 376.
12. ADMINISTRATOR USING ASSETS OF ESTATE MUST PAY INTEREST.—An administrator who uses the assets of the estate in his own business, and for his own profit, may be charged interest thereon at the rate of seven per cent per annum, with annual rests. *Estate of Merrifield* (Cal.), IV, 526.
13. EXECUTORS AND ADMINISTRATORS—APPEAL FROM DECREE OF DISTRIBUTION.—A decree of distribution of an estate will not be reviewed on an appeal by an executor or administrator where he, *as such*, has no interest in the matter sought to be reviewed. *Id.*
14. THE WORDS "TESTAMENTARY EXECUTOR" ARE A CORRECT TRANSLATION of the Spanish word *albacea*. *Emeric* v. *Alvarado* (Cal.), I, 708.

See APPEAL, 17; ATTACHMENT, 5; ESTATES OF DECEASED PERSONS; ESTOPPEL, 2; GUARDIAN AND WARD, 4, 5, 7; PARTIES, 5, 13.

EXEMPTION FROM EXECUTION.

See EXECUTIONS, 2–6.

EXHIBITS.

See EVIDENCE, 48.

EXPERT TESTIMONY.

See ATTORNEYS, 14; EVIDENCE, 33-36; INJUNCTION, 19; MINES AND MINING, 22.

EXPRESS COMPANIES.

See COMMON CARRIERS, 1-5, 8; NEGLIGENCE, 18.

FALSE REPRESENTATIONS.

1. OBTAINING MONEY UNDER FALSE PRETENSES—INDICTMENT.—An indictment for obtaining money under false pretenses charged that at a certain time and place the defendant J., with intent to defraud one K. of his property, did, unlawfully, knowingly, and designedly, falsely pretend and represent to him that certain bonds of a railroad were of the market value of six hundred and fifty dollars, that any bank in San Francisco would lend that amount on them, that the road of said company, issuing said bonds, was in running order and was paying expenses; and that K., believing said false pretenses and representations, was induced, by reason of the same, to loan and deliver to the said J., on the pledge of said bonds, the sum of one thousand three hundred and sixty-five dollars. It further charged that said money was obtained by the defendant unlawfully, knowingly and designedly to defraud said K. The indictment then denied the truth of the false and fraudulent representations, charging that said bonds had not any market value; that no bank in San Francisco would loan any money thereon, and that the company issuing the bonds had no road that was in running order, or that was paying expenses, all of which facts the defendant knew. *Held*, that the indictment was sufficient, and a demurrer thereto should have been overruled. *People* v. *Jordan* (Cal.), IV., 133.

See FRAUD, 20, 21.

FEES.

See JURY AND JURORS, 35.

FENCE LAW.

1. IN THE ABSENCE OF A SHOWING THAT THE PEOPLE OF A CERTAIN COUNTY HAVE ADOPTED the so-called "fence law," the court will presume that the same has never taken effect therein. *Willard* v. *Matheson* (Col.), I, 355.

FERRIES.

1. FERRIES, JURISDICTION OF COUNTY COURT TO ESTABLISH.—The primary object of the statute conferring jurisdiction upon the county courts to establish roads and license ferries for the transportation of persons and property across streams which obstruct land travel using public ways is to secure the public accommodation. For the attainment of this end, but as subordinate to it, when a ferry franchise is granted, the right to take lawful tolls is conferred as an equivalent for the obligations to accommodate the traveling public. Although the taking of such tolls is *privati juris*, and incident to the franchise, a ferry is *publica juris*, and can not be created without a license, and is a thing of public interest and use. It can only exist in connection with some highway or place where the public have rights. The grant of a ferry franchise over a stream, to and from a place where there is no highway, or in which the public have no rights, would be void and inoperative. *Montgomery et al.* v. *Multnomah Railway Company* (Or.), II, 640.
2. THE SAME—PRIVILEGES GRANTED BY LICENSE.—When the county court has exercised its jurisdiction by granting a license for a ferry, and a ferry is established, forming a connecting link in the public highway, it has exhausted its jurisdiction as to such highway or places connected, while such franchise exists. Such franchise gives to the person licensed the exclusive privilege of transporting all persons and property between such places. The county court can not establish another ferry between such places or highways, or between places just outside of or beyond them, designed to accommodate the same traveling public, without violating the exclusive privileges secured by the franchises granted to the ferry already established. *Id.*
3. SALE OF FERRY LICENSE.—Whether a ferry license can be assigned without the consent of the granting power, and whether the county court granting the license has

power to give such consent, *quære*. If such assignment is void, the right to object to the same, and to the exercise of the franchise by a party to whom it was not originally granted, can only be exercised by the state officers in an appropriate proceeding. *Id.*

See COMMON CARRIERS, 4.

FICTITIOUS GRANTEE.

See BONA FIDE PURCHASER, 2; CANCELLATION, 1; DEED, 9–11; EVIDENCE, 4.

FINDINGS.

1. FINDINGS MUST BE OF THE ULTIMATE FACTS PUT IN ISSUE by the pleadings, and not argumentative. *Coglan* v. *Beard* (Cal.), I, 862.
2. THE FINDINGS OF THE LOWER COURT ON THE ISSUES RAISED BY THE PLEADINGS MUST STATE separately the facts found and the conclusions of law, in such a manner that the appellate court may see that the conclusions of law follow as a deduction from the facts found. Tested by such rule, certain findings of the lower court, to the effect that no assessments for taxes during certain years were made on a portion of the property in controversy, and certain judgments rendered for such taxes were void, held insufficient. *Emeric* v. *Alvarado* (Cal.), I, 708.
3. FINDING TO THE EFFECT THAT A SUBSEQUENT UNDERTAKING WAS GIVEN in the place of a former one, which was required upon the issuance of a preliminary restraining order, is erroneous, when the complaint alleges, and the undertaking recites, that the same was given "as a condition to the further continuance of the said injunction." *California Farmers' etc. Ins. Co.* v. *Schindler* (Cal.), I, 122.
4. FINDINGS OF FACT CAN NOT BE CONSIDERED ON APPEAL, unless they are embodied in the statement of the case. *Simpson* v. *Ogg* (Nev.), I, 303.
5. APPELLANTS CAN NOT TAKE ADVANTAGE OF THE FAILURE OF THE COURT TO MAKE ADDITIONAL FINDINGS of fact, within the time required by the statute, when all of such findings were favorable to them. *Smith* v. *Logan* (Nev.), I, 391.
6. THE FINDINGS SHOULD BE CONFINED to the contested facts, and determined from the evidence. Findings as to facts admitted by the pleadings are unnecessary. *Miles* v. *McCallan* (Ariz.), II, 689.
7. FINDING OF FACT, WHEN ESSENTIAL.—Under section 180 of the practice act in trials of issues of fact by the court, written findings of fact and conclusions of law, separately stated, must be made and filed before any judgment can be entered. Such findings are the foundation for the judgment, and are as necessary to precede it as a verdict in case of trial by a jury. In the absence of findings, there is no presumption that the judgment is sustained by the evidence, when the issues are tried by the court. *Reich* v. *Rebellion S. Min. Co.* (Utah), II, 451.
8. JUDGMENT REVERSED FOR FAILURE TO FIND ON A MATERIAL ISSUE. *Hawes* v. *Green* (Cal.), II, 367.
9. FAILURE TO FIND UPON A MATERIAL ISSUE IS GROUND FOR REVERSAL.—IN THE ABSENCE OF FINDINGS, the appellate court will presume that the same were waived, unless the contrary appears by a bill of exceptions. This presumption can not arise where the lower court filed a writing designated as its "decision," and intended to be a finding upon a material issue. *Kimball* v. *Stormer* (Cal.), II, 371.
10. FAILURE TO FIND ON ALL MATERIAL ISSUES can not be taken advantage of in the appellate court, unless there has been a motion in the court below to make additional findings to meet the omitted issues. *Eakin* v. *McCraith* (Wash.), II, 785.
11. FINDINGS—SUFFICIENCY OF.—In an action to set aside a sale on the ground of fraud, where the court finds enough to avoid the sale, it is unnecessary to find more, although everything alleged in regard to such transfer is not found on. *Ohleyer, Assignee, etc.*, v. *Bunce* (Cal.), II, 142.
12. FINDINGS OF A JURY ON SPECIAL ISSUES SUBMITTED TO THEM, in an action for the reformation of a deed for an alleged mistake, are merely advisory to the court. If, in such action, the court files findings as to all the facts in issue, in which, after reciting that a jury had been impaneled to try special issues, and had rendered a verdict, it is stated "now, from said verdict and the testimony adduced in said cause, after due consideration the court finds the following facts," a judgment entered upon such findings will not be reversed for an erroneous instruction to the jury as to the character of the evidence necessary to warrant the relief asked. *Sweetser* v. *Dobbins* (Cal.), II, 145.

13. FINDINGS OF JURY IN EQUITABLE ACTION—SETTING ASIDE VERDICT.—The findings of a jury on issues submitted to them in an equitable action are advisory only. The court may set aside such verdict and find the facts itself. *Johnson et al.* v. *Powers* (Cal.), II, 740.
14. VERDICT IN EQUITY CASE—FINDINGS—INSTRUCTIONS.—Both before and since the adoption of the code, the verdict of a jury, with respect to controverted facts arising in an equity case, is not conclusive upon the questions submitted, but merely advisory to the court. The court may set aside the verdict and order a new trial, or may qualify or alter any of its special findings, or disregard it in whole or in part, and find the facts for himself, or it may approve them in whole or in part, and if approved, they become, by adoption, the findings of the court. If the last method is followed, and the findings are supported by the evidence, the judgment will not be reversed for erroneous instructions to the jury. *Sweetzer et al., Executors, etc.* v. *Dobbins* (Cal.), III, 616.
15. FAILURE TO FIND UPON AN IMMATERIAL ISSUE IS NOT ERROR. *Allenbery* v. *Zellerbach* (Cal.), I, 777.
16. FINDING OF THE COURT WHICH SUBSTANTIALLY RESPONDS TO THE ISSUES made by the pleadings is sufficient. *Jones* v. *Meyer* (Cal.), I, 348.
17. WHERE ONLY PART OF THE ISSUES RAISED BY THE PLEADINGS are submitted to the jury in a proceeding to set aside the probate of a will, the refusal of the court to hear testimony and make findings as to the remaining issues is error. *Sanders* v. *Simcich* (Cal.), I, 868.
18. FAILURE OF A REFEREE TO FIND UPON AN IMMATERIAL ISSUE as to fraud is not error. *Williams* v. *Gallick* (Or.), II, 537.
19. ERRONEOUS FINDING OF THE COURT ON AN IMMATERIAL ISSUE will not warrant a reversal. *Sweetser* v. *Dobbins* (Cal.), II, 145.
20. FINDING OF JURY—WEIGHT OF EVIDENCE.—A verdict of a jury will not be disturbed, on the ground that it is contrary to the weight of evidence, although the testimony of the greatest number of witnesses was opposed to such verdict, unless it appears that the jury acted so unreasonably in weighing the testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of doing justice. *Green, Adm'x,* v. *Taney* (Col.), III, 531.
21. FINDINGS—CONFLICT OF EVIDENCE.—If the record discloses a substantial conflict of testimony upon a material issue, the appellate court will not interfere with the finding of the jury thereon, although they accepted the testimony of one witness as against those of two. Where, however, such finding is unsupported by the testimony of any witness, the judgment will be reversed. *Rankin* v. *Thompson et al.* (Col.), II, 873.
22. FINDING OF A REFEREE WILL NOT BE REVIEWED on appeal when there is evidence to sustain it. *Williams* v. *Gallick* (Or.), II, 537.
23. FINDING OF THE LOWER COURT WILL NOT BE DISTURBED when there is evidence to support it. *Baker et al.* v. *McAllister* (Wash.), II, 690.
24. FINDING OF THE JURY WILL NOT BE DISTURBED when the evidence is conflicting. *Coffman* v. *Brown* (Col.), II, 98; *Kelly* v. *Fitzele* (Cal.), II, 132; *Halleck* v. *Brisnahan* (Wy.), II, 60.
25. WHERE THE EVIDENCE IN SUPPORT OF A FINDING AS TO THE MENTAL CAPACITY of a grantor to make a deed is conflicting, such finding will not be disturbed by the appellate court. *Emeric* v. *Alvarado* (Cal.), I, 708.
26. FINDING OF THE JURY THAT A TESTATOR WAS INDUCED TO EXECUTE A CERTAIN WILL by the undue influence and threats of his wife, held unsupported by the evidence. *Estate of Lang* (Cal.), I, 773.
27. FINDINGS—CONFLICT OF EVIDENCE.—A finding of a jury upon a disputed question of fact, in connection with which there is a material conflict in the testimony, will not be reversed, unless such finding is so unreasonable as to create a strong presumption that the jury were misled, or were controlled by improper motives, or influenced by passion or prejudice. *Leitensdorfer* v. *King* (Col.), III, 135.
28. FINDINGS WILL BE HELD SUPPORTED BY THE EVIDENCE when the evidence is conflicting. *Sweetzer* v. *Dobbins* (Cal.), III, 616.
29. FINDINGS, SUFFICIENCY OF.—A finding that a party "was informed and understood" that he would have to pay a certain note is not an equivalent to a finding that he agreed to pay the same. *Porter* v. *Muller* (Cal.), III, 619.
30. JUDGMENT REVERSED FOR INDEFINITENESS AND INCONSISTENCY IN FINDINGS. *Southmayd* v. *Berry et al.* (Cal.), III, 29.

31. FINDINGS HELD TO SUPPORT THE JUDGMENT. *Capital Savings Bank* v. *Cronkete* (Cal.), III, 479.
32. FINDINGS HELD SUSTAINED BY THE EVIDENCE. *Manor* v. *Davis* (Cal.), III, 364.
33. FINDINGS—NEW TRIAL—APPEAL—STATEMENT MUST CONTAIN FINDINGS.—The sufficiency of the findings of the trial court will not be reviewed on an appeal from an order denying a new trial, unless the same are embodied in the statement, notwithstanding such statement contains a recital that the findings are referred to and made a part thereof, and the transcript shows that they were referred to by the lower court on the hearing of the motion. *Boyd* v. *Anderson* (Nev.), III, 690.
34. JUDGMENT AFFIRMED AND FINDINGS HELD TO HAVE BEEN WAIVED by consent in open court. *Schwegerle & Co.* v. *Mundell* (Cal.), IV, 525.
35. FINDINGS HELD SUFFICIENT TO SUSTAIN THE JUDGMENT. *Stout, Executor, etc.*, v. *Hastings* (Cal.), IV, 588.
36. FINDINGS HELD TOO INDEFINITE AND UNCERTAIN to sustain the judgment. *Paige* v. *Rocky Ford Canal and Irrigation Co.* (Cal.), IV, 522.
37. CLERICAL ERROR IN CONCLUSIONS OF LAW—IMMATERIAL ERROR.—The use of the word "defendant" instead of "defendants," in the conclusions of law found by the court, is a mere clerical error, and entitled to no regard. *Doolan et al* v. *Cunningham, Administrator, etc.* (Cal.), IV, 613.
38. AMENDMENT OF FINDINGS.—When trial is by the court, the court may at any time before judgment amend its findings of facts, notwithstanding a motion for a new trial has been made. *Calhoun* v. *Gilliland, Adm'r, etc.* (Wash.), II, 285.
39. SUPREME COURT CAN NOT INFER ONE FACT FROM OTHER FACTS FOUND.—The only inferences which it can draw from the findings are inferences of law. *De Celis et al.* v. *Porter et al.* (Cal.), II, 144.
40. JUDGMENT IN DE CELIS V. PORTER, 1 WEST COAST REP. 575, MODIFIED as to the date from which interest should be allowed. *Id.*
41. A FINDING THAT AN ACTION WAS COMMENCED, AND THAT JUDGMENT therein was "duly given and made," includes a finding of facts necessary to give the court jurisdiction. *Wetmore* v. *Rupe* (Cal.), II, 885.

See ADVERSE POSSESSION, 3, 8; BILL OF EXCEPTIONS, 9; CONVERSION, 1; EJECTMENT, 9; FORCIBLE ENTRY AND DETAINER, 9; JUDGMENT, 62; LANDLORD AND TENANT, 6; MORTGAGE, 20; NEW TRIAL, 18, 20, 35; NUISANCE, 20; SUPREME COURT, 2.

FINES AND FORFEITURES.

See CONTEMPT, 2, 35; DEED, 3; JUSTICES' COURTS, 7; LARCENY, 14.

FIRE INSURANCE.

See INSURANCE.

FORCIBLE ENTRY AND DETAINER.

1. AN ACTION OF FORCIBLE ENTRY AND DETAINER DOES NOT LIE TO ENFORCE AN INCORPOREAL RIGHT OF WAY, although an action on the case might be maintained for its obstruction, or a suit in equity to restrain an interference therewith. *Roberts* v. *Trujillo* (N. M.), I, 519.
2. ACTION OF FORCIBLE DETAINER CAN NOT BE MAINTAINED when the facts and circumstances indicate no purpose or determination upon the part of the defendant to resist the entry of the plaintiff by force. *Harrington* v. *Watson* (Or.), I, 59.
3. NEITHER THE LEGAL TITLE TO LAND NOR THE RIGHT TO THE POSSESSION can be determined in an action of forcible entry and detainer. *Romero* v. *Gonzales* (N. M.), I, 160.
4. UNLAWFUL ENTRY, UNACCOMPANIED BY ACTUAL FORCE, IS INSUFFICIENT to sustain an action of forcible entry and detainer, under the statute of this territory, on the ground of such entry being constructively forcible. *Id.*
5. OBJECT OF THE STATUTE OF FORCIBLE ENTRY AND DETAINER is to prevent persons from disturbing the public peace, or perpetrating gross and willful wrongs, by maintaining by actual fraud or force what they claim as private rights in the possession of land. *Id.*
6. FORCIBLE ENTRY AND DETAINER—APPEAL FROM COUNTY COURT.—An action under the forcible entry and detainer act, originally brought in the justice's court, and thence

appealed to the county court, can not be taken to the supreme court on appeal. It must be taken, if at all, on writ of error. Such action does not involve any question as to the title to land. *Brandexburg* v. *Reithman* (Col.), II, 774.

7. THE SAME—EJECTMENT.—The statutory action of forcible entry and detainer has not been enlarged by section 267 of the civil code. Such section does not abolish all distinctions between that action and the action of ejectment. *Id.*
8. FORCIBLE ENTRY AND DETAINER—PLEADING—NOTICE TO QUIT.—A complaint in an action of forcible entry and detainer which conforms to the requirements of chapter 3, section 23 of the act of 1872, is sufficient. Such complaint need not allege service of notice to quit on the tenant. *Chung Yow* v. *Hop Chong et al.* (Or.), III, 325.
9. EVIDENCE HELD NOT TO SHOW A FORCIBLE ENTRY on the part of the defendant, or that the land in question was in the possession of the plaintiff. *Alemany, Archbishop, etc.*, v. *Ortega* (Cal.), III, 51.

FORECLOSURE.

See MORTGAGE, 15-35; PARTIES, 5-7; PLEADING AND PRACTICE, 5, 10; STATUTE OF LIMITATIONS, 18.

FORFEITURE.

See DEED, 3; FINES AND FORFEITURES.

FORGERY.

1. FORGERY—INDICTMENT, SUFFICIENCY OF.—Under the latter clause of section 775 of the general statutes, an indictment for forgery is sufficient which charges that the defendant "did counterfeit and forge the handwriting of another to a certain promissory note, dated, etc., for the sum of, etc., with the intent to damage and defraud such person," etc. Such indictment need not set out a copy of the instrument upon which the forgery is predicated, nor charge the act to have been done falsely or feloniously. *Cohen* v. *People etc.* (Col.), II, 528.
2. THE SAME—EVIDENCE OF PASSING FORGED INSTRUMENT—INTENT.—Under such indictment, evidence that the defendant uttered or passed the instrument forged, for the purpose of raising money thereby, is admissible, as tending to show the intent with which the handwriting was forged. *Id.*
3. THE SAME—INSTRUCTIONS.—The court instructed the jury "that if they believed from the evidence that the defendant signed the name, claimed to have been forged to the note in evidence, with the intention of obtaining money thereon, and did obtain money thereon, they should find him guilty." *Held*, that such charge was erroneous, because it omitted to instruct the jury that they must also believe that such signing was forged or counterfeited, and with intent to damage or defraud. *Id.*
4. FORGERY—INTENT—INSANITY FROM DRUNKENNESS.—In a prosecution for forgery of a promissory note, where the intent with which the act was done is an element of the offense, evidence is admissible showing that the defendant was afflicted with dipsomania; that from contracted habits of intemperance his mind had been impaired; that when he was under the influence of liquor he was insane, did not know what he was doing, could not distinguish right from wrong; and that he was in such state when he committed the act of which he was accused. *People* v. *Blake* (Cal.), III, 38.

See CANCELLATION, 3.

FORNICATION.

1. AN INDICTMENT FOR FORNICATION IS SUFFICIENT THAT CHARGES that the defendant and a certain woman "did then and there unlawfully live together in an open state of fornication." *King* v. *The People etc.* (Col.), II, 307.
2. EVIDENCE IN A PROSECUTION FOR FORNICATION REVIEWED and held to establish an overt act on the part of the defendant. *Id.*

FORWARDERS.

See COMMON CARRIERS, 5, 7.

FRANCHISE.

See CORPORATIONS, 47-49; FERRIES.

FRAUD.

1. DEED UNTAINTED BY FRAUD IS NOT IMPEACHABLE FOR FRAUD COMMITTED AFTERWARDS in the obtainment of another deed, for different premises, by the same grantee from the same grantor. *Gutierrez* v. *Brinkerhoff* (Cal.), I, 127.
2. ONE WHO IS A PARTICEPS CRIMINIS IN CERTAIN FRAUDULENT TRANSACTIONS to obtain land from the United States can not enforce a cause of action against his alleged partners in fraud, growing out of such transactions. *Id.*
3. EQUITY WILL NOT INTERFERE TO SET ASIDE A CONVEYANCE ON THE GROUND OF FRAUD, at a suit of a general judgment creditor of the grantor, where the latter has other property subject to execution sufficient to satisfy the judgment. In such action the complaint must allege the insolvency of the debtor, or facts sufficient to indicate that the judgment could not be collected without equitable aid. *Emery* v. *Yount* (Col.), I, 499.
4. FAILURE TO MAKE SUCH ALLEGATIONS CAN BE TAKEN ADVANTAGE OF at any time, and is not cured by evidence establishing the insolvency of the judgment debtor. *Id.*
5. VOLUNTARY CONVEYANCE WILL NOT BE SET ASIDE ON THE GROUND OF FRAUD on the grantor's creditors, unless it is averred and proved that the grantor was in debt at the time of such conveyance, or that the same was made with a view of contracting further obligations. *Id.*
6. COMPLAINT IN AN ACTION BY A JUDGMENT CREDITOR, HAVING A SPECIFIC LIEN by attachment upon a particular parcel of his debtor's land, need not aver the fact of the debtor's insolvency, where the object of the action is to have a subsequent conveyance of such land declared fraudulent and void as to the plaintiff, and that, as to the extent of his lien upon the same, his right to obtain satisfaction of his judgment therefrom be recognized and enforced. *Id.*
7. FORECLOSURE SALE, HOW ATTACKED FOR FRAUD.—A sale by the trustees of a railroad mortgage, under a decree of foreclosure, and in strict compliance with the terms thereof, will not be set aside on motion of a bondholder not a party to the record. If the trustees combine with others to defraud the bondholders, or any of them, or if they did not act in good faith, relief may be had in a suit properly brought for that purpose, in which all the persons interested are joined as parties. *Meyer et al., Trustees etc.*, v. *Utah etc. Railway Company* (Utah), II, 471.
8. VOIDABLE PATENT TO MINING CLAIM, ATTACK ON.—A patent from the United States to a mining claim may be avoided in equity for fraud, mistake, or misrepresentation practiced upon the government. The validity of such patent, however, can not be questioned unless the facts constituting the fraud, mistake, or misrepresentation are stated in the pleadings. Whether the United States government is a necessary party to an action to set aside a patent on such grounds, *quære*. *Parley's Park Silver Mining Company* v. *Kerr* (Utah), II, 432.
9. FRAUDULENT CONVEYANCE—RESULTING TRUST—DISMISSAL OF SUIT.—A voluntary conveyance from an insolvent debtor to his wife does not create the latter a trustee of the creditors of the former. Such conveyance may be set aside at the instance of the creditors on the ground of fraud. A bill in equity against such grantee to have her declared a trustee for the creditors, and for an accounting of the rents and profits of the land conveyed, should not be dismissed. An amendment to the prayer of such bill should be allowed, and the appropriate relief granted. *Perea et al., Administrators etc.*, v. *Gallegos* (N. M.), II, 423.
10. FRAUDULENT TRANSFER—EVIDENCE HELD SUFFICIENT TO JUSTIFY the finding that the sale under which the plaintiff claims title was fraudulent and void as to his vendor's creditors. *Wideman* v. *Franks* (Cal.), II, 376.
11. NOTE OBTAINED BY FRAUD—ASSIGNMENT.—The note which it is the object of this suit to have delivered up and canceled, held to have been obtained through fraud, of which the defendant had notice before it was assigned to him. *McDaniel et al., Adm'r etc.*, v. *Marchbanks* (Or.), III, 339.
12. WHETHER A CONVEYANCE WAS INTENDED TO HINDER, DELAY, OR DEFRAUD THE GRANTOR'S CREDITORS is a question of fact, and not of law. *Read* v. *Rahm* (Cal.), III, 150.
13. FRAUD, ALLEGATIONS OF—PLEADINGS—CANCELLATION OF DEED.—In an action to annul a deed on the ground of fraud, where the fraud consists in making such deed

run in the name of a married woman as grantee, instead of to her husband, an allegation that, subsequent to the execution of the deed, the plaintiff has discovered that the deed, "as it appears upon the record," runs in the name of the wife as the grantee, is no allegation that such deed was obtained by fraud; and an allegation that "the plaintiff does not know whether the husband obtained said deed in his wife's name by misreading the same to plaintiff, or by obliterating the name and putting in hers," is not an allegation that it was done in either way, or that there was any fraud on the part of either the husband or wife. *Rasmussen et al.* v. *McKnight et al.* (Utah), III, 670.

14. THE SAME.—Fraud is a conclusion of law derived from facts, and is not to be presumed; it can be found only when the facts make it apparent. The facts constituting the fraud must be pleaded; a general allegation of fraud is not sufficient on demurrer. *Id.*

15. BILL TO SET ASIDE DECREE—PARTIES—DEMURRER.—A bill in equity to set aside a decree for the partition of land, on the ground that the same was obtained by fraud, should join as defendants all the parties to the original bill on which such decree was rendered, and all persons claiming through or under any or either of them. Such bill is not demurrable, for the reason that another suit is pending between the plaintiffs and some of the defendants, relating to the same subject, unless the suit already pending will afford the plaintiffs the same relief as they would have been entitled to under the bill demurred to. *Bent et al.* v. *Maxwell Land Grant and Railway Co. et al.* (N. M.), III, 8.

16. THE SAME—CONSENT DECREE, IMPEACHMENT OF.—An original bill in equity lies to set aside and annul a decree purporting to have been made and entered by consent, if such consent was obtained by fraud, imposition, or false representations. *Id.*

17. MORTGAGE OF PERSONAL PROPERTY—POSSESSION BY MORTGAGOR—FRAUD.—A mortgage of the stock in trade of a merchant, by the terms of which the mortgagor is to remain in possession of the goods, to sell and dispose of the same as the owner, and remit the proceeds of the sales to the mortgagee, is a fraudulent transfer as against other creditors of the mortgagor. *Speigelberg et al.* v. *Hersch & Co. et al.* (N. M.), IV, 129.

18. CONVEYANCE TO HINDER, DELAY, AND DEFRAUD CREDITORS—PURCHASER WITH NOTICE—ATTACHMENT OF PROPERTY. FRAUDULENTLY CONVEYED.—A conveyance of property made with intent to hinder, delay, and defraud the creditors of the grantor is void, both as against the grantee and a subsequent purchaser with notice, although the latter may have paid a valuable consideration. The property so conveyed may be levied upon and sold at the instance of the creditors of the fraudulent grantor as if no conveyance had ever been made. *Bull* v. *Ford* (Cal.), IV, 527.

19. ALLEGATION OF FRAUDULENT INTENT—SPECIAL DEMURRER.—An allegation that a conveyance was made "with intent to hinder, delay, and defraud the creditors" of the grantor is a sufficient averment of fraudulent intent to sustain a judgment. Whether the same would be sufficient if objected to by special demurrer, *quære*. *Id.*

20. FRAUDULENT REPRESENTATIONS—SALE—RIGHTS OF DEFRAUDED VENDEE.—One who has been induced by false and fraudulent representations to purchase a business and stock in trade need not, upon discovery of the fraud, take steps to rescind the contract. He may retain the property and prosecute his claim for damages either by an original action or as a counter-claim to an action against him for the purchase price, brought by the party committing the fraud. If such contract of purchase was an entirety, the separate value of the stock, aside from the value of the good will of the business, need not be alleged in the answer. *Hereford* v. *Cramer* (Col.), IV, 229.

21. FRAUDULENT REPRESENTATIONS—SALE—MEASURE OF DAMAGES—PLEADINGS.—The measure of damages in an action for fraudulent representations in the sale of both real and personal property is the same. It is the difference between the value of the property as it actually existed on the day of sale and its value as it was represented to be. Such damages need not be separately pleaded. *Id.*

See ACCOUNTING, 1, 6; ARREST AND BAIL, 1, 3, 4; ASSIGNMENT FOR BENEFIT OF CREDITORS, 4; ATTORNEYS, 1; BONA FIDE PURCHASER, 2, 8; CANCELLATION; CHATTEL MORTGAGE; CONSIDERATION, 4; CORPORATIONS, 29; DECEIT; DEED, 11; EVIDENCE, 17, 20; FINDINGS, 11; INFANTS, 5; INJUNCTION, 4; INSOLVENCY, 10; JUDGMENT, 20; MEXICAN GRANT, 8; MORTGAGE, 38, 39; PATENTS, 6; PLEADING AND PRACTICE, 31, 32; PRINCIPAL AND AGENT, 1; REPLEVIN, 3; VENDOR AND VENDEE, 2, 3.

FRUIT TREES.

See INJUNCTION, 17; TAXATION, 68.

FUGITIVES FROM JUSTICE.

1. CUSTODIAN OF A PRISONER HELD UNDER AUTHORITY OF A WARRANT FOR HIS ARREST, issued by the governor of California, upon the requisition of the governor of another state, may be compelled, upon the application of the prisoner for a writ of *habeas corpus*, to produce the body of such prisoner before a court of the state in which he is detained, so that the cause of his imprisonment and detention can be inquired into; and upon a failure so to do, such custodian is guilty of contempt. *In re Robb* (Cal.), I, 255.
2. WARRANT OF EXTRADITION.—A warrant for the arrest and return of a fugitive from justice must recite or set forth the evidence necessary to authorize the state executive to issue it; and unless it does, it is illegal and void. *In re Doo Woon* (U. S. Dist. Ct., Or.), I, 333.
3. HABEAS CORPUS, JURISDICTION OF.—A person arrested under a warrant of extradition from one state of the Union to another "is in custody under or by color of the authority of the United States," and the national courts have jurisdiction to inquire by *habeas corpus* into and determine the legality of the same. *Id.*
4. FUGITIVES FROM JUSTICE ARRESTED AND RETURNED UNDER LAWS OF THE UNITED STATES.—The governor of a state in issuing a warrant for the arrest of a fugitive from justice, the officer who makes the arrest, and the party commissioned to receive the fugitive and deliver him to the authorities of the state where the offense is charged to have been committed, in pursuance of the provisions of sections 5278 and 5279 of the revised statutes of the United States, act under the authority of the laws of the United States, and *pro hac viee* are officers or agents of the United States. *In re Robb* (U. S. Cir. Ct., Cal.), I, 439.
5. WRIT OF HABEAS CORPUS—JURISDICTION.—Where a petition for a writ of *habeas corpus* presented to a state judge or court by a party in the custody of one claiming, in good faith, to be authorized to deliver him to the authorities of another state, as a fugitive from justice, in pursuance of the provisions of said sections, shows upon its face that the petitioner is so held in custody, under such claim made in good faith, the state judge or court has no jurisdiction to issue the writ. The jurisdiction, in such case, is exclusively in the courts of the United States. *Id.*
6. ID.—DUTY OF CUSTODIAN.—Where a writ of *habeas corpus* has been issued by a state judge or court, and been served on the party having the custody of such alleged fugitive, it is the duty of such custodian to make full return to the writ as to the authority under which he holds the prisoner, and to exhibit to the court the original papers evidencing his authority, and respectfully decline to produce the body of the prisoner; and if it appears from said return, or said petition and return, that the prisoner is claimed to be held in good faith, in pursuance of the provisions of said statute, the judge or court issuing the writ has no jurisdiction or authority to proceed further, and no jurisdiction or authority to compel the production of the body of the prisoner, or to commit the party holding him for contempt in thus respectfully declining to produce the prisoner. *Id.*
7. THE EFFECT OF THE PRODUCTION OF THE PRISONER would be to place him in the physical control of the court, and to deprive himself of all power to execute the superior commands of the laws of the United States, to which he owes obedience. *Id.*
8. WHERE THE RETURN TO A WRIT OF HABEAS CORPUS, SUED OUT BY A PRISONER held under requisition proceedings, shows a substantial compliance with the act of congress concerning fugitives from justice, the prisoner will be remanded. *Ex parte Bailey* (Cal.), I, 485.
9. A FUGITIVE FROM JUSTICE CHARGED WITH A FELONY has no right to be heard on any appeal made in his behalf. *People* v. *Tremayne* (Utah), II, 207.
10. NEITHER AN ORDER FORFEITING A DEFENDANT'S BAIL for failure to appear at the trial, nor an order refusing to entertain a motion to set aside the same while the defendant was still a fugitive from justice, nor an order directing the payment of the forfeited bail money into the treasury, is appealable. *Id.*

FUTURE ADVANCES.

See MORTGAGE, 46, 48.

GAMING.

1. GAMING—ACT OF 1876 DEFINING.—Section 1 of the act of 1876 (Ses. L. 39) includes not only the games therein enumerated, but also any game played for anything of value with any device or means suitable and convenient for that purpose; and in which the game depends largely on chance, or more on chance than skill. *In re Lee Tong* (U. S. Cir. Ct., Or.), I, 35.
2. THE CHINESE GAME OF "TANTAN" is a game of pure chance, and when played for anything of value, constitutes gambling within the inhibition of said statute. *Id.*
3. POWER "TO SUPPRESS" WHEN NOT POWER "TO PUNISH."—A grant of power to a city "to suppress gaming and gambling-houses," includes the power to suppress "gaming;" but when the crime of gaming is defined, and the punishment therefor prescribed by the law of the state, the city is not authorized to suppress any game not prohibited by such law, nor to punish any person playing thereat; but it is confined to the use of such means as may be within its power to enforce the state law within its limits. *Id.*

GARNISHMENT.

See ATTACHMENT; JUDGMENT, 14.

GENERAL AVERAGE.

See ADMIRALTY, 20.

GEORGETOWN, CHARTER OF.

See CONSTITUTIONAL LAW.

GIFT.

1. A GIFT CAN NOT BE CONSUMMATED WITHOUT DELIVERY, and consequently, the subject thereof must be *in esse*. *Read* v. *Rahm* (Cal.), III, 150.
2. CONVEYANCE—GIFT FROM HUSBAND TO WIFE.—A conveyance made to a wife, in consideration of a debt due to the community from the grantor, with the consent of the husband, and with the intent that the property conveyed should become the wife's separate property, will operate as a gift to her. *Id.*

See PUBLIC LANDS, 20.

GOODS SOLD AND DELIVERED.

1. ACTION FOR GOODS SOLD AND DELIVERED—EVIDENCE—VARIANCE.—A complaint for certain cattle sold and delivered is not sustained by evidence that such cattle were delivered to the defendant to be slaughtered and the meat sold on commission. *Evans* v. *Bailey et al.* (Cal.), IV, 427.

GRAND JURY.

See JURY.

GRANT.

See BOUNDARIES; DEED.

GRANTOR AND GRANTEE.

See DEED.

GROWING CROPS.

1. MORTGAGE—GROWING CROPS—RENTS, ISSUES, AND PROFITS.—A mortgage of land, with the rents, issues, and profits thereof, attaches as a lien to the crop growing on such land at the time of foreclosure. The proceeds of the sale of such crop should be applied to the payment of the mortgage debt. *Montgomery* v. *Merrill et al.* (Cal.), III, 375.

2. THE VALUE OF A CROP OF GROWING GRAIN MAY BE ASCERTAINED by reference to its value at maturity, less certain expenses. *Harrison* v. *S. V. H. G. Co.* (Cal.), III, 349.
3. A MORTGAGEE OF CROWING CROPS PENDENTE LITE IN AN ACTION OF EJECTMENT is bound by the judgment against the mortgagor, and may be evicted under the writ issued on such judgment. As between him and the successful plaintiff, such growing crops are part of the realty, and pass to the plaintiff, and consequently the mortgagee is not entitled to a restitution of the premises for the purpose of harvesting such crops. *Huerstal* v. *Muir* (Cal.), I, 475

See HOMESTEAD, 13; INJUNCTION, 20; TAXATION, 68.

GUARANTY.

1. CONTRACT TO CARRY STOCK CONSTRUED—GUARANTY.—The defendant Levy, being indebted to a firm of stock-brokers for moneys advanced by them in stock transactions, arranged with another firm of brokers, Eppstein & Co., that the latter firm should take up the stocks, paying to the first firm the amount due it, and carry the stocks for him. In this arrangement the defendant Baldwin executed the following guaranties:

"San Francisco, March 10, 1879—M. J. Levy in account with Eppstein & Co.

1879	PURCHASE	
March 10, 1,250 Belcher, 6½		$8,125 00
March 10, 250 Mexican, 40		10,000 00
Com		45 30
E. & O. Ex		$18,170 30

I herewith guarantee the above account, to wit, $18,170.30, in gold coin, against any loss for sixty days from date, and agree to make good any loss that may be sustained thereon in reselling the above stock, balance to be paid with interest at 1¼ per cent per month. E. J. BALDWIN."

The term of the guaranty was extended from time to time until July 25, 1879, with the consent of the guarantor, at which date the stock was sold by E. & Co., they claiming a balance due them of four thousand and twenty-three dollars and fifty-seven cents. *Held*, that E. & Co. were entitled to protect the security in their hands by paying the assessments levied thereon, and to deduct the amounts so paid from the proceeds of sales; that the guarantor was liable for the balance due E. & Co. on July 25, 1879, with interest thereon from such date at the rate of one and one fourth per cent per month. *Marshall* v. *Levy et al.* (Cal.), IV, 698.

GUARD OF JAIL.

See JAIL GUARD.

GUARDIAN AD LITEM.

See GUARDIAN AND WARD, 12, 13; INFANTS, 4, 5; PARTIES, 6.

GUARDIAN AND WARD.

1. APPOINTMENT OF GUARDIAN—ALLEGATION OF—DEMURRER.—The sufficiency of an allegation as to the appointment of the plaintiff's guardian, in an action by a minor, is not raised by a demurrer to the complaint on the ground that "the plaintiff has no legally appointed guardian." *Morrell* v. *Morgan* (Cal.), III, 683.
2. APPOINTMENT OF GUARDIAN—EVIDENCE OF.—The testimony of a witness as to who was her guardian is sufficient proof of such fact, in the absence of any objection to such testimony. *Id.*
3. POWER OF GUARDIAN TO BORROW MONEY AND MORTGAGE WARD'S ESTATE.—Subdivision 6, section 869 of the general laws of Oregon (1874, page 283), providing that the county court, as a court of probate, has power "to order the renting, sale, or other disposal of the real and personal property of minors," confers no authority on a guardian to mortgage such property. A promissory note, given for money borrowed by a guardian to improve the ward's estate, and a mortgage thereon securing the same, are both void. *Frutch* v. *Bunnell* (Or.), III, 707.

4. ACCOUNTING AGAINST ADMINISTRATOR—PRESENTATION OF CLAIM.—An action for an accounting against the administrator of his guardian can not be maintained by a ward, unless he presents the claim on which such action is founded to the administrator for allowance. *Gillespie* v. *Winn, Administrator, etc.* (Cal.), III, 371.
5. THE DISTRICT COURT HAS JURISDICTION OF AN ACTION for an accounting brought a ward against the executor of his deceased guardian, although such guardian was appointed in another state. *Ong* v. *Whipple, Executor, etc.* (Wash.), II, 798.
6. GUARDIAN AND WARD—SETTLEMENT OF ACCOUNTS.—When a ward attains its majority, the office of guardian ceases, and it is the duty of the latter to exhibit to the probate court and settle his account with the ward. Such accounting should only include transactions during the ward's minority. Transactions subsequent thereto must be settled in an action at law. *In re Allgier* (Cal.), II, 876.
7. ACCOUNTING BY EXECUTORS OF DECEASED GUARDIAN.—The executors of a deceased guardian have no authority to present such guardian's account with his ward to the probate court for settlement, nor has the court authority to receive or act upon it. Such settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties. *Id.*
8. GUARDIAN AND WARD—SALE OF MINOR'S REAL ESTATE, ORDER FOR—DESCRIPTION OF LAND IN.—An order of the probate court for the sale of real estate belonging to a minor must describe the land to be sold with sufficient definiteness and certainty as to admit of its identification without reference to any extraneous matter; otherwise a sale based thereon is void. A description of such lands as "twenty and one half acres of the rancho Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff and said minors were defendants," is insufficient. *Hill* v. *Wall* (Cal.), IV, 501.
9. SALE OF LAND BY GUARDIAN—STATUTE OF LIMITATIONS.—Section 1806 of the code of civil procedure prescribing three years next after the termination of the guardianship of a minor for a recovery by the minor or his grantee of real estate sold by his guardian only applies to sales by guardians appointed by the probate courts of this state. *McNeil* v. *First Congregational Soc.* (Cal.), IV, 421.
10. GUARDIAN AND WARD—SALE OF LAND BY GUARDIAN APPOINTED BY FOREIGN COURT.—One appointed guardian of a minor by the courts of a foreign state has no authority, as such, to sell the lands of his ward situated in this state. *Id.*
11. THE SAME—NATURAL GUARDIAN—SALE OF LAND BY—LEGISLATIVE AUTHORIZATION.—The mother of Francis W. Paty had no power, as his natural guardian, to transfer his real propery, nor did she derive power for that purpose from the act of the legislature of May 6, 1861, authorizing his guardian to sell and convey certain real estate. *Id.*
12. GUARDIAN AD LITEM, ORDER APPOINTING—JUDGMENT ROLL.—An order appointing a guardian *ad litem* for a minor defendant constitutes no part of the judgment roll. *Brady* v. *Page et al.* (Cal.), IV, 695.
13. NEITHER AN ORDER APPOINTING A GUARDIAN AD LITEM FOR AN INFANT NOR THE PETITION FOR SUCH APPOINTMENT NEED APPEAR in the judgment roll. Such appointment may be made on an application *ore tenus* in open court, as well as in writing. *Emeric* v. *Alvarado* (Cal.), I, 708.

See LEASE, 3; SEDUCTION, 2.

HABEAS CORPUS.

1. RETURN TO HABEAS CORPUS.—Unless the return to a writ of *habeas corpus* shows that the caption and detention are legal at the time of the service of the writ, the prisoner ought to be discharged; and a return showing a caption and detention upon valid process since such service is not sufficient. *In re Doo Woon* (U. S. Dist. Ct., Or.), I, 333.
2. RETURN TO A WRIT OF HABEAS CORPUS, WHICH SETS OUT IN FULL THE RECORD of the proceedings under which the petitioner is held, is a full and complete answer to every allegation contained in the petitioner's application for his discharge, and being as admitted as true, negatives the same. *In re Waldrip* (Ariz.), I, 44.
3. NO APPEAL LIES FROM AN ORDER OR JUDGMENT OF THE DISTRICT COURT, directing the discharge of a prisoner after a hearing on an application for a writ of *habeas corpus*, either by the defendant named in such writ or by the people. *In re Clasby* (Utah), I, 524.

4. HABEAS CORPUS—PRISONER DENIED SPEEDY TRIAL.—A prisoner who has not been brought to trial within the time required by section 8 of the *habeas corpus* act, may apply to be discharged on *habeas corpus*. *In re Garvey* (Col.), IV, 247.
5. THE SAME—DETENTION OF PRISONER FOR FIVE TERMS.—A prisoner who is held in custody for five successive terms of court without being tried is entitled to be discharged on *habeas corpus*. *Id.*
6. PETITION FOR A DISCHARGE ON HABEAS CORPUS DENIED.—*Ex Parte Finley on Habeas Corpus* (Cal.), IV, 192.

See CHINESE RESTRICTION ACT; CONSTITUTIONAL LAW, 9; CRIMINAL LAW AND PRACTICE, 44; FUGITIVES FROM JUSTICE.

HARBOR COMMISSIONERS.

See BOARD OF HARBOR COMMISSIONERS.

HEARSAY.

See EVIDENCE.

HIGHWAY.

See STREETS AND HIGHWAYS.

HOLIDAY.

See EQUITY, 2.

HOMESTEAD.

1. SUPERIOR COURT SITTING AS A COURT OF PROBATE HAS NO JURISDICTION to try the title to real estate as between adverse claimants, although, for the purpose of selecting a homestead, it may examine into the title to a given parcel of land mentioned in the inventory. *Estate of Burton* (Cal.), I, 254.
2. A HOMESTEAD FOR THE USE OF THE SURVIVING WIFE OF A DECEDENT can not be set apart under section 1465 of the code of civil procedure so as to include a part of the separate estate of the decedent when there is common property. *Estate of Lord, Deceased* (Cal.), II, 129.
3. A FINDING THAT CERTAIN PARCELS OF LAND OF A DECEDENT which his widow prays may be set apart to her as a homestead could not be divided will not be sustained when the allegations of the petition for the homestead show the contrary. *Id.*
4. WHEN THERE IS NO VALID HOMESTEAD IN EXISTENCE, an order of the court setting the same aside to an insolvent is a nullity. *Matzen* v. *Shaeffer* (Cal.), II, 126.
5. HOMESTEAD—EXISTING INDEBTEDNESS—EXEMPTION.—A debtor may declare a homestead upon his property, so as to render the same exempt from execution as against an existing indebtedness which has not been reduced to judgment, nor become a statutory lien upon the exempted premises by attachment or otherwise, although the effect of allowing the exemption will be to leave the debtor insolvent. *Barnett et al.* v. *Knight et al.* (Col.), II, 864.
6. HOMESTEAD STATUTES—CONSTRUCTION OF.—Homestead exemption is entirely a creature of statute. The statutes authorizing it are not in derogation of the common law, for at common law the creditor had no right to sell the debtor's land. Such statutes should be liberally construed. *Id.*
7. CONVEYANCE BY DEBTOR OF HOMESTEAD IN CONSIDERATION OF FUTURE SUPPORT. A conveyance by an insolvent debtor of his homestead, the value of which is less than that allowed by statute, is not void as against an existing general creditor, although part of the consideration for such conveyance is an agreement on the part of the grantee to aid in the future support of the grantor. *Id.*
8. HOMESTEAD DECLARATION—VALUE OF PREMISES.—A statement in a declaration of homestead with respect to the value of the premises, that "the cash value of the said above-described premises is three thousand dollars," is a sufficient compliance with the provisions of section 1263 of the civil code requiring the declaration to contain an estimate of the actual cash value of the homestead. *Read* v. *Rahm et al.* (Cal.), III, 150.

9. HOMESTEAD — ABANDONMENT — INSOLVENCY PROCEEDINGS.—A homestead created under the act of 1852 can not be subjected to a forced sale in insolvency proceedings. It is the duty of the judge of the insolvency court to set such premises aside to the debtor; and his neglect or refusal so to do is not a conclusive adjudication that such premises are not a homestead, nor is it equivalent to an abandonment. *Dascey et al.* v. *Harris, Assignee, etc.*, (Cal.), III, 203.
10. A HOMESTEAD HAVING BEEN REGULARLY CREATED CAN NOT BE ABADONED except in the manner designated by statute. *Porter and Wife* v. *Chapman et al.* (Cal.), III, 204.
11. HOMESTEAD—ABANDONMENT—INTENTION.—A homestead is not abandoned by the removal of the husband therefrom and residing elsewhere with his family, either in the state or out of it, when their intention was not to relinquish or abandon it, but to return and make it their home. *Id.*
12. THE SAME—A MORTGAGE OF A HOMESTEAD BY A HUSBAND AND WIFE, and a reconveyance by the mortgagee to the husband, is not an abandonment of the homestead. *Id.*
13. WHEAT GROWING UPON A HOMESTEAD IS A PART THEREOF, and does not pass to an assignee in insolvency of the husband. *Dascey et al.* v. *Harris, Assignee, etc.* (Cal.), III, 202.
14. FINDINGS—HOMESTEAD—RESIDENCE.—Finding that the defendants did not, nor did either of them, reside on the demanded premises at the time of filing their declaration of homestead held supported by the evidence. *Grange* v. *Gough et al.* (Cal.), IV, 604.

See APPEAL, 25, 26; HUSBAND AND WIFE, 1; MISTAKE, 3.

HOMICIDE.

See MURDER AND MANSLAUGHTER.

HUSBAND AND WIFE.

1. PROPERTY OF A HUSBAND IS PRESUMED TO BE COMMUNITY PROPERTY in the absence of evidence to the contrary; and upon a declaration of homestead being made and recorded thereon by the wife, becomes, by operation of law, the estate in joint tenancy of the husband and wife, of which they are jointly seised in equal shares. *Schuler* v. *Savings and Loan Society* (Cal.), I, 125.
2. HUSBAND AND WIFE MAY CONTRACT TOGETHER IN RELATION TO PROPERTY in which they are joint owners, and it would seem that the wife is entitled to the fruits of such contract as her separate property. *Id.*
3. POSSESSION OF THE WIFE AS TO THE COMMUNITY PROPERTY IS THE POSSESSION OF THE HUSBAND, and he can not, except in cases of conversion, sue her for the possession of such property or for his interest therein. *Id.*
4. WIFE OF A DEFENDANT IN AN ACTION OF EJECTMENT, AGAINST WHOM A JUDGMENT IS RENDERED, who was in possession of the premises at the commencement of the action, in the absence of proof of a separate property in her, will be presumed to be in possession under her husband, and can be evicted under the judgment against him. *Huerstal* v. *Muir* (Cal.), I, 475.
5. COMMUNITY PROPERTY—HUSBAND'S POWER OF DISPOSITION OVER.—Subsequent to the husband-and-wife act of 1879, a husband can not enter into a valid contract for the sale of community property without his wife joining therein. A vendee under such contract, with knowledge that the subject-matter thereof was community property, can not recover damages for the husband's failure to convey. *Holyoke* v. *Jackson* (Wash.), II, 788.
6. COMMUNITY PROPERTY, PROOF OF—HUSBAND AND WIFE.—It is not necessary to prove that property is, in fact, the product of the joint efforts of the husband and wife in order that it may be declared community estate. If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise, or descent, or by exchange of his individual property, or from the rents, issues, or profits of his separate estate, it belongs to the community, although the wife rendered no assistance in its acquisition. *Lake* v. *Lake* (Nev.), IV, 159.
7. SEPARATE AND COMMUNITY PROPERTY—PROFITS—LABOR AND SKILL OF SPOUSES. The profits of separate property which accrue mainly from the property rather than from the joint efforts of the husband and wife, or either of them, belong to the owner of the property, although the labor and skill of one or both of the spouses

may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of both, they belong to the community. *Id.*

8. THE SAME—PROFITS RESULTING FROM HOTEL.—The profits resulting from the ordinary use of a hotel, the separate property of the husband, either from renting or carrying on the business himself, belong to the husband as his separate estate. *Id.*

9. HUSBAND AND WIFE—SEPARATE PROPERTY—RENTS, ISSUES, AND PROFITS.—All the property owned by a husband at the date of his marriage, as well as that subsequently purchased by him, and the rents, issues, and profits thereof, up to March 7, 1865, the date of the first statute governing the property rights of husband and wife, belongs to him as his separate property. Under such statute, the rents, issues, and profits of the separate estate of the husband did not become common property. *Id.*

10. PROPERTY ACQUIRED DURING COVERTURE—COMMUNITY PROPERTY.—Property acquired during coverture presumptively belongs to the community, and the burden is on the person asserting the contrary to overcome such presumption by proof, sufficiently clear and satisfactory to convince the court or jury of the correctness of his claim. *Id.*

11. HUSBAND AND WIFE—SEPARATE AND COMMUNITY PROPERTY.—Real estate bought by a husband after marriage, with money resulting from the ordinary use by him of the property which he owned at the time of his marriage, is not community property. *Estate of Higgins, Deceased* (Cal.), III, 358.

12. GOODS SOLD FOR FAMILY USE—ACCOUNT—WIFE'S LIABILITY—CAUSES OF ACTION. After the passage of the act of October 21, 1878, the wife is liable in an action jointly with her husband for goods sold for family use and so used, although the same were sold to the husband on his individual credit. An account for goods so sold, partly prior and partly subsequent to the passage of such act, contains two causes of action, one against the husband for the prior sales, and the other against the husband and wife for the subsequent sales. *Watkins* v. *Mason* (Or.), III, 567.

13. WIFE'S LIABILITY FOR GOODS SOLD FOR FAMILY USE.—A wife can not be held liable, under section 10 of the act of 1878, in an ordinary action for goods sold and delivered, when such goods were sold upon the order of the husband, although the same were devoted to family use. *Smith* v. *Sherwin* (Or.), II, 813.

See CHINESE RESTRICTION ACT, 30–32; DIVORCE; GIFT, 2; HOMESTEAD, 12; HUSBAND AND WIFE; MARRIED WOMEN; PARTIES, 10; SURVIVORSHIP, 1.

HYDRAULIC MINING.

See ACQUIESCENCE, 1; ADVERSE POSSESSION, 9; INJUNCTION, 9, 15; NUISANCE, 1, 17.

IDENTIFICATION OF PAPERS.

See APPEAL, 70.

IMMIGRATION COMMISSIONER.

1. COMMISSIONER OF IMMIGRATION—SALARY OF—STATE CONTROLLER.—Under the act of March 15, 1883, the state controller is not authorized to pay the salary and office expenses of the commissioner of immigration out of any money in the treasury, being the excess of moneys collected beyond salary and office expenses prior to the passage of such act. After such act went into effect, the salary and office expenses of such commissioner should be paid only out of the fund made up from fees collected, fines, etc., which were required by its terms to be paid into the treasury, without any deduction for salary and office expenses. *Forrester, Commissioner of Immigration,* v. *Dunn, State Controller* (Cal.), III, 676.

IMPEACHMENT OF WITNESSES.

See WITNESSES.

IMPLIED CONTRACTS.

See CONTRACTS.

IMPORT DUTIES.

See DUTIES ON IMPORTS.

IMPRISONMENT FOR DEBT.

See ARREST AND BAIL, 1-4.

IMPROVEMENTS.

See MECHANIC'S LIEN, 23.

INDEX.

See APPEAL, 95.

INDIANS.

1. DISTRICT COURT HAS NO JURISDICTION TO TRY AN INDIAN BELONGING TO A TRIBE which is recognized and treated with as such by the federal government, having its chief and tribal laws, for killing another Indian belonging to the same tribe. *State ex rel. Truman* v. *McKenney, Judge, etc.* (Nev.), I, 407.
2. NEITHER THE GENERAL LAWS OF THE TERRITORY NOR OF THE STATE, DEFINING CRIMES and providing for their punishment, were intended to apply to crimes committed by one Indian against another of the same tribe. *Id.*
3. POLICY OF THE FEDERAL AND STATE GOVERNMENTS TOWARDS THE INDIAN TRIBES within their borders, and the *status* of such Indians, stated and examined. *Id.*
4. INDIAN COUNTRY—UMATILLA RESERVAVION.—The Umatilla Indian reservation is a place within the geographical limits and general jurisdiction of the state of Oregon; but it is also a tract of country to which the Indian title is not extinguished, and which has been permanently set apart by treaty as a reservation for the sole and exclusive use of the Indians thereon, and is therefore "Indian country" within the meaning of that phrase as used in the revised statutes. *United States* v. *Barnhart et al.* (U. S. Cir. Ct., Or.), IV, 590.
5. INTERCOURSE WITH INDIAN TRIBES.—The United States has jurisdiction over the intercourse with tribal Indians, and congress may prohibit and provide for the punishment of acts relating to affecting such intercourse anywhere in the United states. *Id.*
6. JURISDICTION OF UNITED STATES COURTS OVER CRIMES COMMITTED ON THE RESERVATION.—The United States courts of the district of Oregon have jurisdiction over all crimes committed on the Umatilla reservation by a white man on the property or person of an Indian, and *vice versa*, so far as the same have been defined by an act of congress. *Id.*
7. PLEA OF AUTREFOIS ACQUIT.—B. and A. were indicted in the United States court for the crime of manslaughter, committed in killing Indian William on the Umatilla reservation, and pleaded to the indictment a former acquittal, from which plea it appeared they had been indicted and tried in the state court for the murder of said Indian, and acquitted, to which plea there was a demurrer: *Held*, That the crime of which the defendants were acquitted in the state courts was not the same as that charged in the indictment in the United States court, and therefore the plea was bad. *Id.*
8. INDIAN RESERVATIONS—LANDS OF, WHETHER EMBRACED IN TERRITORY.—None of the lands embraced within the boundaries of Idaho territory are excepted out of said territory by the provisions of section 1 of the organic act, except such as, by the provisions of pre-existing treaties with Indian tribes, were not, without the consent of such Indian tribes, to be included within the limits of any state or territory. *Utah and Northern R'y Co.* v. *Fisher, Assessor, etc.* (Idaho), II, 180.
9. AT THE TIME OF THE PASSAGE OF THE ORGANIC ACT OF IDAHO TERRITORY no treaty existed between the United States and any Indian tribe providing that the lands embraced within the Fort Hall Indian reservation should not, without the consent of such tribe, be included within any state or territory; such lands, therefore, became part of Idaho territory upon the passage of said organic act, March 3, 1863, and have not since been withdrawn from or excepted out of said territory. *Id.*
10. THE FORT HALL INDIAN RESERVATION BEING A PART OF AND INCLUDED WITHIN IDAHO TERRITORY and Oneida county, the property of the Utah and Northern

Railway Company situated thereon is subject to taxation for territorial and county purposes. *Id.*

11. INTRODUCTION OF LIQUORS INTO INDIAN RESERVATION—SEIZURE OF PROPERTY USED FOR.—Property in the possession of a person other than the owner, who is using it for the purpose of introducing spirituous liquors upon an Indian reservation, may be seized by the government agent in charge of such reservation, and delivered over to the proper officer, to be proceeded against for ferfeiture. If such agent surrenders the property to the owner upon demand, he does not thereby admit the illegality of the seizure. *Webb* v. *Nickerson* (Or.), IV, 485.
12. THE SAME—JUSTIFICATION OF SEIZURE, HOW ALLEGED.—In an action brought in a state court against the government agent, for a wrongful taking of such property, the agent may justify his seizure under section 2140 of the United States revised statutes, although the state court had no jurisdiction of the offense for which the seizure was made. Such justification, however, to be available as a defense, must allege that the person introducing the spirituous liquors was either a white person or an Indian. *Id.*

See MURDER AND MANSLAUGHTER, 20.

INDICTMENT.

See ASSAULT WITH DEADLY WEAPON; CRIMINAL LAW AND PRACTICE; ESCAPE FROM STATE PRISON; FALSE REPRESENTATIONS; MURDER AND MANSLAUGHTER.

INDIGENT SICK.

See COUNTY PHYSICIAN, 1.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 1.

INFANTS.

1. MINORITY—PERIOD OF, WHEN TERMINATES—STATUTE OF LIMITATIONS—EJECTMENT. A male person born on the eleventh day of April, 1855, becomes of age, under section 26 of the civil code, at the first minute of the eleventh day of April, 1876. His right of action for recovery of real estate in the adverse possession of another commences to run from such day, and expires after a period of five years, on the tenth day of April, 1881. *Ganahl et al.* v. *Soher et al.* (Cal.), IV, 609.
2. INFANT'S POWER TO NOMINATE ATTORNEY—SERVICE OF SUMMONS ON INFANT—APPOINTMENT OF GUARDIAN AD LITEM.—An infant over the age of fourteen has not power to nominate an attorney, nor has the court authority to appoint a guardian *ad litem* to appear for such infant defendant until after summons has been served upon him. *McCloskey* v. *Sweeney* (Cal.), IV, 290.
4. SUIT BY INFANTS—APPOINTMENT OF PROCHEIN AMI.—A bill in equity brought on behalf of certain infants, by their next friend, need not show that an order appointing such *prochein ami* had been entered of record before the bill was filed. *Bent* v. *Maxwell Land etc. Co.* (N. M.), III, 8.
5. DECREE IN FAVOR OF INFANTS—IMPEACHMENT OF.—A decree entered apparently in favor of certain infant complainants, upon the consent of their guardian *ad litem*, may subsequently be set aside, upon the application of such infants, if such guardian's consent was obtained by fraud. *Id.*
6. INFANTS' LEGAL ESTATE IN LAND—POWER OF EQUITY OVER.—In the absence of statutory authorization a court of equity has no inherent jurisdiction to divest infants of their legal estates in land. *Id.*

See GUARDIAN AND WARD; PARTIES, 6; SUMMONS, 2.

INFORMATION.

See CRIMINAL LAW AND PRACTICE.

INFORMATION AND BELIEF.

See ASSIGNMENT, 5; MORTGAGE, 15; REMOVAL OF CAUSES, 21; STREETS AND HIGHWAYS, 18.

INFRINGEMENT OF COPYRIGHT.

See COPYRIGHT, 3.

INFRINGEMENT OF PATENT.

See PATENT.

INJUNCTION.

1. EQUITY WILL NOT, AT THE INSTANCE OF AN ALLEGED GRANTEE HAVING MERELY A CONSTRUCTIVE POSSESSION, enjoin a sheriff's sale of the real property conveyed under a subsequent execution against the grantor, where the validity of the conveyance to such grantee, and his title depending thereon, are fairly questioned. *Coolidge* v. *Forward* (Or.), I, 832.
2. AN INJUNCTION WILL NOT ISSUE TO RESTRAIN PROCEEDINGS UNDER A JUDGMENT rendered in favor of a plaintiff in an action prosecuted by him by a name in which merely the initial of his Christian name was stated, when no objection was made to the complaint on that ground. *Boyd* v. *Platner* (Mont.), I, 798.
3. PROSECUTION IN ONE COURT OF AN ACTION FOR THE RECOVERY OF AN INDEBTEDNESS, in which an attachment has issued against the property of the debtor, can not be stayed by another court of co-ordinate jurisdiction, at the instance of the assignee, for the benefit of creditors of such debtor, although the plaintiffs in the attachment suit had agreed to release the property attached and dismiss such suit. *Wilson* v. *Baker* (Cal.), I, 550.
4. ENJOINING SHERIFF'S SALE—DISPUTED TITLE—PRIOR LEGAL ACTION.—In the absence of statutory enactment, a sheriff's sale of real property, under an execution issued on a judgment against the plaintiff's grantor, will not be enjoined at the instance of an alleged prior purchaser, when the plaintiff's title to the property is *bona fide* disputed, and has never been settled in a court of law, unless the complaint shows some ground of equity jurisdiction, such as fraud. *Coolidge* v. *Forward* (Or.), III, 702.
5. RESTRAINING EXECUTION SALE—ALLEGATION OF COMPLAINT.—A complaint in an action to restrain the sale of the plaintiff's real property, under an execution issued upon a judgment against her, must aver that the plaintiff was neither served nor appeared in the action in which such judgment was entered. An allegation that she had no knowledge of such judgment until after it was rendered is not sufficient. *Farrington* v. *Brown et al.* (Cal.), III, 103.
6. INJUNCTION DOES NOT LIE TO PREVENT THE ENFORCEMENT OF A DECREE OF FORECLOSURE entered in another action, in violation of a stipulation therein. The plaintiff's remedy is in such action. *Buell* v. *San Francisco Savings Union* (Cal.), III, 51.
7. INJUNCTION AGAINST EXECUTION OF SHERIFF'S DEED.—A complaint in an action to enjoin a sheriff from executing to the purchaser a deed to certain real property, alleged to belong to the plaintiff, and to have been sold as the property of a third person, under an execution against him, is fatally defective, unless the existence of the judgment under which such execution issued be averred. *Schuyler* v. *Boughton, Sheriff, etc.* (Cal.), II, 890.
8. WRIT OF REVIEW.—AN EX PARTE ORDER FOR AN INJUNCTION can not be annulled on a proceeding for a writ of review, because an appeal lies from the order granting the injunction. *Golden Gate Consolidated Hy. M. Co.* v. *Superior Court* (Cal.), II, 736.
9. INJUNCTION SUSPENDING WORKING OF HYDRAULIC MINES.—AN EX PARTE injunction restraining a hydraulic mining corporation from conducting its business in a manner injurious to the plaintiff is not void, although granted without notice to the defendant. Such injunction does not suspend the general and ordinary business of the corporation. *Id.*
10. SERVICE OF INJUNCTION—RETURN OF.—An affidavit of the service of an injunction, which states that the same was personally served upon the superintendent and managing agent of the defendant, is *prima facie* evidence of such fact, although the affidavit subsequently states that the affiant is informed and believes that the person served was such superintendent and agent. *Id.*
11. THE SAME—REVIEW OF EVIDENCE OF SERVICE OF INJUNCTION ON CERTIORARI.—Conceding that the supreme court will, on an application for a writ of certiorari, look into the affidavits used on a motion to quash the service of an injunction, when the jurisdiction of the court to which the writ issues depends upon such evidence,

still, when such evidence is conflicting, it will be held that the lower court had jurisdiction. *Id.*

12. NOTICE OF INJUNCTION—WHEN NOT SERVED.—A defendant against whom an injunction has issued, who has actual notice thereof, will be bound thereby, although the same is not served. *Id.*

13. AN INJUNCTION NEED NOT BE SERVED BY A SHERIFF; it may be served by any person authorized to serve a summons. *Id.*

14. INJUNCTION AGAINST CORPORATION—AGAINST WHOM BINDING.—An injunction restraining any acts of a corporation, and addressed to it and its agents, binds not only the intangible artificial being, but also all the individuals who act for the corporation in the transaction of its business, to whose knowledge the decree comes. *Morton* v. *Superior Court of Tulare County* (Cal.), III, 488.

15. HYDRAULIC MINING—ORDINARY BUSINESS OF CORPORATION—INJUNCTION.—It is no part of the general and ordinary business of a corporation to do unlawful acts, such as dumping mining debris, tailings, and other refuse matter from a mine, into watercourses which wash the debris and materials down upon and spread them over the land of another, rendering it valueless for agricultural or other purposes. The doing of such acts may be restrained by a temporary injunction, at the instance of the party injured, without notice to the corporation, although the effect of such injunction will be to prevent the successful carrying out of the business in which the corporation is engaged. *Hobbs* v. *Amador and Sacramento Canal Co. et al.* (Cal.), IV, 523.

16. PRELIMINARY INJUNCTION, MODIFICATION OF—JUDICIAL DISCRETION.—The court that grants a preliminary injunction may, in the exercise of its judicial discretion, modify the same at any time before the case terminates in a final judgment; and the order of modification will not be disturbed, unless there has been an abuse of discretion. *Id.*

17. WASTE—DESTRUCTION OF FRUIT TREES—INJUNCTION.—The entry upon land, and digging up and removing fruit trees growing thereon, is an injury to the inheritance in the nature of waste, which courts of equity will enjoin. *Silva* v. *Garcia* (Cal.), III, 769.

18. INJUNCTION—TRESPASS — COSTS—JUDGMENT.—In an action to restrain continual trespassing upon land, the plaintiff is not entitled to costs when the court finds against him on the fact constituting the alleged trespass, nor to a judgment restraining the defendant from asserting a claim to any portion of the property described in the complaint, when it is nowhere alleged that the defendant asserts any such claim. *Lawrence et al.* v. *Getchell* (Cal.), III, 619.

19. INCONVENIENCE TO DEFENDANTS.—In granting relief, where the complainant's rights are certain, and the invasion of them is clearly established, a court of equity can not consider the inconvenience which will result to defendants from the relief. Nor is it the province of the court to speculate upon, or to consider, or to suggest, any possible modes by which defendants may avoid the injurious consequences of their acts, or to decide upon the conflicting opinions of scientific experts concerning the feasibility or sufficiency of such suggested modes. The only duty of the court is to grant the relief to which the complainant is entitled upon the law and facts of the case. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct., Cal.), I, 183.

20. AN ORDER DISSOLVING AN INJUNCTION ISSUED UPON AN EX PARTE APPLICATION restraining the defendants in an action of ejectment from interfering with the crops growing on the premises sought to be recovered, on the ground that such defendants were insolvent and a judgment against them for the value of the crops would be unavailing, will not be reversed where there is nothing in the record to show upon what the court below acted in the hearing and determination of the motion to dissolve. *Fowler* v. *Heimrath* (Cal.), I, 484.

21. SUPREME COURT HAS NO POWER TO STAY THE OPERATION OF AN INJUNCTION restraining the appellant from diverting the waters of a certain stream, pending an appeal. *Swift* v. *Sheppard* (Cal.), I, 133.

22. INJUNCTION TO BE OBEYED.—When a party to an injunction doubts its extent or significance, he ought not to disobey or disregard it, with a view of testing it in this particular, but he should apply to the court for a modification or construction of it. *Wells, Fargo & Co.* v. *Oregon R'y & N. Co.* (U. S. Cir. Ct., Or.), I, 547.

See CONTEMPT; EASEMENT, 4; FINDINGS, 3; JUDGMENT, 29; LANDLORD AND TENANT, 7; NUISANCE, 1-17; QUIETING TITLE, 3; TAXATION, 34-40, 69; WATER RIGHTS.

INSANE PERSONS.

1. CONTRACT OF AN INSANE PERSON IS MERELY VOIDABLE, not absolutely void. The right to avoid it is a personal right, which can only be exercised by the insane person, or his guardian or representatives. Other parties to the contract who are of sound mind are not affected until it is avoided by the party entitled to disaffirm it. *Caldwell* v. *Ruddy* (Idaho), I, 295.
2. INSANE PERSON CAN NOT DISAFFIRM HIS CONTRACT WITHOUT RETURNING THE CONSIDERATION therefor. *Id.*
3. INSANITY—OPINION OF NON-PROFESSIONAL WITNESS.—Upon the trial of an issue involving the sanity of a person, the opinion of a non-professional witness, based upon his own observations, is competent evidence and is entitled to weight, according to the intelligence of the witness, his means of information, and the character of the derangement. *Parkhurst* v. *Hosford* (U. S. Cir. Ct., Or.), IV, 311.
4. INSTRUCTIONS CONCERNING INSANITY, IF ERRONEOUS, will not authorize a reversal, when there was no evidence that the defendant was insane. *People* v. *Wheeler* (Cal.), II, 70.

See WILLS, 8.

INSOLVENCY.

1. SUPERIOR COURT HAS NO JURISDICTION TO MAKE A DECREE DISCHARGING AN ALLEGED INSOLVENT, where the schedule filed by him was not sworn to before the judge having jurisdiction, as required by section 4 of the insolvency act of 1852, but was sworn to before a notary public. *Baker* v. *Everhart* (Cal.), I, 779.
2. JURISDICTION IN A PROCEEDING OF INVOLUNTARY INSOLVENCY is acquired by the service of a copy of the petition of the creditors and the order of the court on the debtor. In such case no notice to creditors is required to be published. *Ohleyer, Assignee, etc.*, v. *Bunce* (Cal.), II, 142.
3. IN SUCH PROCEEDING, WHEN IT DOES NOT APPEAR FROM THE RECORD whether or not the debts of the petitioning creditors were created after the act of 1880 took effect, the appellate court will presume that they were in support of a finding that the order appointing an assignee was duly made and given. *Id.*
4. ADJUDICATION OF INSOLVENCY, EFFECT ON PENDING ACTIONS.—An order of the district court adjudging the defendant in a pending action an insolvent debtor, and staying all proceedings against him, does not deprive the court in which such action is pending of jurisdiction, so as to make its subsequent action void. *State ex rel. Barnett* v. *Fifth District Court* (Nev.), II, 630.
5. A FRAUDULENT DISCHARGE IN INSOLVENCY CAN NOT BE TAKEN advantage of by a creditor of the insolvent, when the latter pleads such discharge in an action by the former, who fails to allege that the fraud was unknown to him, or that he had no notice of the same at the time of the adjudication of the insolvency. *Rosenthal* v. *Schnieder* (Wash.), II, 735.
6. EVERY CREDITOR OF AN INSOLVENT DEBTOR MAY FILE HIS OPPOSITION to the debtor's discharge, and may control the same to the extent of withdrawing it, whether other creditors consent thereto or not. *Brangon* v. *His Creditors* (Cal.), I, 120.
7. A PROCEEDING BY CERTAIN CREDITORS OF A DEBTOR TO HAVE HIM ADJUDGED AN INSOLVENT, and that a surrender of his property be made for the benefit of his creditors, may be dismissed upon the motion of the debtor for delay in prosecuting such proceeding, which is unaccounted for and inexcusable. *Kornahrens* v. *His Creditors* (Cal.), I, 563.
8. A CREDITOR WHO HAS JOINED IN THE EXECUTION OF A COMPOSITION AGREEMENT with his debtor can not object that the sum due him has not been paid in accordance with its exact terms, if he afterwards agrees to a different time and mode of payment. *Paige* v. *Carter* (Cal.), I, 558.
9. ASSIGNEE IN INSOLVENCY—APPOINTMENT OF, HOW ALLEGED.—In alleging the appointment of an assignee in insolvency, it is not necessary to aver that notice was given to the creditors before the appointment of the assignee, or that they failed to act, or that the assignee was competent to be appointed. An averment that by an order duly given and made a certain person was appointed assignee is sufficient. *Bull, Assignee, etc.*, v. *Houghton et al.* (Cal.), III, 369.
10. ACTION BY ASSIGNEE—FRAUD ON CREDITORS—DEMAND.—In an action by an assignee in insolvency to recover back moneys unlawfully paid by the insolvent with intent to defraud his creditors, no demand is necessary to be averred or proved. *Id.*

11. IT IS THE DUTY OF AN ASSIGNEE IN INSOLVENCY TO TAKE INTO HIS POSSESSION the entire estate of the insolvent and hold it for the parties interested. *Id.*
12. ORDER IN INSOLVENCY PROCEEDING—CERTIORARI.—An order of the superior court, directing the assignee of an insolvent debtor to pay out of the estate certain moneys, if erroneous, is not in excess of its jurisdiction, and consequently not reviewable on *certiorari*. *Brown* v. *Superior Court* (Cal.), III, 30.
13. PROMISSORY NOTE—ASSIGNMENT—DISCHARGE IN INSOLVENCY.—A promissory note made in this state, payable to a citizen thereof, and assigned without indorsement to a resident of another state, is discharged by the discharge of the maker in insolvency, after the assignment of such note, and before the same was indorsed by the payee. *Thomas* v. *Crow* (Cal.), III, 436.
14. INSOLVENCY—DISCHARGE UNDER ACT OF 1880—JUDGMENT.—A debtor may be discharged, under the insolvency law of April 16, 1880, from a judgment rendered against him in 1876. *Hundley* v. *Chaney* (Cal.), III, 199.
15. DATE OF CREATION OF DEBTS IN INSOLVENCY.—The appellate court will not presume that debts were not created after the insolvent act of 1880, where the proceedings in involuntary insolvency are attacked collaterally. *Ohleyer* v. *Bunce* (Cal.), III, 639.
16. SUFFICIENCY OF NOTICE OF APPOINTING ASSIGNEE is established by the recitals in the order appointing the assignee, as against an alleged fraudulent transferee of the insolvent's personalty. *Id.*
17. A SALE OF MERCHANDISE NOT IN THE ORDINARY COURSE OF BUSINESS by an insolvent will charge the purchaser with knowledge of the seller's condition, and that he made the sale to prevent the merchandise from being ratably distributed among his creditors, and brings the case within the provisions of the insolvent act of 1880. *Id.*
18. OREGON INSOLVENCY ACT—CASE IN JUDGMENT.—The Oregon assignment act of 1878 (Ses. L. 36) declares a general assignment by an insolvent debtor invalid, unless made for the equal benefit of all the creditors of the debtor; but when so made, it shall have the effect to dissolve a prior attachment in an action in which judgment is not then taken, but does not affect a prior judgment against the debtor or an execution thereon. S., an insolvent debtor, whose debts equaled $38,000 and assets did not exceed $30,000, confessed judgment in favor of his Portland creditors for $6,690, and had execution issued thereon, and levied on his stock of goods worth $27,000, and sold thereby $25,000 worth of them to said Portland creditors, with the intent to prefer them to his San Francisco ones, and with the understanding that they would return the same to him as soon as he was able to settle with the latter on terms sufficiently favorable to himself. The day after this judgment was confessed, an action was commenced against S. on the claims of the San Francisco creditors, amounting to $29,205.40, and an attachment issued therein and levied on said stock of goods, then in the hands of the sheriff, on said execution. Soon after, and before judgment could be had in the latter action, S. made a general assignment for the benefit of his creditors, in pursuance of which the assignee therein claimed the possession of the remainder of the goods—about $2,000 in value—still held under the attachment, on the ground that the same was dissolved by the assignment, and threatened to take the same and dispose of them thereunder; thereupon the attaching creditor filed a bill to restrain the assignee, and have the assignment set aside as fraudulent, to which there was a demurrer. *Held*, 1. That the attaching creditor could maintain the suit; and 2. That the confession of judgment and assignment being parts of one common purpose and transaction by which the Portland creditors were preferred to the San Francisco ones in the distribution of the insolvent debtor's property, the assignment was fraudulent and void. *Kahn* v. *Salmon* (U. S. Cir. Ct., Or.), III, 383.
19. MONEY IN HANDS OF INSOLVENT—DELIVERY OF, TO ASSIGNEE.—The superior court has jurisdiction in cases of insolvency after an examination of the insolvent, and upon application of the receiver to order the insolvent to deliver all money in his hands belonging to the estate to the assignee. *Goodday* v. *Superior Court* (Cal.), III, 762.
20. INSOLVENCY—JUDGMENT AFFIRMED. *In re Laswell* (Cal.), IV, 220.

See ATTORNEYS, 1; EQUITY, 1; FRAUD, 3, 5; HOMESTEAD, 9, 13; INJUNCTION, 3, 20.

INSTRUCTIONS.

1. SUPREME COURT WILL REVERSE A JUDGMENT FOR THE REFUSAL OF THE LOWER COURT to give an instruction only when it was the duty of the court to give such

instruction exactly as requested. If any part of a single instruction ought not to have been given, the rejection of the whole thereof will be affirmed. Such result follows when any part of a single instruction is so worded that it may have a tendency to mislead the jury, as well as when a part directly declares that to be law which is not law. *People* v. *Davis* (Cal.), I, 341.

2. WHEN AN INSTRUCTION ASKED FOR CONTAINS SEVERAL PROPOSITIONS, one or more of which are erroneous, and the balance unobjectionable, it is not error for the court to refuse the whole request. *People* v. *Biddlecome* (Cal.), I, 691.
3. INSTRUCTIONS PARTLY CORRECT AND PARTLY INCORRECT.—A refusal to give instructions partly correct and partly incorrect is not ground for a reversal of the judgment. *Garlick* v. *Bowers* (Cal.), IV, 501.
4. INSTRUCTING THE JURY IN ACCORDANCE WITH THE LANGUAGE OF THE PENAL CODE without identifying the sections read by number is not error. *People* v. *Lewis* (Cal.), I, 131.
5. INSTRUCTION AS TO WHAT CONSTITUTES A MURDER, GIVEN IN THE LANGUAGE OF THE STATUTE, is not error. *People* v. *Biddlecome* (Cal.), I, 691.
6. REFUSAL TO GIVE AN INSTRUCTION WHICH HAS ALREADY BEEN GIVEN in substance is not error. *Id.; People* v. *Lee Hung* (Cal.), I, 45; *Martin* v. *Hill* (Utah), I, 629.
7. REFUSAL OF THE COURT TO GIVE AN INSTRUCTION WHICH HAS ALREADY BEEN GIVEN in substance in reference to the nature of and degree of credibility to be attached to the testimony of an accomplice is not error. *Territory* v. *Kinney* (N. M.), I, 801.
8. REFUSAL TO GIVE INSTRUCTIONS ASKED IS NOT ERROR if the jury have been properly instructed upon all questions left for their determination. *Brewster* v. *Baxter* (Wash.), II, 791.
9. REFUSAL OF THE COURT TO GIVE CERTAIN INSTRUCTIONS AS ASKED is not error when the same are given in substance. *City of Seattle* v. *Busby* (Wash.), II, 45.
10. INSTRUCTIONS ASKED FOR WHICH HAVE ALREADY BEEN GIVEN in substance may be refused. *People* v. *Righetti* (Cal.), IV, 380.
11. INSTRUCTIONS ASKED FOR, IF THE SAME HAVE ALREADY BEEN GIVEN in substance, may be refused. *Cook* v. *Territory* (Wy.), IV, 340.
12. AN INSTRUCTION, ALTHOUGH ERRONEOUS, IF NOT PREJUDICIAL TO THE DEFEATED PARTY, is not ground for reversal. *Winans* v. *Sierra Lumber Co.* (Cal.), IV. 277.
13. INCONSISTENT INSTRUCTIONS WILL NOT WARRANT A REVERSAL when it appears that the beaten party was not prejudiced thereby. *Bassett* v. *Inman* (Col.), II, 534.
14. ERROR IN AN INSTRUCTION can not be taken advantage of by the party at whose request it was given. *Harrison* v. *Spring V. H. G. Co.* (Cal.), III, 349.
15. A JUDGMENT WILL BE REVERSED for contradictory instructions, notwithstanding the court charged that the one meant the same thing as the other. *Id.*
16. REFUSAL OF THE COURT TO GIVE AN INSTRUCITON CONTAINING HYPOTHETICAL RECITALS of fact having no bearing on the matters at issue is not error. *Dreyfuss* v. *Tompkins* (Cal.), I, 350.
17. AN APPELLANT CAN NOT COMPLAIN OF THE INSTRUCTIONS OF THE COURT as to the test of his liability which were given at his own request. *Gilson* v. *Price* (Nev.), I, 373.
18. INSTRUCTIONS GIVEN AT THE REQUEST OF A PARTY can not be afterwards complained of by him. *People* v. *Biggins* (Cal.), II, 887.
19. INSTRUCTIONS TO A JURY SHOULD BE GIVEN WITH REFERENCE TO THE IMMINENT FACTS in a case. If the facts are controverted, the instructions upon them should be hypothetical; if uncontroverted, the court may assume them. *Id.*
20. WHEN THE CHARGE AS A WHOLE STATES THE LAW CORRECTLY the verdict will not be disturbed, although some part of the charge, standing alone, may contain some inaccuracy of expression which would be subject to criticism. *Id.*
21. INSTRUCTIONS, CONFLICTING SENTENCES IN.—Sentences in an instruction are to be read in connection with the context; and if the instructions, as a whole, when so read, fairly and correctly present the law applicable to the case, the judgment will not be reversed merely because there is an apparent conflict between certain isolated sentences. This rule applied to an instruction as to the amount of evidence necessary to prove a justification of a homicide. *People* v. *Turcott* (Cal.), II, 490.
22. INSTRUCTION PARTLY CORRECT AND PARTLY INCORRECT.—An instruction is fatally erroneous which contains one correct and one incorrect proposition respecting the legal effect of the evidence, and which tells the jury that if the evidence sustains either proposition the verdict must be in a certain manner. *Downing* v. *Bartels*, (Col.), II, 506.

23. JUDGMENT WILL NOT BE REVERSED BECAUSE CERTAIN PORTIONS OF THE CHARGE ARE OBJECTIONABLE, if such charge as a whole is unobjectionable. *People* v. *McDowell* (Cal.), I, 478.
24. INSTRUCTION NOT BASED ON EVIDENCE.—Where an instruction is based upon a state of facts not warranted by the evidence, the manifest tendency of which is, from the special features of the case, to lead the jury to infer the existence of such facts, and thereby take an erroneous view of the case, it is ground for reversal, although such instruction may be correct as an abstract proposition of law. *Willis* v. *Oregon Railway and Navigation Co.* (Or.), III, 240.
25. INSTRUCTIONS UPON ABSTRACT QUESTIONS OF LAW NOT APPLICABLE TO THE ISSUES and proofs are erroneous, but will not warrant a reversal unless the effect has been to confuse or withdraw the material issues from the attention of the jury. *Davis* v. *Utah S. R. R. Co.* (Utah), II, 453.
26. PRACTICE—INSTRUCTIONS.—In charging a jury, the court should give only such instructions as are pertinent to the evidence. A refusal, therefore, to instruct the jury as to the weight to be given to circumstantial evidence is not error, when there was no such evidence in the case. *People etc.* v. *Ah Too* (Idaho), II, 171.
27. INSTRUCTIONS GIVEN IN ABSENCE OF DEFENDANT.—Giving instructions to the jury in a prosecution for murder, in the absence of the defendant, will not warrant a reversal, if subsequently, and while the defendant is present, the court directs the jury to disregard his former instructions, and then instructs them to the same effect as previously. *People* v. *Soto* (Cal.), IV, 46.
28. RECALLING AND RECHARGING JURY—SUPERIOR COURT.—The superior court has inherent power to cause the jury to be brought into court after they have retired for deliberation, and to give them further instructions, although the jury themselves did not demand to be recalled. *People* v. *Perry* (Cal.), III, 674.
29. INSTRUCTIONS AS TO MATTERS OF FACT—WEIGHT OF EVIDENCE.—If testimony has been introduced to prove a certain matter, the court may instruct the jury that testimony has been introduced tending to prove such matter, and such instruction is not an expression of the court's opinion as to the weight or effect of the evidence, nor as to what fact has been proved. *Id.*
30. INSTRUCTIONS AS TO EFFECT OF EVIDENCE.—It is error for the court, in a criminal prosecution, to charge the jury that the evidence shows certain facts tending to convict the defendant. *People* v. *Casey et al.* (Cal.), III, 26.
31. THE COURT MAY CHARGE THE JURY as to an admitted fact. *People* v. *McFadden* (Cal.), III, 425.
32. FAILURE OF THE COURT TO GIVE AN INSTRUCTION which would have been proper is not error, if such instruction is not requested. *Leitensdorfer* v. *King* (Col.), III, 135.
33. REFUSAL TO GIVE INSTRUCTIONS ASKED FOR will not be reviewed on appeal, unless an exception is taken to the action of the trial court. *Leahy* v. *S. P. R. R. Co.* (Cal.), II, 693.
34. INSTRUCTIONS—REVIEW ON APPEAL.—Instructions given on the trial will not be reviewed on appeal when the transcript fails to contain all of the instructions, or a certificate that those portions included therein were all that were given upon the points covered thereby. *Oregon R'y and Navigation Co.* v. *Galliher* (Wash.), II, 552.
35. INSTRUCTIONS.—If the record of a case on appeal to this court contains no evidence, and an instruction given to the jury be correct under any possible state of the evidence, such instructions must be sustained. *People* v. *Mooney* (Idaho), II, 124.
36. AFTER THE JURY HAVE BEEN INSTRUCTED AND HAVE RETIRED to consider their verdict, in a prosecution for a felony, the court can not, at their request, give them further instructions in the absence of the defendant. If such were done, it would be presumed that the irregularity *per se* constituted error. *Territory* v. *Lopez* (N. M.), I, 821.
37. INSTRUCTIONS TO A JURY MUST BE IN WRITING, and the materiality of a fact will be presumed from the fact that the court below deemed it proper to give an instruction thereon. *Id.*
38. INSTRUCTION TO A JURY IN A PROSECUTION FOR A FELONY, that they must determine a certain fact "according to the evidence, and just as they would any fact in their own private affairs," is erroneous, as tending to mislead the jury to infer there from that they might determine every question submitted to them by the same rule. The jury should have been instructed that they should be convinced or satisfied from the evidence, to the exclusion of every reasonable doubt, that such fact had been established. *Id.*

39. INSTRUCTIONS—REFUSAL TO GIVE, ON ACCOUNT OF LENGTH.—The court can not refuse to give instructions requested on account of their length, when the same are handed in at the time prescribed by the court's rules. *Andrews* v. *Runyon* (Cal.), IV, 81.
40. INSTRUCTIONS—EVIDENCE —Where the evidence warrants it, the court must give every instruction asked which suggests a theory of the case not suggested by the instructions given. *People* v. *Wong Chow* (Cal.), IV, 131.
41. FAILURE OF THE TRIAL COURT TO NOTE THE MODIFICATIONS MADE BY HIM in an instruction as asked for in the manner required by statute is an irregularity, but not such an error as to warrant a reversal. *Denver and Rio Grande R'y Co.* v. *Harris* (N. M.), I, 826.
42. OBJECTIONS TO INSTRUCTIONS MUST BE MADE AT TRIAL.—Objections to instructions will not be considered by the appellate court, unless the same were made and saved at the trial in a proper bill of exceptions. *Territory* v. *Young* (Mont.), IV, 468.
43. INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION, to which no exceptions are taken, are not grounds for reversal. *Cook* v. *Territory* (Wy.), IV, 340.
44. INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION need not be marked. It is sufficient if it appear that the charge was given. *People* v. *Samuels* (Cal.), IV, 382.
45. INSTRUCTIONS—INFLUENCING VERDICT.—While a judge is not warranted in saying anything to the jury to influence their decision, or indicate to them what their verdict should be, or even to unduly hasten a verdict, he may charge them upon the great desirability, both to the litigants and to the public, of having them agree upon a verdict. *Stepy* v. *Stark* (Cal.), IV, 663.
46. INSTRUCTIONS—DUTY OF COURT TO GIVE—EXTENT OF.—Courts are not required to state in their instructions to juries the entire law upon any given subject, but only so much thereof as may be applicable and essential to the issue and facts of the case on trial. To this extent the charge must be correct and explicit, and if unexceptionable in these essentials, it will not be ground for reversal that the instructions are not strictly correct as universal propositions of law. *Denver, S. P. and P. R. R. Co.* v. *Conway* (Col.), IV, 672.
47. THE INSTRUCTIONS OF THE LOWER COURT EXAMINED, and held to correctly state the law as applicable to the issues and the evidence. *Id.*
48. UNITED STATES COURT—VERDICT INSTRUCTIONS.—Courts of the United States have power to direct the jury to bring in a verdict for the defendant, and should do so in all cases where a verdict, if given for the plaintiff, would be set aside as not sustained by the evidence. *Alexander* v. *Tennessee etc. Min. Co.* (N. M.), III, 71.

See APPEAL, 58, 59; ASSAULT WITH DEADLY WEAPON, 3; BURGLARY, 11; CRIMINAL LAW AND PRACTICE; EVIDENCE; INSANE PERSONS, 1, 2; MURDER AND MANSLAUGHTER, 4, 6, 9; NEGLIGENCE; NEW TRIAL; ROBBERY, 2.

INSURANCE.

1. LIFE INSURANCE—PRELIMINARY PROOF OF DEATH—RECITALS IN.—In an action on a life insurance policy, papers offered for the purpose of showing compliance with the requirements of the policy as to preliminary proof of death are *prima facie* evidence, against the insured, of the facts recited therein, including the manner of the insured's death. *Walther* v. *Mutual Life Ins. Co.* (Cal.), III, 368.
2. INSURANCE—NOTICE OF LOSS—JOINDER OF DEFENDANTS.—Where two insurance companies join in issuing a policy against loss by fire, in which the several liability of each is distinctly set forth, and a loss occurs, they may be joined as defendants in an action to recover the loss; and a notice of such loss, addressed to one of such companies, but delivered to the agent of both, is equivalent to a notice to both. *Bernero* v. *Insurance Cos.* (Cal.), III, 292.
3. POLICY OF INSURANCE—APPLICATION FOR INSURANCE—PLEADING.—In an action to enforce a policy of insurance, the complaint need not allege the terms of the application for insurance, when such application was merely verbal. *Tischler* v. *California Farmers' Mutual Ins. Co.* (Cal.), IV, 535.
4. FIRE INSURANCE—STIPULATION AGAINST GUNPOWDER—FIRE-WORKS.—The keeping of fire-works without the written consent of the insurer will not invalidate a policy of fire insurance, although the same provides that if gunpowder is kept on the premises without such written consent the policy shall be void. *Id.*

5. FIRE INSURANCE—INCREASE OF RISK—ANSWER.—In an action on a policy of fire insurance, facts showing an increase of the risk, if relied on as a defense, must be set up in the answer. *Id.*
6. FIRE INSURANCE—INCREASE OF RISK—CONDITIONS—WAIVER.—A condition in a policy of fire insurance, that if the risk is increased the policy shall be void, enters into and forms part of the contract of insurance; and if the policy contains an express stipulation that such a condition shall not be waived, except by indorsement on the policy, it can not be waived in any other way. *Gladding et al.* v. *Insurance Ass'n* (Cal.), IV, 106.
7. THE SAME—EVIDENCE—FINDINGS.—The finding that the increase of risk in this case was not occasioned by the plaintiffs, or with their consent, reviewed, and held unsupported by the evidence. *Id.*
8. FIRE INSURANCE—CONSTRUCTION OF POLICY—KEEPING GIANT POWDER—FACTS MATERIAL TO RISK—PLEADING—AMENDMENT.—Keeping giant powder and other explosives in a building adjacent to the building insured is not equivalent to keeping such articles within the insured premises. Whether the fact that such articles were kept in the adjacent building was material to the risk, and therefore a matter of which the insured was bound to notify the insurer, is a question for the jury, and in an action on the policy must be raised by the answer. The answer in this case having omitted to raise such question: *Held*, that it was too late to do so by an amendment after trial. *Sperry et al.* v. *Insurance Co. of North America* (U. S. Cir. Ct., Col.), IV, 650.
9. ASSIGNMENT OF POLICY OF INSURANCE.—The assignment of a policy of life insurance as collateral security for advances made to a third person vests the legal title to the policy in the assignee. The interest of the owner of the policy only extends to what remains of it after such advances have been paid. Until such advances have been paid, the owner of the policy, although he is under no obligation to repay the same, is not entitled to have it surrendered to him, or to receive the amount due thereon. *Gilman* v. *Curtis* (Cal.), II, 135.
10. ASSIGNMENT OF POLICY OF LIFE INSURANCE AS COLLATERAL—RIGHTS OF ASSIGNEE. The assignment of a policy of life insurance as collateral security for advances to be and which were made by the assignee vests the legal title to the policy in the latter. The interest of the owner of the policy only extends to what remains of it after such advances have been repaid. Until such repayment, the assignee can not be made to surrender the policy. *Gilman* v. *Curtis* (Cal.), IV, 429.
11. FINDINGS HELD INDEFINITE, UNCERTAIN, AND INCONSISTENT. *Id.*

INTENTION.

See BOUNDARIES, 1; CRIMINAL LAW AND PRACTICE, 19; FRAUD, 19.

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 12, 13; JUDGMENT, 17; NEGLIGENCE, 23.

INTERLOCUTORY JUDGMENT.

See APPEAL, 77, 78; PARTITION, 4.

INTERPLEADER.

1. BILL OF INTERPLEADER—CONFLICTING CLAIMS FOR RENT—A TENANT AGAINST WHOM TWO CONFLICTING claims for the rent due are made may institute a bill of interpleader against such claimants, to determine their respective rights to the rent. In such action the court may determine the ultimate rights of the parties on each side as between themselves. *Schluter* v. *Harvey* (Cal.), II, 730.

INTERPRETER.

1. AN INTERPRETER SHOULD BE INSTRUCTED TO INTERPRET AND REPORT to the court every statement made by the witness. An instruction to him not to interpret and report statements which the witness learned from others is error, which, if it appears to have been acted upon, will warrant a reversal. *People* v. *Wong Ah Bang et al.* (Cal.), III, 58.

2. REMOVAL OF INTERPRETER OF CRIMINAL COURTS OF SAN FRANCISCO.—An interpreter, appointed for the criminal courts of the city and county of San Francisco, under the act of March 8, 1876, by the county judge, the mayor, and the police judge of said city and county, may be removed from office, and another interpreter appointed in his place, after the adoption of the present constitution, by the votes of the mayor and superior judge, although the police judge votes against such removal. *People ex rel. Glover* v. *Becker* (Cal.), IV, 303.

INTERVENTION.

See ADMIRALTY, 27.

INVENTION.

See PATENTS.

IRRIGATION.

See WATER RIGHTS.

JAIL GUARD.

1. GUARD OF JAIL—CAUSE OF ACTION—JUDGMENT.—A person who is employed on three several occasions as temporary guard of the county jail has three separate and distinct causes of action for the recovery of his salary, and a judgment obtained on one is no bar to a recovery on the others. *Hughes* v. *Mendocino County* (Cal.), III, 201.

JEOPARDY.

See KIDNAPING, 1.

JETTISON.

See ADMIRALTY, 20.

JOINT DEBTORS.

See CONSIDERATION, 3.

JOINT TENANTS.

See HUSBAND AND WIFE, 1.

JUDGE.

1. JUDGE OF THE COUNTY COURT WHO HAS BEEN OF COUNSEL FOR THE DEFENDANT in a former trial is disqualified from acting as judge in a subsequent trial of such case. It is his duty to certify such case up to the district court for further proceedings, either upon his own motion or that of a party desiring the same, without imposing as a condition to such removal that the party so desiring shall pay all the accrued costs. *Connell* v. *Gavitt* (Col.), I, 488.
2. LEGISLATURE MAY ENJOIN UPON A JUDGE THE PERFORMANCE OF JUDICIAL FUNCTIONS in matters outside of actions and proceedings in courts, and in such cases the provisions of the practice act in reference to appeals to the supreme court are inapplicable. *Lyon County* v. *Esmeralda County* (Nev.), I, 395.

JUDGMENT.

1. FINAL JUDGMENT, WHAT IS.—While proceedings are pending for a review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and until litigation on the merits is ended, there is no finality to the judgment in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it. *Gillmore* v. *American Central Ins. Co.* (Cal.), I, 872.

2. A JUDGMENT ENTERED FOR THE PLAINTIFF IN ONE ACTION, in pursuance of a stipulation which authorized the entry of the same upon a final judgment for the plaintiff in another action, is premature, if entered pending a motion by the defendant in the latter action for a new trial, although entered more than one year after a judgment in the latter action, from which no appeal was taken. *Id.*
3. A JUDGMENT TO BE FINAL MUST SHOW BY THE ENTRY ON THE RECORD, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day. A judgment which does not conform to such requirements will be held to be introductory merely. *Dusing* v. *Nelson* (Col.), II, 110.
4. JUDGMENT IN PROBATE COURT, WHAT IS.—Entries in the docket of the probate court that complaint was filed, summons issued and served, demurrer to complaint filed, and the entry of fees for overruling demurrer and entering default, with various entries of fees, do not constitute a judgment for either party. An appeal from such a judgment to the district court should be dismissed. *Gray, Sheriff, etc.*, v. *Cederholm et als.* (Idaho), II, 172.
5. JUDGMENT BY DEFAULT OUT OF TERM.—A judge of the district court has power to render judgment at his chambers, and out of term, in a case where the defendant has made default. *Murne* v. *Schwabacher Bros. & Co.* (Wash.), II, 799.
6. ENTRY OF JUDGMENT IN VACATION.—A judgment regularly rendered by a court in the transaction of its judicial business may be entered of record in vacation. *Sieber* v. *Frick* (Col.), II, 98.
7. JUDGMENT ON THE PLEADINGS IN AN ACTION FOR BREACH OF CONTRACT.—In an action to recover damages for breach of contract, where the answer admits the material allegations of the complaint, the plaintiff may move for judgment on the pleadings, or submit the question of damages to a jury. If he adopts the former course, without giving evidence of damages, the court can only award him nominal damages. *Hadlan* v. *Ott et al.* (Wash.), II, 565.
8. A PLAINTIFF IS NOT ENTITLED TO JUDGMENT UPON THE PLEADINGS when any of the material allegations of the complaint are denied by the answer. *Reich* v. *Rebellion Silver Mining Co. et al.* (Utah), II, 451.
9. JUDGMENT FOR THE PLAINTIFF ON THE PLEADINGS can not be rendered when the answer denies any of the material allegations of the complaint, or sets up new matter constituting a defense. *Miles et al.* v. *McCallan et al.* (Ariz.), II, 689.
10. JURISDICTION OVER THE PERSONS AS WELL AS SUBJECT-MATTER IN CONTROVERSY WILL ALWAYS BE PRESUMED in support of the judgments and orders of courts of general jurisdiction, when the same are questioned in collateral actions, and the record shows nothing to the contrary, although such jurisdiction does not affirmatively appear. *Hughes* v. *Cummings* (Col.), I, 608.
11. VALIDITY OF AN ORDER MADE BY THE COUNTY JUDGE SETTING ASIDE A JUDGMENT OF DISMISSAL, and reinstating a cause on the docket of the county court, can not be questioned in a collateral action, although the record fails to show that the requisite notice was given to the judgment creditor or his assignee, if the judgment has been assigned. If erroneous, the error can only be corrected in a direct proceeding. *Id.*
12. THE JURISDICTION OF THE COUNTY COURT OVER ITS JUDGMENTS IS NOT LOST upon filing and recording a transcript of the judgment of the justice of the peace in the office of the clerk of the district court. The object of such filing and recording is merely for the creation of a lien on the real property of the judgment debtor. *Id.*
13. VALIDITY OF A JUDGMENT FOR DIVORCE MAY BE COLLATERALLY ATTACKED FOR WANT OF JURISDICTION over the person of the defendant, when such fact affirmatively appears from the record, although such judgment recites that due service of process had been made. *Israel* v. *Arthur* (Col.), I, 286.
14. JUDGMENT CAN NOT BE RENDERED AGAINST ONE SUMMONED AS GARNISHEE until after judgment has been recovered in the action against the principal debtor. In proceedings against the garnishee he may show, either by the record or other competent evidence, that the judgment against the principal debtor was void for want of jurisdiction. *Smith* v. *Montoya* (N. M.), I, 152.
15. JURISDICTION OF A COURT OF GENERAL JURISDICTION WILL BE PRESUMED from the judgment itself, although the record does not recite the facts conferring jurisdiction; otherwise if the entire record discloses a want of jurisdiction. *Id.*
16. JURISDICTION OF COURTS, WHEN PRESUMED—ACTION ON JUDGMENT OF COURT OF GENERAL JURISDICTION.—The jurisdiction of courts of general jurisdiction is presumed, and the judgments and decrees of such courts are in all cases of at least *prima facie* validity. In pleading such judgment or decree as a cause of action or

as a defense, jurisdictional facts need not be stated. The same rules apply whether the judgment sued on is domestic, foreign, or of one of the sister states. *Bruckman* v. *Taussig* (Col.), IV, 670.

17. JUDGMENT OF SISTER STATE, ACTION ON—INTEREST ALLOWABLE.—Interest on a judgment of a sister state, as specified therein, is allowable in an action thereon in another state. *Id.*

18. CONSENT JUDGMENT, APPEAL FROM—DISMISSAL.—An appeal from a judgment of the justices' court, entered by consent, may be dismissed by the superior court, on its own motion. *Yeazell* v. *Superior Court etc.* (Cal.), III, 522.

19. RECORD OF COURT OF SISTER STATE—AUTHENTICATION OF EVIDENCE.—In an action in this state, a transcript of a record of a court of a sister state is admissible in evidence when the same is authenticated, in compliance with the federal laws, although the certificate of the clerk fails to state, as required by section 738 of the civil code, that such copy has been compared by him with the originals. *Bloomfield* v. *Humason, Executrix, etc., et al.* (Or.), III 614.

20. JUDGMENT OF SISTER STATE, IMPEACHMENT OF—SURPRISE—FRAUD.—The defendant in an action on a judgment rendered against him in another state, after due service of process, and opportunity to be heard, can not impeach the validity of such judgment, for reasons which might have been given in defense in the action in which the judgment was rendered, in the absence of surprise or fraud on the part of the judgment creditor. *Weir* v. *Vail* (Cal.), III, 405.

21. A MOTION TO SET ASIDE A JUDGMENT IS A DIRECT and not a collateral attack. *People etc.* v. *Mullan* (Cal.), III, 300.

22. VOID JUDGMENT—SERVICE OF SUMMONS BY PUBLICATION—SETTING ASIDE JUDGMENT.—A judgment purporting to have been rendered after a service of summons by publication is void if no affidavit for, or order authorizing service by, publication was ever made. Such judgment should be set aside upon motion by the defendant or his assignee. *Id.*

23. JUDGMENT—LIEN—EQUITABLE INTEREST.—A judgment is not a lien upon a mere equitable interest of the judgment debtor in land. *Bloomfield* v. *Humason* (Or.), III, 614.

24. JUDGMENT, ADMISSIBILITY OF, IN EVIDENCE—PARTIES AND PRIVIES.—The general rule that judgments and decrees are inadmissible as evidence, except in suits between parties and privies thereto, does not apply to a case where such decree is offered by the plaintiffs as a connecting link in a chain of title under which he claims, adverse to that of the defendants. *Wells* v. *Francis* (Col.), III, 217.

25. A MOTION FOR A JUDGMENT, PURSUANT TO A STIPULATION, can not be considered a trial on the merits. If a party to such stipulation is entitled to judgment, it is upon the stipulation which has been entered as an order of the court, and not upon a trial of the cause. A motion for a new trial in such case is irregular, and should be dismissed. *Id.*

26. WHERE JUDGMENT HAS BEEN RECOVERED IN EXCESS OF THE AMOUNT claimed in the declaration, and such excess is capable of exact computation, the proper practice on appeal is to permit the judgment creditor to file a remission of the excess, and if such is done, to affirm the judgment as to the residue; otherwise to reverse the judgment and order a new trial. *Orr* v. *Hopkins* (N. M.), I, 157.

27. COURTS HAVE NO AUTHORITY, UNDER SECTION 813 OF THE CODE OF CIVIL PROCEDURE, TO REVIVE A JUDGMENT rendered in favor of a partnership, and continue the same in the names of the surviving partners, and issue execution thereon in such names after more than six years have elapsed since the rendition of the judgment. *Boyd* v. *Platner* (Mont.), I, 798.

28. AFTER JUDGMENT HAS BEEN RENDERED AGAINST A PRISONER AND HE HAS BEEN COMMITTED to jail thereunder, the court has no power, even during the same term, to revise such judgment and increase the sentence imposed. *State of Oregon* v. *Cannon* (Or.), I, 836.

29. DECREE DIRECTING SALE OF STOCK SUBJECT TO INJUNCTION.—In an action to foreclose a lien upon certain mining property and certain stock, the sale of which is restrained by an existing injunction, there is no error in a decree which provides for the sale of the mining property, and if a deficiency then exists, that the plaintiff may, upon notice to the defendant, apply to the court for an order directing the sale of the stock, subject to the injunction, and the application of the proceeds of said sale to the payment of said deficiency, and that until such order no process issue for the sale of such stock. *Allenberg* v. *Zellerbach* (Cal.), I, 777.

30. WHERE A MAP OR OTHER PAPER IS REFERRED TO IN A JUDGMENT as a material part of it, it should be identified by the judgment and made a part of it. It

should not be referred to as a paper recorded elsewhere. *Emeric* v. *Alvarado* (Cal.), I, 708.

31. COPARTNERSHIP DEBT, MERGER OF, IN JUDGMENT AGAINST ONE PARTNER.—The plaintiff sued the defendant in error and several others on a partnership note. The defendant in error's co-defendants defaulted, and judgment was rendered against them. Afterward, and before the trial against the defendant in error, the plaintiff voluntarily amended his complaint so as to abandon the note and rest the action entirely upon the original indebtedness represented thereby. The trial was had more than two years after the default judgment was entered, and after several terms of the court had intervened. *Held*, that such default judgment was a bar to the continuance of the action against the defendant in error, and should not be set aside at the request of the plaintiff, and that the court had authority to render the same under section 146 of the code of civil procedure. *Exchange Bank of Denver* v. *Ford* (Col.), II, 624.

32. THE PAYMENT OF A JUDGMENT MAY OPERATE AS AN EQUITABLE ASSIGNMENT of the same to the party making the payment, although the judgment is satisfied of record. Equity, however, will not keep such judgment alive to the prejudice of subsequent *bona fide* purchasers of the premises on which it was a lien, who purchased the same when it appeared of record that the lien had been discharged, and who had no knowledge of any equities existing in favor of the person who discharged the judgment. *Persons* v. *Shaeffer et al.* (Cal.), II, 128.

33. PLAINTIFF IN AN ACTION OF EJECTMENT IS BOUND BY A FORMER JUDGMENT in an action between his grantor and the present defendant, wherein their respective titles to the land in controversy were put in issue. *Eakin* v. *McCraith* (Wash.), II, 785.

34. JUDGMENTS REGULARLY ENTERED ARE BEYOND THE COURT'S CONTROL after the expiration of the term during which they were rendered. *Exchange Bank of Denver* v. *Ford* (Col.), II, 624.

35. PRACTICE—JUDGMENT ROLL.—Papers in a case which properly form no part of the judgment roll, and which would on motion have been stricken from it, may be considered on appeal as a part of the record by stipulation of parties. *Grete* v. *Knott* (Idaho), II, 169.

36. FACTS STATED IN THE RECITALS OF A JUDGMENT of a court of general jurisdiction are presumed to have been proved by competent evidence, but such evidence properly forms no part of the judgment roll. *Id.*

37. JUDGMENT AND FINDINGS IN FAVOR OF THE PLAINTIFF WILL BE PRESUMED TO BE SUPPORTED by the evidence when the same is not produced before the appellate court. *Dusing* v. *Nelson* (Col.), II, 110.

38. PERSONS NOT PARTIES TO ACTION, DECREE RESERVING RIGHTS OF.—The rights of persons not parties or privies to an equitable action can not be injuriously affected by the judgment therein. Equity, however, has power to protect by reservation or limitation in such decree the rights of persons interested, although they are not parties. Such power is conferred by section 16 of the code of civil procedure. *Buck* v. *Webb et al.* (Cal.), II, 397.

39. DECREE ENFORCING RESULTING TRUST, RIGHTS OF CREDITORS UNDER RESERVATION IN.—A decree in an action to enforce a secret resulting trust upon certain property of a corporation required the company to convey such property to its *cestui que trust*, and provided that the latter should take the same subject to the payment therefrom "of any and all just debts against the corporation which may be determined by due process of law to be preferred over the claim of the *cestui que trust*." *Held*, that the effect of such provision was to create a specific lien on such property in favor of certain creditors of the company; that such lien would exist in favor of a creditor without notice of the existence of such secret trust, whose claim accrued prior to the rendition of such decree, and while the company was in possession and apparently the owner of the property; that a single action might be brought to establish such claim and to enforce the lien, and that in such action the corporation was a proper party. *Id.*

40. JUDGMENT, WHEN RELATES TO A FREEHOLD.—An appeal will not be dismissed on the ground that the judgment appealed from does not relate to a freehold, when it appears from the cross-bill filed by the appellants that the subject-matter of the litigation directly involved the title to several mines, and the findings on the issues presented by the cross-bill were against the appellants. *Atkinson* v. *Tabor* (Col.), II, 105.

41. A JUDGMENT, AS SUCH, CAN NOT BE LEVIED UPON AND SOLD UNDER EXECUTION. It must be levied upon as a debt, in the manner provided in subdivision 5, section 542, of the code of civil procedure. *Id.*

42. JUDGMENT BOOK AND ROLL—EVIDENCE OF JUDGMENT.—Any objection which might exist to the proof of a judgment, by means of the judgment book, is cured by the introduction of the judgment roll by the party objecting. *Packard* v. *Johnson* (Cal.), III, 763; *Packard* v. *Moss* (Cal.), III, 769.
43. SUFFICIENT EVIDENCE IN SUPPORT OF A JUDGMENT WILL BE PRESUMED to have been given, in the absence of an affirmative showing to the contrary. This principle is always applied in appeals upon the judgment roll alone. *Kelly* v. *Kelly* (Nev.), I, 143.
44. JUDGMENT OF THE LOWER COURT WILL BE REVERSED FOR FAILURE to find on a material issue. *Southern Pacific R. R. Co.* v. *Bennett* (Cal.), I, 140.
45. JUDGMENT WILL BE REVERSED WHEN THE TRIAL COURT FAILS TO FIND on all the material issues. *Duane* v. *Neumann* (Cal.), I, 565.
46. WHEN THERE IS EVIDENCE TO SUSTAIN THE JUDGMENT, the same will be affirmed. *Tweed* v. *Lowe* (Ariz.), I, 658.
47. WHEN THE EVIDENCE IS CONFLICTING, THE JUDGMENT WILL BE AFFIRMED. *Rathgeb* v. *Dasso* (Cal.), I, 566.
48. WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE, the judgment will not be reversed because the evidence does not sustain the findings. *Burton* v. *Nichols* (Cal.), I, 343.
49. JUDGMENT WILL BE REVERSED WHEN THERE IS NO EVIDENCE to support a material finding. *Crites* v. *Wilkinson* (Cal.), I, 565.
50. JUDGMENT WILL BE REVERSED WHEN THE EVIDENCE IS INSUFFICIENT to support the findings. *Wilson* v. *Baker* (Cal.), I, 551.
51. JUDGMENT OF THE LOWER COURT WILL BE REVERSED WHERE THE PREPONDERANCE OF EVIDENCE is so great as to a particular finding that the appellate court has no hesitancy in declaring such finding against the evidence. *Chamberlain* v. *Raymond* (Utah), I, 522.
52. JUDGMENT HELD SUPPORTED BY THE FINDINGS. *Keating* v. *Edgar, Auditor etc.* (Cal.), II, 572.
53. JUDGMENT DIRECTED TO BE ENTERED in accordance with the former opinion, reported in 1 West Coast Rep. 264. *Tucker, Sheriff etc.*, v. *Parks, Assignee etc.* (Col.), II, 613.
54. JUDGMENT REVERSED for error of court below in construction of contract sued on. *Martin* v. *Hill* (Cal.), II, 895.
55. JUDGMENT REVERSED FOR ERROR IN THE FINDINGS, and for the rejection of material evidence. *Millich* v. *Gutternich* (Cal.), III, 372.
56. JUDGMENT AFFIRMED UPON A REVIEW OF THE EVIDENCE. *Robinson* v. *Placerville etc. R. R. Co.* (Cal.), III, 23.
57. JUDGMENT AFFIRMED ON THE AUTHORITY OF *Swift* v. *Sheppard*, 11 Pac. C. L. J. 560. *Swift et al.* v. *Sheppard* (Cal.), III, 194.
58. JUDGMENT AND ORDER AFFIRMED on authority of *People* v. *Herbert*, 10 Pac. C. L. J. 293, and *People* v. *Raten*, 11 Id. 366. *People* v. *E. Bennett* (Cal.), III, 48.
59. JUDGMENT OF THE LOWER COURT MODIFIED. *Reynolds* v. *Weston et al.* (Cal.), III, 356.
60. JUDGMENTS IN CROSS-ACTIONS—SET-OFF—EXECUTION.—Plaintiff recovered a pecuniary judgment against defendant. In a cross-action the latter afterwards recovered a smaller judgment against the plaintiff. An execution was issued on the last-named and levied on the first-named judgment, and the same sold thereunder. Subsequently the plaintiff moved for and obtained an execution under this judgment. *Held*, that the judgments being in cross-action, each could be set off against the other, the smaller being thereby satisfied, the latter to the extent of the smaller, and an execution issued for the balance; that such right of set-off could not be defeated by the holder of the smaller judgment levying execution upon the larger, and selling the same for a mere fraction of the amount due upon it, thereby depriving the holder thereof of his entire judgment, and leaving the smaller judgment to stand against him, almost unsatisfied. *McBride* v. *Fallon* (Cal.), III, 94.
61. ACTION ON JUDGMENT—DEFENSE OF NUL TIEL RECORD—DEMURRER.—A defense of *nul tiel record* to an action on a judgment is good, and a demurrer thereto should be overruled. *Reynolds* v. *Robertson* (Cal.), IV, 609.
62. FINDINGS—PRIOR JUDGMENT—DECISION OF COURT.—Where a prior judgment is pleaded in bar of an action, a finding that on a certain day a court rendered "its decision" in favor of the defendants, is not a finding that a judgment was rendered. *Gray* v. *Noon et al.* (Cal.), IV, 588.
63. WHEN THE EVIDENCE IS CONFLICTING THE JUDGMENT OF THE LOWER COURT will not be disturbed. *Oakland Bank of Savings* v. *Applegarth* (Cal.), IV, 605.

See APPEAL; ATTACHMENT, 5, 6, 19; BILL OF PARTICULARS, 2; CERTIORARI; CLAIM AND DELIVERY; CONVERSION, 1; COSTS, 2, 4; DEED, 20; DEMURRER, 13; DIVORCE, 3, 7, 10; GROWING CROPS, 3; HUSBAND AND WIFE, 4; INJUNCTION, 2, 7, 20; INSOLVENCY, 14; MANDAMUS, 1; MECHANICS' LIENS, 19, 20; MORTGAGE, 15–17, 28; PARTITION, 1–4; PARTNERSHIP, 11; REPLEVIN, 7; SURETIES, 15.

JUDGMENT ROLL.

See APPEAL, 75; GUARDIAN AND WARD, 12, 13.

JUDICIAL NOTICE.

See JURY AND JUROR, 3; NUISANCE, 12.

JURISDICTION.

1. JURISDICTION IN DISTRICT OF RESIDENCE.—The act of congress providing that a person shall not be sued in any district other than that in which he resides, or shall at the time be found, is not one affecting the general jurisdiction of the court; but the provision is rather in the nature of a personal exemption in favor of the defendant, which he may waive. *Gray et al.* v. *Quicksilver Mining Co.* (U. S. Cir. Ct., Cal.), III, 538.
2. JURISDICTION—FOREIGN CORPORATION—Where a corporation organized under the laws of one state, and doing business in another, files in the proper office of the latter state a designation of a person residing therein in pursuance of the requirement of the laws of said state, upon whom process may be served, such corporation so filing such designation thereby waives its right to be exempt from suit in the national courts held in the district embracing said state, under the provisions of section 1 of the act of congress of 1875, relating to the jurisdiction of the United States courts; and consents to be sued in the district embracing the state where said designation is filed, and the business of such corporation is so carried on. *Id.*
3. JURISDICTION OF SUPERIOR COURT—AD DAMNUM CLAUSE.—The *ad damnum* clause of the complaint is the test of jurisdiction; and if the amount sued for, according to such clause, exceeds three hundred dollars, the superior court has jurisdiction. *Baily* v. *Sloan et al.* (Cal.), III, 295.
4. OPINION RENDERED WITHOUT JURISDICTION—PRECEDENT.—An opinion of the supreme court, rendered in a case in which it had no jurisdiction, can not be regarded as a precedent. *Trutch* v. *Bunnell* (Or.), III, 707.
5. PROCEEDINGS IN INFERIOR COURTS—JURISDICTION MUST APPEAR OF RECORD.—In proceedings in inferior courts the facts conferring jurisdiction and the power to act in a given case must affirmatively appear upon the face of the record. *Tompkins* v. *Clackamas County* (Or.), IV, 598.
6. REHEARING DENIED IN HUGHES v. CUMMINGS, 1 West Coast Rep. 608. *Hughes* v. *Cummings et al.* (Cal.), II, 121.

JURY AND JURORS.

1. QUALIFICATION OF JURORS, CITIZENSHIP OF.—A juror must be a citizen of the United States. If he is not, a want of such qualification vitiates a verdict of conviction, where there has been no negligence or want of watchfulness on the part of the defendant in failing to discover the disqualification. *People* v. *Reese et al.* (Utah), II, 440.
2. WAIVER OF QUALIFICATION.—Where a juror, in answer to a question put to him under the direction of the court, says he is a citizen of the United States, the defendant, if he has no reason to doubt the truthfulness of such statement, may examine such juror as to his other qualifications, without reference to his qualification of citizenship, and if it afterward appears that the juror was not a citizen, the objection to him on such ground will not be waived by failing to examine him as to his qualification in that respect. *Id.*
3. CHALLENGE OF JUROR—ACTUAL AND IMPLIED BIAS.—The challenge of a juror for implied bias under section 244 of the criminal procedure act, or for actual bias, under section 26 of the act of March 13, 1884, must specify the particular cause from which bias is to be inferred. The mere assertion, "I challenge the juror for implied bias," or, "I challenge the juror for actual bias," is not enough. *People etc.* v. *Hopt* (Utah), II, 283.

4. THE SAME—REVIEW OF RULING ON CHALLENGE.—Ruling of the trial court on a challenge of a juror for actual or implied bias will not be reversed when the record does not contain the evidence upon which such ruling was based. *Id.*
5. JUDICIAL NOTICE OF STATUTES—TRIAL OF CHALLENGES OF JUROR.—Courts will take judicial notice of the statutes and authoritative decisions of courts within their jurisdiction. Consequently, the trial of a challenge of a juror for actual bias, after the passage of the act of March 13, 1884, must be had by the court, without the intervention of triers, although such statute was never published, as provided by the act of January 19, 1854. *Id.*
6. POLYGAMIST AS JUROR—ACT OF MARCH 22, 1882, CONSTRUED.—Under the act of congress of March 22, 1882, a polygamist or bigamist is not prohibited from acting as a juror, except in the cases mentioned in section 5 thereof. The position of a juryman is not such an office or place of public trust, honor, or emolument as is contemplated by section 8 of such act. *Id.*
7. PEREMPTORY CHALLENGES BY PROSECUTION AFTER PASSING THE JURY.—After the prosecution has passed the jury, declining to exercise the right of peremptory challenge, and the defendant thereupon peremptorily challenges one juror, it is not error warranting a reversal for the court to allow the prosecution to then peremptorily challenge a juror. At most the action of the court would be a mere irregularity, not affecting any substantial right of the defendant. *People* v. *Majors* (Cal.), II, 580.
8. THE DECISION OF THE TRIAL COURT IN OVERRULING A DEFENDANT'S challenge to a juror for actual bias is not reviewable on appeal. *People* v. *Riley* (Cal.), II, 364.
9. THE MODE OF SELECTING A JURY IN CRIMINAL CASES, as stated in prior opinions of the court, affirmed. *Id.*
10. ONLY TEN PEREMPTORY CHALLENGES ARE ALLOWED A DEFENDANT on a trial for robbery. *Id.*
11. A CHALLENGE OF A JURY FOR CAUSE, ON THE GROUND THAT HE HAD SERVED ON A JURY which had tried a prisoner jointly indicted with the defendant, will not be sustained unless such facts appear in the record. *Mooney* v. *People* (Col.), II, 322.
12. ERRONEOUSLY SUSTAINING A CHALLENGE OF A JUROR FOR CAUSE is ground for reversal. *Id.*
13. JUROR, DISQUALIFICATION OF.—Impressions, or qualified and conditional opinions formed upon reports, which easily yield to the evidence of witnesses having personal knowledge of the facts and testifying under oath, constitute no valid objection to a juror. *People* v. *O'Loughlin* (Utah), I, 164.
14. BUT IF THE JUROR'S MIND IS CLOSED AGAINST AND IS IN OPPOSITION to the truth as it may be related by the witnesses, resists its force, and perverts the judgment, then such juror is disqualified for having "formed an unqualified opinion." *Id.*
15. IN CLOSELY BALANCED CASES MUCH WEIGHT SHOULD BE GIVEN to the judgment of the trial court before whom the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized. *Id.*
16. JUROR, PEREMPTORY CHALLENGE OF.—One of several defendants, jointly indicted and on trial, can not for himself alone peremptorily challenge a juror; and the same rule applies where all the defendants, jointly challenging, have exhausted their challenges under an act of congress, even though they claim the right to severally challenge under a territorial statute. *Id.*
17. AN OBJECTION TO A JUROR ON THE GROUND OF GENERAL OR ABSOLUTE DISQUALIFICATION, under the statute, differs from an objection on the ground of bias merely. The latter is addressed to the sound discretion of the trial judge; while under the former, if sustained by the evidence, the rejection of the juror becomes mandatory by an arbitrary rule of law. *Territory* v. *Lopez* (N. M.), I, 821.
18. ONE NOT THE HEAD OF A FAMILY IS NOT QUALIFIED TO ACT AS A JUROR.—As to what constitutes a head of a family, *quære*. But one of two equal partners living together in the same house, and under a contract with their employees by which they were to board and lodge them at their house, and all partners and employees were to eat at the same table, is not such head of a family within the meaning of the statute. *Id.*
19. CHALLENGE—IMPLIED BIAS—CONSCIENTIOUS SCRUPLES—TRIAL OF CHALLENGE.—Where a juror is challenged by the prosecution for implied bias, upon the ground that his testimony given during the examination as to his qualifications to act as a trial juror, shows that he has conscientious scruples against inflicting the death penalty, and the facts are denied by the defendant, the court may decide the challenge without a re-examination of the juror, if the defendant offers no testimony. *People* v. *Abbott* (Cal.), IV, 132.

20. DEATH PENALTY—CONSCIENTIOUS SCRUPLES—JUROR.—Neither a person who testifies that in a clear case of willful and deliberate murder, he would be, as a juror in favor of imprisonment for life and opposed to hanging; nor one who has, to a "certain extent," conscientious scruples against finding a man guilty of a crime for which he would be hanged, should be permitted or compelled to serve as a juror in a prosecution for murder. *Id.*

21. SUMMONING A JURY.—An order of the court directing the clerk "to draw the names of thirty-five good and lawful men," to be summoned from the body of the county, is a substantial compliance with sections 214 and 215 of the code of civil procedure. *People* v. *Wheeler* (Cal.), II, 70.

22. SUMMONING OF JURORS.—When jurors have not been drawn or summoned to attend the session at which the action is tried, the court may order a sufficient number to be forthwith drawn and summoned to attend court, or by an order entered on its minutes, direct the sheriff forthwith to summon so many good and lawful men of the county to serve as jurors as might be required. *Leahy* v. *Southern Pacific R. R. Co.* (Cal.), II, 693.

23. TRIAL JURORS—SUMMONING UNDER OPEN VENIRE—DISCRETION OF COURT.—The necessity of selecting additional trial jurors under an open venire is a matter within the discretion of the lower court. *State* v. *Angelo* (Nev.), IV, 482.

24. JUROR'S OATH—FORM OF—WHEN SUFFICIENT.—An oath administered to trial jurors as follows: "You, and each of you, do solemnly swear that you will well and truly try this cause, and a true verdict render according to the law and the evidence. So help you God," is substantially sufficient. *Id.*

25. IRREGULARITIES IN FORMATION OF GRAND JURIES.—The validity of an indictment for irregularities in the organization of the grand jury, not apparent upon the face of the record, can only be called in question by challenge or plea in abatement. A motion to quash the indictment does not lie. *Cook* v. *Territory* (Wy.), IV, 340.

26. SEPARATION OF JURORS DURING TRIAL.—A separation of one trial juror from his fellows during the progress of a trial for murder, for the purpose of speaking with a third person about a matter entirely disconnected with the trial, will not warrant a reversal. *Id.*

27. SEPARATION OF THE JURY.—The fact that the jury on the trial of a prisoner charged with murder, after having the case submitted to them, and being sent out to deliberate upon their verdict, separated without the permission of the court and mingled with the people, and afterwards reassembled, came into court, and returned a sealed verdict of guilty, is not a sufficient ground for setting aside such verdict, when it affirmatively appears from the record that the prisoner was not prejudiced by the proceeding. *Territory* v. *Nichols* (N. M.). I, 668.

28. THE SAME.—The record showed that the jury agreed upon their verdict at about four o'clock in the morning; that they wrote it out and each juror signed it; in this condition it was placed in an envelope, sealed, and taken in charge by the foreman of the jury; that the jurors then separated and reassembled at the court-house at eight o'clock the same morning and returned their verdict to the court; that the verdict was not in any way changed after the jury separated, but the verdict which they agreed to, signed, sealed up in the envelope, and delivered to their foreman, was the same verdict upon which they were polled. *Held*, that the refusal of the trial court to set aside the verdict upon these facts was not error. *Id.*

29. MISCONDUCT OF JURY—ACCEPTING HOSPITALITY FROM COUNSEL—IMPEACHMENT OF VERDICT.—Jurors are presumed to do their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that during a trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which rendered the act of invitation necessary; and a supper at the hotel of his associate counsel, under like circumstances. Such acts, however improper or indiscreet, could not in themselves have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict of conviction. *People* v. *Lyle* (Cal.), IV, 349.

30. MISCONDUCT OF JURY, WHEN WILL AUTHORIZE A NEW TRIAL.—To warrant setting aside a verdict, and granting a new trial for irregularities and misconduct of a jury, it must be either shown as a fact or presumed as a conclusion of law that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed. *Id.*

31. AFFIDAVITS OF JURORS AND BAILIFF—ADMISSIBILITY OF.—The affidavits of jurors and the bailiff having the jury in charge are admissible in support of the verdict. *Cook* v. *Territory* (Wy.), IV, 340.
32. JUROR NOT ON ASSESSMENT ROLL—NEW TRIAL—ARREST OF JUDGMENT.—The fact that a juror in a criminal prosecution is not assessed upon the assessment roll of the county is not, after verdict, a ground for a new trial or for an arrest of judgment. *People* v. *Samuels* (Cal.), IV, 382.
33. DISCHARGE OF JURY ON LEGAL HOLIDAY—CONSTRUCTION OF CONSTITUTION.—Section 5, article 6, of the constitution, does not prohibit all business in the superior court on a legal holiday or non-judicial day, except the issuing of injunctions and writ of prohibition. Such section is prohibitory of legislation establishing terms of court, during which only judicial business can be transacted, but leaves the legislature at liberty to allow or disallow the transaction of all or any class of judicial business upon legal holidays. Under section 134 of the code of civil procedure, and section 1142 of the penal code, a jury may be discharged on the twenty-second of February. *People* v. *Soto* (Cal.), IV, 46.
34. RECEIVING A VERDICT ON SUNDAY.—The act of the trial court in permitting the verdict of the jury in a criminal case to be rendered and received on Sunday is not error. *Territory of New Mexico* v. *Nichols* (N. M.), I, 668.
35. PAYMENT OF JURY FEES—SETTLEMENT OF BILL OF EXCEPTIONS.—After a judgment of nonsuit, in a civil action tried by a jury, the court may, by virtue of section 17 of the act of March 28, 1868, refuse to settle the plaintiff's bill of exceptions until the plaintiff has paid the jury fees. The settlement of a bill of exceptions is a proceeding in the action within the meaning of such section. *Lukes* v. *Logan, Superior Judge* (Cal.), IV, 218.
36. PAYMENT OF JURORS' FEES.—Where a plaintiff is ordered to pay the fees of the jury, the court has no authority, on the mere failure, neglect, or refusal of the plaintiff to comply with such order, to direct that the clerk issue a certificate to all of the jurors of the time and mileage to which each juror is entitled to pay, and that the same be paid out of the county treasury, as is provided in section 28 of the act of March 5, 1870. *Ex parte Makinney* (Cal.), II, 286.
37. HANDING FORM OF VERDICT TO JURY.—It is neither an error nor an irregularity for the clerk to hand to the jury, when they are leaving the court-room to consider the verdict, various forms of verdict corresponding to those which they were instructed might be brought in. *People* v. *Robinson* (Cal.), II, 591.
38. WHERE THE EVIDENCE IN REGARD TO A FACT IN ISSUE IS CONFLICTING, the jury should determine such fact, and with their determination the court will not interfere. *Sacalaris* v. *Eureka & Palisade R. R. Co.* (Nev.), I, 398.
39. FACTS CLEARLY PROVED NEED NOT BE LEFT TO THE JURY to decide. *Brewster* v. *Baxter* (Wash.), II, 791.
40. GRAND JURORS—CERTIFICATE OF DRAWING.—Where the certificate of the county clerk, sheriff, and justice of the peace recited that certain named persons were "drawn to serve as grand and petit jurors at the September term of the third judicial district of the territory of Wyoming, to be held at Sweetwater county," the omission of the word "court" from such certificate will not vitiate an indictment found by such grand jurors. *Donovan* v. *Territory of Wyoming* (Wy.), II, 66.
41. A GRAND JUROR CAN NOT BE COMPELLED TO TESTIFY, under sections 903, 920, and 926 of the penal code, as to how he voted with respect to the findings of a particular indictment; nor is such testimony permissible under section 995 of the penal code, which authorizes a motion to set aside an indictment where it has not been "found" as prescribed by such code. *Ex parte Sontag* (Cal.), I, 588.
42. GRAND JURY, WHILE ENGAGED IN THE DISCHARGE OF ITS DUTIES, is a component part of the court with which it is connected. *In re Tyler* (Cal.), I, 337.

See BILL OF EXCEPTIONS, 7; CONTEMPT, 1; CORPORATIONS, 14, 16; INSTRUCTIONS; MURDER AND MANSLAUGHTER, 19; PLEADING AND PRACTICE, 25; SUPPLEMENTAL PROCEEDINGS, 3.

JUSTICES' COURTS.

1. ACTION IN JUSTICE'S COURT.—Whether an action in the justice's court be with or without written pleadings, the facts essential to constitute a cause of action must be given in evidence, unless such evidence be waived by the conduct of the defendant, or by the averments or admissions of the answer. *Rio Grande Extension Co.* v. *Coby* (Col.), II, 613.
2. JURISDICTION OF JUSTICE'S COURT—SERVICE OF SUMMONS.—A justice's court has jurisdiction, without regard to the residence of the parties, when personal service

of the summons is made on the defendant in any precinct in the county, although such precinct is not the one in which the action is brought. Such service may be made by the constable of the precinct in which the action is brought. *Taylor* v. *Jenkins* (Or.), II, 817.

3. ACTION IN JUSTICE'S COURT INVOLVING VALIDITY OF TAX, CERTIFICATION OF, TO DISTRICT COURT.—A justice's court has no jurisdiction of an action involving a question as to the validity of a tax. Section 537 of the practice act, so far as it provides that such action shall be certified to the probate court for trial, is void, for the reason that the legislature could not confer such jurisdiction on the probate court. The justice's court having no jurisdiction to try such action, and there being no law authorizing its transfer to another court, the justice should dismiss the same. He can not certify it to the district court for trial. *Crismon, Collector, etc.*, v. *Tufts et al.* (Utah), II, 449.

4. NO INTENDMENTS CAN BE PRESUMED IN FAVOR OF THE JURISDICTION OF A JUSTICE OF THE PEACE, but each step towards its acquirement must be affirmatively shown. *Victor Mill and Mining Co.*, v. *Justice's Court* (Nev.), I, 299.

5. SECTIONS 1093 TO 1097, BOTH INCLUSIVE, OF THE CIVIL PRACTICE ACT, relating to service of summons, are applicable to justices' courts. *Id.*

6. ORDER OF A JUSTICE OF THE PEACE DENYING A MOTION TO SET ASIDE AN EXECUTION SALE OF LAND will be presumed to be correct unless the contrary appears. The party aggrieved by such order could have the action of the justice's court reviewed by the superior court on appeal from the judgment. *Peterson* v. *Weissbein & Co.* (Cal.), I, 853.

7. JUSTICES OF THE PEACE—FEES, FINES, AND FORFEITURES, DISPOSAL OF.—The statute of April 1, 1880, and sections 1457 and 1570 of the penal code, regulating the duties of justices of the peace as to the disposition of the fines and forfeitures collected by them, and also as to the disposal of the fees of the justices, in cases in which the fines were imposed or the forfeitures incurred, are not inconsistent and must be read together. If the fine or forfeiture was imposed or incurred without costs, or with costs which were not collected, it is the duty of the justice to collect the costs out of the fines or forfeitures paid to him, and to report the amount of his fees to the city treasurer, and pay it into the city treasury, as required by the statute of 1880, and pay over the residue into the county treasury, as required by sections 1457 and 1570 of the penal code. But if the fine was imposed or the forfeiture incurred with costs, and the fine or forfeiture with costs were paid, then the entire fine or forfeiture is to be paid into the county treasury, and the fees of the justices are to be paid into the city treasury. *County of Los Angeles* v. *City of Los Angeles* (Cal.), III, 441; *Los Angeles* v. *Morgan* (Cal.), III, 444.

8. LOS ANGELES CITY COURT—JUDGE OF—MAYOR.—The mayor of the city of Los Angeles can not, by a general deputation, substitute the justices of the peace for said city to act for him in his place and stead, as the judge of the city court. *Id.*

8. THE SAME—NO SUCH JUDICIAL OFFICER IS KNOWN to the law as a "justice of the peace of Los Angeles city and *ex officio* judge of the city court thereof." *Id.*

9. DUE-BILLS—JUSTICE'S COURT—JURISDICTION.—Due-bills, which specify no place of payment, are payable at the domicile of the debtor, and an action thereon in the justice's court must be brought in the precinct in which the maker resides. *Klopenstine* v. *Woolf* (Utah), III, 261; *Sanders* v. *Woolf* (Utah), III, 262.

10. JUSTICE'S COURT OF SAN JOSE—CRIMINAL JURISDICTION OF.—The justice's court of the city of San Jose, organized under the charter of 1874, has jurisdiction to try and determine a criminal action for one of the public offenses enumerated in section 115 of the code of civil procedure, charged to have been committed within the corporate limits of said city, until the organization of the police court for said city, and the election of the police judge thereof, under the general law of April 1, 1880, relative to courts of justice. *In re Carrillo* (Cal.), IV, 104.

11. JUSTICES OF THE PEACE—TERM OF OFFICE OF—ELECTION.—The act of 1880, amending section 110 of the code of civil procedure, fixing the term of office of justices of the peace at two years from the first day of January next succeeding their election, is constitutional. Such officers are to be elected in the year 1884. *Bailey* v. *Supervisors of San Joaquin Co.* (Cal.), IV, 185.

See AMENDMENT, 2; APPEAL, 23, 79, 80, 92; CERTIORARI, 6, 9, 11; CORPORATIONS, 28, 37; MANDAMUS, 7.

JUSTIFICATION.

See CONVERSION, 2.

KIDNAPING.

1. KIDNAPING—ASSAULT AND BATTERY—ONCE IN JEOPARDY.—An acquittal or conviction of an assault and battery is no bar to a subsequent prosecution for kidnaping, although the two offenses were committed by the same act. *State* v. *Stewart* (Or.), III, 229.

LABORER.

See CHINESE RESTRICTION ACT.

LACHES.

1. LACHES—STATUTE OF LIMITATIONS.—The defense of laches, neglect, or acquiescence is peculiar to equity courts, and will be enforced in proper cases. No formal plea of the statute of limitations is necessary to raise this defense in a court of equity. It may arise upon the bill as presented to the court, or upon the case as made by the complainant. *Pratt* v. *California Min. Co.* (U. S. Cir. Ct., Nev.), I, 87.
2. DILIGENCE IN PROSECUTING DEMAND—CHARACTER OF PROPERTY INVOLVED.—Where property is of a speculative, fluctuating value, parties are held to a stricter diligence in the assertion of alleged rights therein than where the property involved is of a value fixed, permanent, and little changeable. *Id.*
3. NEITHER THE DEFENSE OF THE STATUTE OF LIMITATIONS NOR THAT OF LACHES can be pleaded against the United States, although, as a general rule, whenever the government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. *United States* v. *Southern Col. etc. Co.* (U. S. Cir. Ct., Col.), I, 11.
4. COURTS OF EQUITY MAY REFUSE TO ENTERTAIN A CONTROVERSY when the lapse of time since the cause of action accrued is so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead, and the proofs lost or destroyed. *Id.*
5. A VENDEE UNDER A CONTRACT FOR THE SALE OF LAND IS NOT GUILTY OF LACHES in not paying the purchase price when the same was not to become due and payable until the vendor had executed him a deed, if such deed has never been executed or tendered. *Richards* v. *Snyder* (Or.), II, 282.

See ACQUIESCENCE, 1.

LAKES.

See WATER RIGHTS.

LANDLORD AND TENANT.

1. DESTRUCTION OF PREMISES, WHEN TERMINATES OBLIGATION TO PAY RENT.—The doctrine of the common law is that when lands and buildings are leased, and the tenant expressly covenants, without limitation or reservation, to pay rent for a term of years, he is not released from that obligation by the destruction of the building leased by accidental fire. *Harrington* v. *Watson* (Or.), I, 59.
2. EXCEPTION TO THIS RULE EXISTS WHEN THE LEASE OF AN UPPER STORY or basement, or an apartment in a building, founded upon the idea that it is not the intention of the lease to grant any interest in the land beyond that connected with the enjoyment of the room demised, and when this is destroyed by accidental fire, there is nothing upon which the demise can operate, and the lease terminates with the destruction of the thing rented. *Id.*
3. LEASES MUST BE CONSTRUED ACCORDING TO THE INTENTION of the parties, and with reference to the subject-matter. *Id.*
4. LEASE—COVENANT OF.—The execution of a lease for real estate implies a covenant to lessee for quiet enjoyment during the term. *Owens* v. *Wight* (U. S. Cir. Ct., Col.), I, 541.
5. SAME—REMEDY OF LESSEE.—In case of entry upon the demised premises by the lessor during the term, the remedy of the lessee is in damages by suit at law for breach of covenant, and not by action in equity for an accounting. *Id.*
6. FINDING THAT A TENANT WAS AUTHORIZED BY HIS LANDLORD TO MAKE CERTAIN REPAIRS to the leased premises held not to be supported by the evidence. *Savings and Loan Society* v. *Gerichten* (Cal.), I, 591.

7. TEARING DOWN BUILDINGS—WASTE—INJUNCTION—TENANT.—The tearing down or destruction of the demised buildings by a tenant, unless authorized by the terms of his lease, is waste, and if threatened, such actions will be restrained by injunction. *Davenport* v. *Magoon* (Or.), III, 328.
8. THE SAME—LEASE—ALTERATION BY TENANT.—A provision of a lease, authorizing the tenant to alter and repair the demised buildings so as to adapt them to other business than that for which they were originally intended, does not authorize him to tear down and destroy such buildings. *Id.*
9. SERVICE OF A NOTICE TO QUIT ON A TENANT MAY BE PROVED by parol. *Chung Yow* v. *Hop Chong* (Or.), III, 325.
10. NOTICE TO QUIT—DESCRIPTION OF PREMISES.—The description of the premises in such notice, to wit: "The premises situated on the west side of Second street, between Alder and Morrison streets, Portland, Or., occupied by you as a store," will be held sufficient, when it appears that such description was correct, and that the tenant was not misled thereby. *Id.*
11. LEASE—OFFER AND ACCEPTANCE—SUB-LETTING.—Where the owner of a building posts up a written notice therein, inviting bids for a lease of the premises, and in pursuance thereof a bid was handed in, which was accepted by the owner, who thereupon posted a notice that such bidder was the lessee of the building, and entitled to its possession, such facts constitute a valid contract of leasing between the owner and the bidder, so as to enable the latter to sub-lease the building, without any further acts on the part of the owner. *Id.*
12. LANDLORD AND TENANT—HOLDING OVER—NOTICE TO INCREASE RENT.—A tenant of demised premises, holding over after the expiration of his term, is presumed in law to hold over as tenant at the same rent he had previously paid, if no new agreement is made. But if he has notice from the landlord that if he retains possession he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to pay such increased rent. *Reitteman* v. *Brandenburg* (Col.), IV, 246.
13. GRAIN RAISED BY A TENANT UNDER A WRITTEN AGREEMENT WITH HIS LANDLORD that the same should be delivered to the latter and remain his property, and in no way subject to the disposal of the former, until certain advances made to him had been repaid, can not, after such delivery, be attached by a creditor of the tenant, until such advances have been paid. *Howell* v. *Foster* (Cal.), II, 743.
14. TENANCY FROM YEAR TO YEAR.—A tenant from year to year ceases to be such when he enters into a lease with his landlord for a definite time. *Brandexburg* v. *Reithman* (Col.), II, 774.

See INTERPLEADER; LEASE; MECHANICS' LIENS, 7, 9.

LARCENY.

1. THE LARCENY OF A BULL, COW, STEER, OR CALF IS GRAND LARCENY, irrespective of the value of the animal stolen, under section 487 of the penal code. *People* v. *Barnes* (Cal.), I, 772.
2. A BAIL BOND, GIVEN FOR THE RELEASE OF A PERSON HELD FOR GRAND LARCENY, is not void on the ground that no offense was alleged, and that the names of the owners of the property were not stated, when the complaint on which the prisoner was held charges him with the larceny of "two head of cattle of the value of twenty-five dollars each," the same being "the property of Page Bros." *Id.*
3. INDICTMENT FOR LARCENY SHOULD ALLEGE THE OWNERSHIP in the thing stolen as of the date when the offense was committed. *People* v. *Lewis* (Cal.), I, 131.
4. THE STEALING AT THE SAME TIME OF TWO HORSES, the property of different persons, may be treated as but one offense and charged as such in an indictment. *Heywood* v. *Territory* (Wash.), II, 284.
5. AN OBJECTION TO AN INDICTMENT ON THE GROUND THAT MORE THAN ONE OFFENSE IS CHARGED therein comes too late if made after verdict. *Id.*
6. INSTRUCTION AS TO OWNERSHIP.—Where an indictment charges a defendant with stealing a horse, the property of a person unknown, the court may instruct the jury that if the owner of such horse is now unknown, they might assume, in the absence of evidence to the contrary, that such owner was unknown to the grand jury finding the indictment. *Id.*
7. LARCENY OF CATTLE—INSTRUCTIONS.—In a prosecution for the larceny of cattle, where the defendant claims that at the same time of the taking, the cattle were lost and abandoned and had no owner, and there is evidence to sustain such claim, an instruction is erroneous which charges the jury that "the taking of the animals

with intent to approriate the entire dominion over them and convert them to the taker's use, raised a presumption of a guilty and felonious intent." *State* v. *Swayze* (Or.), II, 669.

8. THE SAME—NATURAL MARKS—OWNERSHIP.—The finder of personal property lost or mislaid, which has such marks of ownership upon it as will enable him to determine who the owner is, must restore it, and will be deemed guilty of larceny, if with such knowledge of the true owner he takes it with intent to convert it to his own use and deprive the owner thereof. But the natural marks on live animals are not presumed to be marks of ownership. *Id.*

9. LARCENY—NAME OF OWNER OF STOLEN PROPERTY.—Where a defendant is indicted and convicted for the larceny of the property of one H. W., a new trial should not be granted because the true name of such owner was H. W. B., when it appears that he was known by both names, and there was no doubt as to his identity. *People* v. *Woods* (Cal.), II, 495.

10. IN A PROSECUTION FOR LARCENY, WHEN THE TAKING OF THE PROPERTY IS ADMITTED, the intent with which the same was taken is a question for the jury. *People* v. *Grider* (Cal.), II, 290.

11. LARCENY—INFORMATION—ALLEGATION OF OWNERSHIP.—An information for larceny which alleges that "the property taken was the personal property in the possession of Frederick Schwartz, and that the same was taken from the person and against the will of him, the said Schwartz," sufficiently describes the ownership of the property. *People* v. *Hicks* (Cal.), IV, 420.

12. LARCENY—VALUE OF PROPERTY, HOW STATED—INFORMATION.—An information for larceny need not allege that the value of the property stolen was "in current coin of the United States." *People* v. *Righetti* (Col.), IV, 606.

13. LARCENY IN SECOND DEGREE—PETIT LARCENY—VERDICT.—A verdict finding the defendant guilty of larceny in the "second degree," is equivalent, under section 486 of the penal code, to a verdict for petit larceny. *Id.*

14. PETIT LARCENY, PUNISHMENT FOR—FINE AND IMPRISONMENT.—A judgment upon a conviction for petit larceny may provide for a punishment by fine or imprisonment, or both. If both are ordered, the judgment may direct that the defendant be further imprisoned until such fine be paid, in conformity with section 1205 of the penal code. *Id.*

15. LARCENY—EVIDENCE OF SIMILAR OFFENSE NOT ADMISSIBLE.—On a trial for larceny, evidence tending to show that the defendant had in his possession property taken by other thefts at the same time, is inadmissible. *People* v. *Cunningham* (Cal.), IV, 506.

16. SHORT-HAND REPORTER'S NOTES ON TESTIMONY TAKEN ON PRELIMINARY EXAMINATION.—On such trial the reporter's notes in short-hand of the testimony of a witness taken on the preliminary examination of the defendant, are not admissible, although the witness may have died before the trial, and the correctness of such notes is proved by the reporter. *Id.*

17. WRONGFUL APPROPRIATION OF WATER—COMPLAINT FOR, WHEN SUFFICIENT.—A complaint which avers that the defendant, "with intent to injure and defraud, etc., without knowledge of the owners, and with intent to evade payment for the water taken thereby, made connections and maintained the same with certain mains and service-pipes of the Spring Valley Water Works, for the purpose of taking water therefrom for the supply of certain tanks and water-works kept and maintained" by the defendant, sufficiently charges the offense created by section 499 of the penal code. *Ex parte Helbing* (Cal.), IV, 687.

18. LARCENY — POSSESSION OF RECENTLY STOLEN PROPERTY. — The mere possession of recently stolen property, unconnected with other facts and circumstances tending to show guilt, is not, of itself, sufficient to warrant a conviction for larceny; it is merely a circumstance tending to implicate the accused; but if linked with other facts and circumstances also tending to implicate him, it may amount to direct and positive proof. *People* v. *Elster* (Cal.), III, 33.

19. PREVIOUS CONVICTION OF GRAND LARCENY — IMPRISONMEMT.—When a defendant is convicted of an assault with intent to commit robbery, and of a previous conviction of grand larceny, he may be sentenced, under section 671 of the penal code, to imprisonment for the term of his natural life, or for ten years, or for any number of years not less than ten. *People* v. *Brooks* (Cal.), III, 53.

20. IN A PROSECUTION FOR THE LARCENY OF PROPERTY THAT DOES NOT EASILY PASS FROM HAND TO HAND, THE PRISONER'S EXCLUSIVE AND UNEXPLAINED POSSESSION of the stolen property, recently after the theft, is not only a circumstance to be considered as tending to show the prisoner's guilt, but raises such a presumption that he

is the thief that the burden of proof is taken from the prosecution and laid upon him. *Territory of Arizona* v. *Casio* (Ariz.), I, 656.

21. IN A PROSECUTION FOR LARCENY, EVIDENCE of a fact which tends to connect the defendant with the taking of the property named in the information is competent. *People* v. *Ross* (Cal.), II, 291.

See BURGLARY, 1, 2, 10.

LAUNDRY ORDINANCE.

1. LAUNDRY ORDINANCE—VALIDITY OF.—The provisions of the ordinance of the city and county of San Francisco, approved June 25, 1883, declaring it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are cleansed for hire, within certain named limits, without having first obtained a certificate from the health-officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of firewardens that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property; and providing that no person or persons owning or employed in such laundries shall wash or iron clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M., nor upon any portion of that day known as Sunday, are not in conflict with the fourteenth amendment of the constitution of the United States, nor with section 1 of article 1 of the constitution of California, guaranteeing to all men the inalienable right of acquiring, possessing, and protecting property, and pursuing and obtaining happiness; nor with section 11 of the same article, declaring that all laws of a general nature shall have a uniform operation; nor with section 21 of the same article, declaring that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.. *Ex parte Moynier* (Cal.), I, 782.

LEASE.

1. LESSOR AND LESSEE—ABANDONMENT OF LEASE—RECOVERY OF AMOUNT.—A lessee, under a contract of lease, by the terms of which possession of the premises is to be given him at a future day, who pays the rent in advance, may recover back the same, if, after demand, the lessor refuses to deliver the possession, and the parties thereupon abandon the lease by mutual consent. *Barth et al.* v. *Jones et al.* (Col.), IV, 214.
2. LEASE—CONTRACT IN WRITING—ALTERATION OF, BY PAROL AGREEMENT.—The terms and provisions of a written lease can not be altered by an unexecuted oral agreement between the lessor and lessee. *Erenbirg et al.* v. *Peters et al.* (Cal.), IV, 426.
3. JOINT LEASE—ACTION TO ENFORCE COVENANT—DEATH OF JOINT LESSOR—PARTIES—GUARDIAN AND WARD.—An action for the breach of a covenant in a joint lease, after the death of one of the joint lessors, must be brought in the name of the surviving lessors. Neither the executor nor administrator of the deceased lessor is a proper party. If such deceased lessor made the lease for himself, and also as guardian and trustee for his ward, such ward, after attaining majority, may join with the surviving lessors in an action to enforce a covenant made for his benefit. *Salisbury et al.* v. *Shirley* (Cal.), IV, 688.
4. THE ASSIGNMENT OF THE TERM BY THE LESSEE CREATES A PRIVITY OF ESTATE between the assignee and the lessor. *Id.*
5. COVENANTS TO PAY RENT AND TAXES—LIABILITY OF ASSIGNEE OF LESSEE—Covenants in a lease to pay rent and taxes run with the land, and are binding upon and enforceable against the assignee of the lessee by virtue of the privity of estate existing between him and the lessor. *Id.*
6. THE JUDGMENT AWARDED THE PLAINTIFFS affirmed after a construction of the covenants sued on. *Id.*

See LANDLORD AND TENANT; STATUTE OF FRAUDS. 1.

LEGACY.

See EXECUTORS AND ADMINISTRATORS, 5; WILLS, 6.

LIBEL.

1. ACTION FOR—VARIANCE—PARTIES PLAINTIFF.—In an action for libel, proof that the libelous words were published of the plaintiff and a third person is not a fatal vari-

ance. In such actions, when the injury is several, each person injured must sue alone. *Robinett* v. *McDonald* (Cal.), III, 787.

LICENSE.

1. SALE OF SPIRITUOUS LIQUORS—LICENSING OF, BY COUNTY.—Under section 11, article 11 of the constitution, the boards of supervisors of counties have power to regulate the sale of spirituous liquors within their counties, by imposing a license upon the retail sale of such liquors. *Ex parte Walters* (Cal.), III, 28.
2. JUDGMENT REVERSED on the authority of *Ex parte Walters*, 3 West Coast Rep. 28. *People* v. *Dwyer* (Cal.), III, 438.

See COUNTY GOVERNMENT ACT, 6; NUISANCE, 25.

LICENSE COLLECTOR.

1. COUNTY LICENSE COLLECTOR, APPOINTMENT OF.—The general power conferred on boards of supervisors to license business and collect license taxes within their respective counties includes the power to appoint an agent to make such collections. There is nothing in section 5 of article 11 of the constitution conflicting with such power. *People* v. *Ferguson; People* v. *Ponet* (Cal.), III, 45.

LIENS.

1. A VENDOR'S LIEN EXISTS IN FAVOR OF A PARTNER on his share of the partnership real estate which he has conveyed to his copartner, and the same may be enforced against the estate of the latter, in the absence of fraud. *Reese* v. *Kinkead* (Nev.), I, 386.
2. LIEN OF AN ATTACHING CREDITOR IS SPECIFIC, AND IS NOT MERGED in the judgment until a transcript of the judgment docket is filed in the office of the county recorder. No time is limited by law for filing such transcript, and it is optional with the attaching creditor to do so or not. *Emery* v. *Yount* (Col.), I, 499.
3. LIEN OF A JUDGMENT CREDITOR OBTAINED BY FILING A TRANSCRIPT OF HIS JUDGMENT extends to all the realty of the debtor not exempt from execution, unattached as well as attached. Such lien takes precedence over subsequent purchasers or incumbrancers; but if such transcript is not recorded, the rights of *bona fide* purchasers or incumbrancers of the debtor's realty, prior to execution levy thereon, are in no way affected by such judgment. *Id.*

See ASSIGNMENT, 2; ATTACHMENT, 27; FRAUD, 6; GROWING CROPS, 1; JUDGMENT, 12, 23; MECHANICS' LIENS; MORTGAGE; REDEMPTION; STATUTE OF FRAUDS, 6.

LIFE INSURANCE.

See INSURANCE.

LIQUOR ORDINANCE.

1. PROHIBITION OF SALE OF LIQUORS—CONSTRUCTION OF ORDINANCE.—The provision of the city charter of Logan City, granting power to the city council by ordinance to "license, regulate, prohibit, or restrain" certain persons, places, and business, but which fails to state what acts may be licensed, regulated, prohibited, or restrained, does not authorize the passage of an ordinance prohibiting all persons from selling, manufacturing, giving away, or disposing of any spirituous liquors. *Logan City* v. *Buck* (Utah), II, 437.

LOAN.

See CONSIDERATION, 3.

LOCATION.

See MINES AND MINING.

LODE.

See MINES AND MINING.

LOS ANGELES.

See JUSTICES' COURTS, 8, 9.

LOST DOCUMENTS.

See EVIDENCE, 31, 42, 47.

MAIL.

See OBSTRUCTING THE MAIL.

MAINTENANCE.

See ASSIGNMENT, 6.

MALICE.

See MALICIOUS PROSECUTION; MURDER AND MANSLAUGHTER.

MALICIOUS PROSECUTION.

1. QUESTION AS TO THE WANT OF PROBABLE CAUSE, IN AN ACTION FOR MALICIOUS PROSECUTION, is a mixed question of law and fact: of fact for the jury, if there is a conflict of evidence, under proper instructions of the court; and of law for the court, if the underlying facts are admitted or uncontroverted. *Hynes* v. *Nelson* (Cal.), I, 473.
2. PROBABLE CAUSE FOR AN ARREST EXISTS WHERE THE DEFENDANT BELIEVED THE FACTS CHARGED AGAINST THE PLAINTIFF, and, acting upon such belief, consulted his counsel, and was advised by him that such facts constituted a crime, and that he might and ought to have the plaintiff arrested. *Id.*
3. MALICIOUS PROSECUTION—PROBABLE CAUSE—QUESTION FOR COURT.—In an action for malicious prosecution, whether the facts as found by the jury constitute probable cause, or the contrary, is a question for the court. *Eastin* v. *Bank of Stockton* (Cal.), IV, 436.
4. THE SAME—MEASURE OF DAMAGES—REASONABLE EXPENSES.—In such action the plaintiff, if successful, is not entitled to recover all that he paid out and expended in the defense of the former suit, but only so much thereof as was reasonably laid out and expended. *Id.*
5. ACTION FOR MALICIOUS PROSECUTION OF CIVIL ACTION.—In this state an action can be maintained for the malicious prosecution of a civil action in which no process other than the summons was issued. *Id.*
6. MALICIOUS PROSECUTION—MEASURE OF DAMAGES—DAMAGES AS PUNISHMENT.—Damages in an action for malicious prosecution are limited to such an amount as will compensate the plaintiff for his pecuniary loss, for injury to his person, and for his mental and physical suffering. Damages as a punishment to the defendant are not allowable. *Murphy* v. *Hobbs* (Col.), IV, 653.
7. THE SAME—ACTUAL AND IMPLIED MALICE—PROBABLE CAUSE—WANT OF.—In such action malice may be implied from a want of probable cause. Probable cause is such a state of facts known to and influencing the prosecutor as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon facts within his knowledge, to believe or entertain an honest and strong suspicion that the person accused is guilty. If probable cause for the arrest exists, the prosecutor is not liable, although he may have been influenced by improper motives. If a want of probable cause appears, evidence of the acts and conduct of the prosecutor, showing actual malice, is admissible, for the purpose of enhancing the compensatory damages. *Id.*
8. A CAUSE OF ACTION FOR MALICIOUS PROSECUTION IS BARRED in two years. *Taylor* v. *Bidwell* (Cal.), III, 479.

MANDAMUS.

1. MANDAMUS AGAINST SUPERVISORS—JUDGMENT.—In *mandamus* against a board of supervisors, on a judgment recovered against the county, the judgment should order the board to allow the judgment, and should not direct its payment by them. The

treasurer is the proper person to pay. *Johnson* v. *Supervisors of Sacramento County* (Cal.), III, 478.

2. SACRAMENTO BONDS—MANDAMUS.—Ordered that a writ of mandate issue to the municipality of Sacramento and its authorities annually to levy and collect for municipal purposes on all real and personal property within the city limits, except such as are exempt by law, a tax of one hundred cents on the one hundred dollars, and that fifty-five per cent of the revenue thus derived within the city limits for municipal purposes be set apart and appropriated to an interest and sinking fund, to be applied to the annual interest and final redemption of the bonds issued for the city indebtedness, in accordance with the act of the legislature of the state, adopted April 24, 1858. *Meyer* v. *Brown* (Cal.), III, 406.
3. EQUITY JURISDICTION—REMEDY AT LAW.—Under section 721, R. S., suits in equity in the United States courts can not be sustained in any case where a plain, adequate, and complete remedy may be had at law. *Hausmeister* v. *Porter, Treasurer, etc.* (U. S. Cir. Ct., Cal.), III, 594.
4. MANDAMUS AN ADEQUATE REMEDY AT LAW.—Where the treasurer of a city refuses to pay coupons due upon bonds out of funds in the treasury expressly provided for that purpose by the statute, and refuses to set apart a portion of the taxes collected as a sinking fund for the payment of bonds of the city, as required by the statute, a writ of *mandamus* to compel the performance of those duties affords a plain, adequate, and complete remedy at law; and a bill in equity will not lie at the suit of a bond-holder, merely to restrain the application of the funds so provided to other objects of city expenditures, the said bill not being ancillary to any other pending proceeding at law to obtain payment. *Id.*
5. A PROVISION IN THE CITY CHARTER OF SACRAMENTO PROHIBITING ANY SUIT or actions against the city, upon any bonds which had been issued under its former charter, is no defense to a proceeding by *mandamus* against the treasurer of such city to compel him to pay the interest coupons on certain bonds issued by such city under the authority of its charter granted in April, 1858, the payment of which was a duty enjoined upon such treasurer by the provisions of such charter. *Meyer* v. *Porter* (Cal.), I, 874.
6. IT IS NO DEFENSE TO SUCH PROCEEDING, BROUGHT BY AN INDIVIDUAL BOND-HOLDER, that such coupons have never been presented to the board of trustees for audit and examination, nor the fact that there are other creditors interested in the fund provided for their payment who have not demanded payment. *Id.*
7. A WRIT OF MANDATE MAY BE ISSUED by the superior court to compel a justice of the peace to issue an execution in favor of a judgment creditor who is entitled to the same. The issuance of such execution by the justice calls for the exercise of a ministerial function only, and is a duty especially enjoined upon him by law, resulting from his office. *Hamilton* v. *Tutt* (Cal.), I, 858.

See APPEAL, 24; WARRANTS, 1, 4.

MANSLAUGHTER.

See MURDER AND MANSLAUGHTER; CRIMINAL LAW AND PRACTICE.

MAP, INFRINGEMENT OF.

See COPYRIGHT, 3.

MARITIME LAW.

See ADMIRALTY.

MARRIAGE CONTRACT.

See CANCELLATION, 3.

MARRIAGE SETTLEMENT.

1. ANTENUPTIAL SETTLEMENT, BREACH OF.—Prior to the death of defendant's intestate he and the plaintiff, an unmarried woman, entered into an agreement whereby they mutually promised to intermarry within a reasonable time. In consideration thereof, the agreement provided that "the party of the first part [the defendant's

intestate] grants and gives to the party of the second part" certain bonds then in his possession, "all of which he promises to deliver to her on or before the day of their marriage, to be and become her own absolute property." *Held*, that such agreement was an antenuptial settlement, the consequences of which could not be avoided by the defendant's intestate refusing to consummate the marriage. That upon his refusal, after a reasonable time, to marry, the plaintiff, having at all times remained ready and willing to consummate the contract, was entitled to the bonds. That it was not for her to have sought him, but it was his duty to have sought her in marriage. *Connor* v. *Stanley, Administrator, etc.* (Cal.), II, 749.

MARRIED WOMEN.

1. A MARRIED WOMAN WHO HOLDS THE TITLE TO HER SEPARATE PROPERTY in her own name may mortgage the same in such name. *Rickards* v. *Hutchinson* (Nev.), I, 659.
2. MARRIED WOMAN'S CONTRACT—SEPARATE ESTATE—SECURITY FOR HUSBAND'S DEBTS.—The assignment by a married woman of a note and mortgage of real estate, the same being her separate property, as collateral security for payment of her husband's debts, without any fraud or improper inducements on the part of her husband, and with the intention of binding her separate estate, is a valid contract, and enforceable in equity against her separate estate. *Cartan, McCarthy & Co.* v. *David et al.* (Nev.), III. 182.
3. THE SAME—INTENTION, HOW EXPRESSED.—The intention of a married woman to charge her separate estate need not be expressed in any set form of words. It may be inferred from the particular circumstances of the transaction, when the same are such as to leave no reasonable doubt that such was her intention. *Id.*
4. THE SAME—A MARRIED WOMAN can, under the statute, 1 Comp. L., secs. 159, 169, make any disposition of, or contract concerning, her separate property that she desires. *Id.*
5. NOTE AND MORTGAGE, ASSIGNMENT OF, BY MARRIED WOMAN—ACKNOWLEDGMENT.—The assignment by a married woman, of a note and mortgage of real estate belonging to her, may be made by merely indorsing the back of the note. Such note and mortgage are mere chattels, and an assignment thereof is not such a contract affecting real estate as the statute requires to be acknowledged separate and apart from her husband. *Id.*
6. THE SAME—COLLATERAL SECURITY—STATUTE OF FRAUDS—INDEPENDENT UNDERTAKING.—If the assignment of such note and mortgage by the wife was made for the purpose of securing the note of her husband, at the time the husband's note was given, and as part of the same transaction, the consideration for the husband's note must be regarded as the consideration for the collateral security of the wife, and no new or additional promise by her is necessary. The transaction must be treated as an original undertaking on the part of the wife, and can not be considered as a mere parol promise to pay the debt of another. *Id.*
7. MARRIED WOMAN, WHEN MAY SUE ALONE—DESERTION.—A married woman may sue alone to recover for personal injuries sustained by her through the negligence of the defendants, when she is living separate and apart from her husband, by reason of his desertion of her. *Andrews* v. *Ruuyon et al.* (Cal.), IV, 81.
8. DESERTION—OFFER TO RETURN AND REFUSAL—HUSBAND AND WIFE.—A wife's desertion of her husband is cured if she, before the expiration of the statutory period required to make the desertion a cause of divorce, and when in the vicinity of her husband's home, offered to go back and resume the performance of her marital duties, and he refuses to receive her. Under such circumstances an actual physical return is not necessary. From the date of his refusal the husband is deemed to have deserted the wife. *Id.*

See DEED, 17, 19; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. UNDER A CONTRACT OF EMPLOYMENT WHERE THE WORK IS TO BE DONE BY THE DAY OR MONTH, and nothing is said as to the time of payment for the services to be rendered, the wages of the employee are due and may be demanded at the close of each day or month, as the case may be. After such demand and non-payment, the employee may maintain attachment proceedings to recover his wages. *De Lappe* v. *Sullivan* (Col.), II, 107, 108.

2. LIABILITY OF THE MASTER FOR THE ACT OF HIS SERVANT.—A master is liable for the act of his servant when done within the scope or general course of his employment, although done contrary to the master's orders. *Heenrich* v. *Pullman Palace Car Company* (U. S. Dist. Ct., Or.), II, 303.
3. MASTER AND SERVANT—NEGLIGENCE.—In an action to enforce an employer's liability for an injury occasioned to an employee through the employer's failure to exercise ordinary care in supplying suitable appliances for the work to be done, an instruction as to the liability of the defendant for not exercising ordinary care in the selection and employment of proper fellow-servants is erroneous, where no question in regard to such liability is raised by the pleadings or evidence. *Willis* v. *Oregon R'y etc. Co.* (Or.), III, 240.
4. THE SAME—COMMON EMPLOYMENT—VICE-PRINCIPAL.—A master is not liable to a servant for an injury occasioned by a fellow-servant engaged in a common employment. He is liable, however, for an injury to a servant occasioned by the negligence of a vice-principal to whom he has committed the substantial control of the business and the power to do all acts necessary to its conduct. *Id.*
5. THE SAME—THE FOREMAN OF A GANG OF LABORERS engaged in erecting a shed under the direction of a superior is a fellow-servant with the rest of such laborers, and if an injury happens to one of them through the negligence of such foreman, their principal is not liable. *Id.*
6. MASTER AND SERVANT—RIGHTS OF SERVANT DISCHARGED BEFORE END OF TERM.—A servant who is employed for a definite period and discharged before the expiration thereof, without fault on his part, may either treat the contract as rescinded, and at once bring an action for the value of the services rendered, or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach; or, in some cases, he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term. *Saxonia M. and R. Co.* v. *Cook* (Col.), IV, 453.
7. THE SAME—MEASURE OF DAMAGES—WHEN SERVANT MUST SECURE OTHER LABOR.—The measure of damages in the latter class of cases is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. The servant can not recover the wages accruing for the balance of the term as a matter of course. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor, must be deducted from the amount of the damage occasioned by the breach of contract of employment. The burden of showing that such other labor was or might have been obtained is on the defendant. *Id.*
8. THE SAME—BREACH OF CONTRACT—HOW ALLEGED—WRONGFUL DISCHARGE.—In an action to recover damages for breach of a contract, by the terms of which the defendant agreed to employ the plaintiff for a certain term, and at stipulated wages, an averment that "the defendant neglects and refuses to keep and perform its said agreement, to the damage of the plaintiff," is not a sufficient allegation of the breach of contract. If the breach consisted in a wrongful discharge of the plaintiff before the end of the term of employment, such wrongful discharge as a breach of the contract should be averred as the fact constituting the cause of action. *Id.*

See CORPORATIONS, 12, 13; NEGLIGENCE; TRUSTS, 4.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIENS.

1. MECHANIC'S LIEN FOR WORK DONE IN CUTTING LUMBER attaches upon the identical timber cut. *Baxter* v. *Smith et al.* (Wash.), II, 794.
2. THE MECHANICS' LIEN LAW OF 1877 was intended as a substitute for and repeal of the law of 1873. No lien under the act of 1873 survived such repeal except as the same was continued by the act of 1877. *Seattle & W. W. R. R. Co.* v. *Ah Kowe* (Wash.), II. 53.
3. THE TIME WITHIN WHICH A MECHANIC, NOT THE ORIGINAL CONTRACTOR, MAY FILE HIS NOTICE of lien for work done on a railroad is limited by the act of 1877 to thirty

days from the completion of the work or from cessation of labor thereon. Unless such notice is filed within such time the right to a lien is lost. *Id.*

4. MECHANIC'S LIEN—DESCRIPTION OF PROPERTY.—A notice of a mechanic's lien will be held on demurrer to sufficiently describe the property sought to be charged, when the same is described therein as "a lot of saw-logs marked 'F. & A.,' now lying in" a certain slough. *Wheeler* v. *Port Blakeley Mill Company* (Wash.), II, 555.

5. THE SAME—REQUISITES OF STATEMENT OF DEMAND.—The notice of such lien must contain a statement of the full amount of the lienor's demand before any deductions are made, and also the amount thereof after the deduction of all just credits and offsets. Unless each of such amounts is stated, the notice is insufficient. *Id.*

6. MECHANICS' LIENS—REQUISITES OF STATEMENT OF DEMAND.—Judgment affirmed on authority of *Wheeler* v. *Port Blakeley Mill Co.*, 2 West Coast Rep. 555. *McLeod* v. *Port Blakeley Mill Company* (Wash.), II, 798.

7. MECHANICS' LIENS FOR CONSTRUCTION AND REPAIR AGAINST A LESSOR.—Where the owner of a mill and reduction works leased the same for a term of years, and during the term the lessee made repairs in the mill, in pursuance of a clause of the lease that the lessee, "at his own cost and expense, should make all necessary repairs and improvements in and about said mill and reduction works," and an agent of the lessor had personal and full knowledge that said repairs were being made by the lessee, and the lessor and his agent failed to give notice, as provided by the statute, that the lessor would not be responsible for the same: *Held*, that under section 9 of the lien law, the parties furnishing the materials or labor for said repairs obtained a lien for the price of such materials and labor upon the estate or interest of the owner and lessor of said mill. *Gould* v. *Wise* (Nev.), II, 405.

8. THE SAME—WORK AND LABOR IN "CARRYING ON" A MILL.—Under the same circumstances, by the proper construction of section 19 of the same lien law (of 1875), persons who performed work and labor, by the employment of the lessee, in "carrying on" or operating the mill, obtained a lien for the price of such work and labor upon the estate or interest of the owner and lessor of the mill. Leonard, J., dissenting. *Id.*

9. CONSTRUCTION OF STATUTES.—In construing a provision of a statute, the word "on," although found both in the published statutes and in the enrolled bill, may be treated by the court as a clerical error, and may be read "or," when the latter word would give a full, consistent, and effectual meaning to the provision, in complete conformity with the general intent of the whole statute, while the word "on" would render the provision uncertain, delusive, virtually inoperative, and opposed to the general intent of the entire statute. This is especially so when the provision is borrowed, without other material change, from previous statutes on the same subject, in all of which the word was "or." *Id.*

10. THE SAME.—In the absence of all testimony, and of any objection at the trial, the court will infer that the land used in connection with the mill, and to which the lien was declared to extend, was reasonably convenient for the use of said mill, under the requirements of the statute. *Id.*

11. LEONARD, J., dissented from a portion of this decision, holding that under a correct construction of the whole statute, the estate of the lessor, under these circumstances, was liable only to a lien for materials and labor in repairing or constructing, and not for labor in carrying on or operating. *Id.*

12. MECHANIC'S LIEN.—Evidence held sufficient to sustain the findings. *McGuire et al.* v. *Logus et al.* (Or.), II, 825.

13. MECHANICS' LIENS—JURISDICTION—ASSIGNMENT.—In actions begun in the United States circuit court by an assignee to foreclose mechanics' liens, the jurisdiction of the court as to all of the original lien claimants whose liens are sought to be enforced, must be affirmatively shown by the bill of complaint. *Hampton* v. *Truckee Canal Co.* (U. S. Cir. Ct., Nev.), I, 17.

14. WHERE IT APPEARS FROM THE BILL THAT ANY OF THE ORIGINAL LIEN HOLDERS, by reason of their citizenship, could not maintain an action in this court to foreclose or enforce their liens, the bill must be dismissed for want of jurisdiction. *Id.*

15. LIEN OF A MECHANIC CAN ONLY BE MAINTAINED BY A SUBSTANTIAL OBSERVANCE OF and compliance with the provisions of the statute; and omissions so to do can not be aided by any averments in the complaint, or by extrinsic evidence. *Malter* v. *Falcon Mining Co.* (Nev.), I, 514.

16. FAILURE TO STATE IN THE NOTICE OF A MECHANIC'S LIEN THE NAME OF THE OWNER of the building against which the lien is sought to be enforced, as required by statute, is fatal to the existence of such lien. The name of such owner should be stated in a direct, clear, and positive manner, and not inferentially. *Id.*

17. MECHANIC'S LIEN—NAME OF OWNER—STATEMENT.—The same person may be both the owner and the reputed owner of a building, and a statement in a mechanic's claim of lien that a certain name is the name of the owner of the building on which his work was done, is none the less positive because it is also declared to be the name of the reputed owner. *Arata et al.* v. *Tellurium Gold and Silver Mining Co. et al.* (Cal.), III, 151.
18. THE VERIFICATION OF A MECHANIC'S CLAIM OF LIEN, which states that the same "is true," is sufficient. The omission to state of the affiant's "own knowledge" is not a defect. *Id.*
19. LABORERS' LIENS—PLEADINGS—JUDGMENT.—In an action to enforce laborer's liens, where the complaint does not aver that any money was due the contractor, but the answer presents that issue, judgment consistent with the case, as presented by the complaint and answer, may be given. Such judgment can not exceed the amount due the contractor. *O'Donnell et al.* v. *Kramer et al.* (Cal.), III, 197.
20. FORECLOSURE OF MECHANIC'S LIEN—FORM OF JUDGMENT.—In an action to enforce a mechanic's lien, a judgment in effect "that the claimant claims the benefit of the law of liens of mechanics and others upon real property, to wit, chapter 2, title 4, part 3, of the code of civil procedure," can not be entered by default. *Arata* v. *Tellurium etc. Mining Co.* (Cal.), III, 151, 290.
21. MINING CLAIM, DEFINITION OF—MECHANIC'S LIEN.—A "mining claim," as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. Independent of acts of congress providing a mode for the acquisition of title to the mineral lands of the United States, the term "mining claim" has always been applied to a portion of *such* lands to which the right of exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, usages, or customs. It is not applicable to land the title to which is held under a Spanish or Mexican grant, although such land is mineral in character; consequently a statute creating a mechanic's lien under certain circumstances, on "mining claims," is not applicable to mineral land held under a Spanish or Mexican grant. *Williams* v. *Santa Clara M. Co.* (Cal.), IV, 616.
22. MORTGAGE—MECHANIC'S LIEN, PRIORITY OF.—The lien of a recorded mortgage or of a deed of trust given as security for a debt, takes priority over a subsequent mechanic's lien, under section 1186 of the code of civil procedure. *Id.*
23. NOTICE NOT TO BE RESPONSIBLE FOR IMPROVEMENT.—Section 1192 of the code of civil procedure, requiring the "owner or person having or claiming an interest" in lands on which an improvement is erected, within three days after he has obtained knowledge of the intended improvement, to give notice that he will not be responsible for the same, and providing that, in default of such notice, his interest shall be subject to the lien for such improvement, filed in accordance with the provisions of the code, does not apply to nor affect the interest of a prior mortgagee under a recorded mortgage. *Id.*

See ADMIRALTY, 18.

MEMORANDUM.

See EVIDENCE, 45, 46.

MESNE PROFITS.

See EJECTMENT, 14.

MEXICAN GRANTS.

1. SURVEYOR GENERAL OF NEW MEXICO, UNDER THE ACT OF CONGRESS of July 22, 1854 (10 U. S. Stat. 309), is clothed with judicial powers and duties with reference to Mexican and Spanish grants of land made prior to the acquisition of the territory by the United States. *Whitney* v. *McAfee* (N. M.), I, 162.
2. COURTS HAVE NO AUTHORITY TO REVIEW, REVERSE, OR MODIFY ANY DECISION OF THE SURVEYOR GENERAL, as to the validity or invalidity of such grant, made in a case before him. Such power rests with congress alone, and until reversed or modified by congress, any such decision of the surveyor general is binding upon the courts, and must be regarded as *res adjudicata*. *Id.*

3. REPORT OF THE SURVEYOR GENERAL, UNDER THE ACT OF JULY 22, 1854, PRONOUNCING VALID a Mexican grant, operates so as to segregate from the public domain the lands covered by such grant, and to except and reserve them from the operation of the homestead and other general laws of the United States providing for the disposal of the public domain, and pending the final action of congress on such decision, to vest by necessary implication in the grantee, and those claiming under him, the exclusive right of possession in and to the entire tract covered by the grant as reported on. *Id.*
4. THE PUBLICATION AND APPROVAL BY THE SURVEYOR GENERAL OF A PLAT AND SURVEY of a Mexican grant, under the act of congress of June 14, 1860, in the absence of an application to have the same returned to the district court, has the same effect in law "as if a patent for the land so surveyed had been issued by the United States." After that the grant was in no sense *sub judice*. *Southern P. R. R. Co.* v. *Garcia* (Cal.), I, 586.
5. A PATENT FOR LANDS PREVIOUSLY WITHDRAWN FROM SALE, IF AT THE TIME OF WITHDRAWAL the same were within the exterior limits of a Mexican grant *sub judice*, is invalid. *Id.*
6. GRANT BY THE MEXICAN GOVERNMENT TO THE "HEREDEROS" OF A DECEASED TESTATOR.—Under the Spanish and Mexican law, an heir (*heredero*) could be instituted by will, if designated therein by apt words, so that it can be perceived who is meant. And where, in the proceedings to obtain a grant of land, the Mexican governor declares that a certain deceased testator was the lawful owner of the land, and by his death his successors (*herederos*) are lawful owners of the same, and directs that a title in conformity with this view be delivered and handed over to the testamentary executor of said deceased, for the ends required, the grant issued to such successors (*herederos*) will be held to have issued to the successors as established by the will of the testator. The governor had power to make such grant under the decree of 1824, and the regulations of 1828. *Emeric* v. *Alvarado* (Cal.), I, 708.
7. CONFIRMATION OF MEXICAN GRANT—SURVEYOR GENERAL'S REPORT.—The confirmation by act of congress of a private land claim in New Mexico or Colorado, upon the recommendation of the surveyor general, under the act of 1854 (10 U. S. Stat. 308, sec. 8), is equivalent to a grant *de novo*, of the lands embraced within such confirmation, although the same exceeds eleven square leagues to each grantee. *United States* v. *Maxwell Land Grant Company et al.* (U. S. Cir. Ct., Col.), III, 514.
8. THE SAME—SURVEY—SETTING ASIDE PATENT—FRAUD.—Where such confirmation is of a grant within certain named out-boundaries, and through the fraud of the United States officers the survey and patent thereof is so made as to include a large quantity of land lying without such boundaries, such patent will be set aside at the instance of the United States, as against subsequent purchasers under the patent, when the clause contains recitals upon its face showing the amount of land intended to be confirmed. *Id.*

See PARTITION, 1, 3, 5, 6; PUBLIC LANDS, 24, 25, 27.

MINES AND MINING.

1. LOCATION.
2. WORK UPON.
3. MINING RULES AND REGULATIONS.
4. POSSESSION.
5. CONTESTS BETWEEN CLAIMANTS.
6. MISCELLANEOUS.

1. LOCATION.

1. MINING LAWS—LOCATION OF PLACER CLAIM—STATUTES AFFECTING.—The provisions of section 2324 of the United States revised statutes, requiring a mining location to be distinctly marked on the ground, so that its boundaries may be readily traced, that a record of the claim should be made, and that annual work to the value of one hundred dollars should be done thereon, apply both to placer and to lode locations. A state statute, or a rule of miners, which attempts to dispense with such requirements is void. *Sweet* v. *Ronk et al.* (Col.), IV, 116.
2. POSSESSION OF CLAIM—SUBSEQUENT LOCATION.—Mere possession of a mining claim without a valid location is not sufficient to hold such claim as against a subsequent location made in accordance with law. *Id.*
3. LOCATION OF MINE—CERTIFICATE OF—REQUISITES AND FUNCTIONS OF.—The location certificate of a mine differs from ordinary documentary muniments of title in

that it is not a title, nor proof of title, nor does it constitute or of itself establish the possessory right of a claimant to which it relates. It is purely a creature of statute. Its purposes and functions are twofold: when duly recorded, it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground, and is thus constructive notice of the claimant's possession; in addition, the filing of such certificate is one of the statutory steps requisite to constitute a perfected mining location. *Stepy et al.* v. *Stark et al.* (Col.), IV, 663.

4. THE SAME—LOCATION, HOW MADE—CONTENTS OF CERTIFICATE.—In order to perfect a location of a quartz mine four steps are necessary: first, the sinking of a discovery shaft upon the lode ten feet in depth, or deeper if necessary to disclose mineral in place; second, the posting of a notice at the place of discovery, giving the name of the lode, the name of the locator, and the date of discovery; third, marking the surface boundaries of the claim by posts in the manner pointed out by statute; fourth, making and recording a location certificate containing the name and description of the lode, the name of the locator, and the date of the location. The statute does not require such certificate to contain a statement that the discovery shaft has been sunk the requisite depth, nor that the discovery notice has been posted or boundary marked. *Id.*

5. THE SAME—PROOF OF LOCATION—ORIGINAL AND AMENDED CERTIFICATE.—When the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the locating certificate, must, when contested, be established by proof outside of such certificate. The record of such certificate is proof of its own performance, and is *prima facie* evidence of all which the statute requires it to contain, and which are therein sufficiently set forth; and when the certificate for any reason is deemed void, it is admissible in evidence in a contest affecting the location, in connection with a valid amended certificate correcting the defects of the original. *Id.*

6. THE SAME—EFFECT OF AMENDED CERTIFICATE—EVIDENCE OF.—Such amended certificate, under the statute, can not create a right of possession or location in the premises claimed under the first location which did not exist prior to the filing of such additional certificate; it can confer no additional rights, and is therefore evidence of none as against any intervening or pre-existing rights of another. Except as against such intervening rights, an additional certificate recorded after the commencement of an action serves the same purpose in its admission as evidence as an original location certificate, and will relate back to the first location. *Id.*

7. FINDING OF THE COURT THAT THE NOTICE OF LOCATION OF A MINING CLAIM CONTAINED A SUFFICIENT DESCRIPTION of the location, by reference to natural objects and permanent and well-known monuments, to identify the same, will be presumed to be correct when the record contains no copy of the notice. *Eilers* v. *Boatman* (Utah), I, 632.

8. LOCATION OF A MINING CLAIM IS SUFFICIENTLY DEFINITE WHEN THE ACCESSIBLE BOUNDARIES THEREOF are plainly marked on the ground by stakes and natural objects, and the inaccessible boundaries described by courses and distances sufficient to point out to any one honestly endeavoring to ascertain where such boundaries were. *Id.*

9. RIGHT OF THE OCCUPANTS OF MINING GROUNDS ON THE PUBLIC DOMAIN WILL BE UPHELD, when the appropriation thereof has been made by means which substantially comply with the law, and which, in view of the surrounding circumstances, convey notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private person. *Id.*

10. LOCATOR OF A MINING CLAIM, IN MARKING HIS CLAIM ON THE GROUND so that its boundaries can be readily traced, is not held to absolute exactness in running the lines or in fixing the corner or other posts. The difference of a few feet or a few points between the monuments fixed by an actual survey for a patent and those fixed at the time of location is immaterial, and does not affect the validity of the original location. *Id.*

11. THE LOCATION OF A VEIN OR LODE MADE UPON THE SURFACE WHERE THE VEIN OR LODE FINDS ITS APEX will not be defeated by the secret, underground workings, and possession by parties having no possession of or right to the surface embracing it. The possession of a vein recognized by the mining laws, and to which protection is given, is a posssession by one who holds the surface where the vein makes its apex. *Id.*

12. AS BETWEEN TWO LOCATORS, AND AS AFFECTING THEIR RIGHTS ONLY, ONE CAN NOT LOCATE a mining claim on ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied. *Id.*
13. EXPRESS FINDING, IN AN ACTION TO DETERMINE THE CONFLICTING RIGHTS OF TWO ADVERSE CLAIMANTS of a mining claim, that the defendant was in possession of the same at the time suit was commenced is not necessary where the facts found establish the defendant's right to the possession, and that he had done all that was required by law in order to inaugurate a title to and hold a valid mining claim, and that he was constructively, if not actually, in possession. *Id.*
14. LOCATION OF MINING CLAIM—END STAKES.—The statute of Colorado, R. S. 630, affords no support to one who, in locating his claim, fails to set the proper stakes at the end of the claim, when the proper position for them was not inaccessible, but merely difficult of access, or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are subsequently set. *Crœsus Mining etc. Co.* v. *Colorado Land etc. Co.* (U. S. Cir. Ct., Col.), I, 451.
15. SAME—CHANGE OF LINES.—The locator of a mining claim can not, after the location, change the lines of his claim so as take in other ground, when such change will interfere with the previously accrued rights of others. *Id.*
16. ALIEN—RIGHT TO LOCATE MINING CLAIM.—Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands. *Id.*
17. SAME—STATE COURT MAY NATURALIZE.—The necessary oath declaratory of intention by an alien to become a citizen of the United States may be administered in the courts of record of the state. One who has so declared his intention to become a citizen may make a valid location of a mining claim. *Id.*
18. ADVERSE CLAIMANT, IN A SUIT BROUGHT AGAINST AN APPLICANT FOR A PATENT, MAY SHOW that the location of the claim applied for is invalid, for the reason that the ground contained therein is embraced by a third claim, in which neither party has or claims any interest. *Harrington* v. *Chambers* (Utah), I, 63.
19. VALID LOCATION OF A MINING CLAIM MAY BE MADE, whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following them, in the expectation of finding ore. *Id.*
20. MINERAL VEIN, WHERE MAY BE SHOWN TO EXIST.—Where the validity of a claim depends upon whether a lode has been discovered and located, evidence that such claim contains a vein within its boundaries, at places other than at the discovery point, is admissible. *Id.*
21. DEFINITION OF LODE AND VEIN.—The terms "lode" and "vein," as used in the acts of congress in reference to the location of mining claims, are such "lodes" and "veins" as are so called by miners. *Id.*
22. EXPERT TESTIMONY IS ADMISSIBLE TO SHOW THAT A CLAIM CONTAINED SUCH A VEIN as a miner discovering it would be likely to follow, with the reasonable expectation of finding paying ore. *Id.*
23. BOUNDARIES OF CLAIM by permanent monuments and stakes at the corners, and by distinctly marking the location on the ground, are sufficient. *Du Prat* v. *James* (Cal.), III, 651.
24. MINING CLAIM—LOCATION—NOTICE—MARKING BOUNDARIES.—Simply posting a notice and erecting a discovery monument is not a valid location of a mining claim, although the notice stated that the locator claimed twenty days within which to make the boundaries and to record the claim. Such claim is open to relocation at any time before the original locator marked his boundaries on the ground. *Newbill et al.* v. *Thurston et al.* (Cal.), III, 367.
25. LOCATION OF MINING CLAIM—NOTICE—DESCRIPTION.—The notice of location of a mining claim must describe the property sought to be located by reference to natural objects or permanent monuments, which can be seen by the eye and made the basis for a survey. A description made entirely by reference to the boundary lines of four other locations is insufficient. *Baxter Mountain Gold Mining Co.* v. *Patterson et al.* (N. M.), III, 77.
26. PRIOR LOCATION OF A MINING CLAIM IS NOT INVALIDATED BY A MISTAKE OF THE RECORDER in recording such location by a name somewhat different from that stated in the certificate of location. *Weise* v. *Barker* (Col.), II, 108.
27. A VALID LOCATION OF A MINING CLAIM CAN NOT BE MADE while the same is in the actual possession of other prior locators. The description of a mining claim, as the same appears in the complaint and on the record, held sufficient. *Id.*

2. WORK UPON.

28. MINING CLAIM, WORK UPON, WHAT CONSTITUTES.—Work done outside of a mining claim, if done for the purpose and as a means of developing the same, is as available for holding the claim as if done within the boundaries of the claim itself. One general system of work may be devised, well adapted and intended to develop several contiguous claims, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it. *Harrington* v. *Chambers* (Utah), I, 63.

29. WORK ON PLACER CLAIMS.—The provisions of the United States revised statutes requiring a certain amount of work to be performed or improvements made during each year on each mining claim located after May 10, 1872, and until a patent issues therefor, apply as well to that class of claims known as placer claims as to the class known as lode or vein claims. *Carney* v. *Arizona Mining Co.* (Cal.), I, 851.

30. WORK ON MINING CLAIM, WHEN MAY BE DONE.—Prior to the act of congress of May 10, 1872, there was no law of congress requiring annual labor to be done on mining claims in order to hold them. When that act speaks of the amount of work to be performed or improvements to be made each year, it means each year from and after its passage. Consequently, work done on a mining claim prior to May 10, 1872, can not be considered the first, or any part of the first, annual expenditure required by that act and the several amendments thereto. *Thompson* v. *Jacobs et al.* (Utah), II, 430.

31. MINING CLAIM—FAILURE TO PERFORM WORK—RELOCATION.—Failure to perform the required annual amount of work on a mining claim, under section 2324 of the United States revised statutes, renders such claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before such relocation. *Russell* v. *Brousseau* (Cal.), III, 781.

32. MINING CLAIMS—PERFORMANCE OF WORK.—Performance annually of the specified amount of labor is a condition which must be complied with. Failure so to do opens the land for other locations. *Du Prat* v. *James* (Cal.), III, 651.

33. RIGHT OF ORIGINAL LOCATOR TO PERFORM THE LABOR AFTER A FAILURE, and have the benefit of his location, is dependent upon his having performed the labor before relocation. *Id.*

34. LABOR REQUIRED IN LOCATING MINING CLAIM.—Personal expenditures made in traveling about matters connected with the claim, and the value of the time thereby consumed, are not labor performed on the mine. *Id.*

3. MINING RULES AND REGULATIONS.

35. MINING LAWS—CONFLICT BETWEEN UNITED STATES AND STATE.—The laws of the United States are paramount with respect to the acquisition of title to mineral lands on the public domain; the laws of the state or territory must not conflict therewith, and so far as they do, they are entirely nugatory. *Johnson et al.* v. *McLaughlin et al.* (Ariz.), III, 178.

36. THE SAME—LOCATION OF MINING CLAIM—RECORDING—LOCAL REGULATIONS—The location of a mining claim, recorded in the recorder's office of the proper county, in strict compliance with the laws of the United States and of the territory of Arizona, is not valid, because not recorded with and examined by the local district recorder, in compliance with the local regulations of the mining district. *Id.*

37. FAILURE TO COMPLY WITH THE LOCAL REGULATIONS OF A MINING DISTRICT will not work a forfeiture of a prior location, unless such regulation prescribes a forfeiture as a penalty for its non-observance. *Id.*

4. POSSESSION.

38. LODE SITUATE WITHIN PLACER MINE—RIGHT TO POSSESSION OF.—As against a mere intruder, the grantees under a placer patent are entitled to the possession of a lode situated within the placer grant, although at the time of the application for such patent the applicants knew of the existence of such lode. *Iron Silver M. Co.* v. *Reynolds et al.* (U. S. Cir. Ct., Col.), IV, 449.

39. ENTRY UPON THE ACTUAL POSSESSION OF ANOTHER, for the purpose of laying a foundation for a pre-emption claim to lands, can not be made. *Du Prat, Executrix,* v. *James et al.* (Cal.), III, 651.

5. CONTESTS BETWEEN CLAIMANTS.

40. MINING LAW—ADVERSE CLAIM.—In a suit brought under section 2326, U. S. R. S., to determine the right of possession of an adverse mining claim, the title of each party to the disputed premises is brought in question, and each party must make

proof of his title thereto before he can ask a judgment in his favor. *Bay State Silver M. Co.* v. *Brown* (U. S. Cir. Ct., Nev.), III, 520.

41. BETTER TITLE.—In such suit the better title must prevail, and judgment be for the party establishing that better title. *Id.*

42. FAILURE OF PROOF.—Where neither party establishes title to the ground in controversy, judgment can not be for either party, and the suit must be dismissed. *Id.*

43. PRESUMPTIONS OF FACT.—In suits of this nature, no presumptions of fact as to title arise. Title, right of possession, or forfeiture are facts to be established by the evidence. *Id.*

44. PATENT OF MINERAL LANDS FROM THE UNITED STATES—RIGHTS OF PATENTEE—INTERFERENCE BY A STRANGER.—Where defendants have obtained a patent of mineral land from the United States government, after all the preliminary steps required by statute had been duly taken, including the sixty days' publication of notice, and where no adverse claim was filed by the complainants during such publication, but after the publication of notice had been completed, the complainants objected before the local land office, and before the general land department, to defendants' right to a patent, and after hearings on said objections the defendants' title was sustained, and a patent issued to them. *Held*, that the complainants, not being connected with nor having any interest in the title, can not object to the patent on the ground of any alleged wrong which the patentees may have perpetrated against the government. *Wright et al.* v. *Dubois et al.* (U. S. Cir. Ct., Col.), IV, 153.

45. THE SAME.—The government, as a land-owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can complain. Publication of notice is a process bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the lands. Thereafter the only right or privilege remaining to any third parties is that of protest or objection, filed with the land department and cognizable only there; if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy. *Id.*

46. IN AN ACTION OF EJECTMENT TO RECOVER THE POSSESSION OF A MINING CLAIM, where the defendant relies upon a forfeiture by plaintiff, for failure to do the necessary work, as required by the act of congress (R. S., sec. 2326), such forfeiture need not be specially pleaded. *Steele* v. *Gold Lead Gold and Silver Mining Co.* (Nev.), I, 363.

47. A PRIOR LOCATOR OF A MINING CLAIM, WHO HAS REGULARLY APPLIED FOR A PATENT, need not, in order to preserve his rights, protest against any subsequent application for the same ground, while his own application is pending in the land department; and, in a controversy between such applicants, the prior locator is entitled to be heard, and have his rights determined in the proper forum where they are questioned, whether it be in the state courts or in the land office. *Id.*

6. MISCELLANEOUS.

48. TIMBER ON MINERAL LANDS IN CALIFORNIA.—The provisions of the act of June 3, 1878 (20 Stat. 88), giving permission to the residents of Colorado, Nevada, the territories therein named, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to California. The subject of cutting timber on the public lands within such state is regulated and restricted by the act of the same date (20 Stat. 89), especially applicable to California. This result follows whether such acts are regarded as one or separate enactments. *United States* v. *Benjamin* (U. S. Cir. Ct., Cal.), III, 540.

49. A GRANT OF AN UNDIVIDED ONE-THIRD INTEREST IN A PIECE OF MINING GROUND, together with the water rights, reservoirs, and tail-races belonging to the same, expressly conditioned that such grant should convey no other rights to the grantee except a mining right, does not make the grantee a coparcener, joint tenant, or tenant in common with the grantor. It simply conveys to him a right to enter upon and occupy the land for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. Such right is not capable of partition. *Smith* v. *Cooley* (Cal.), I, 855.

See CORPORATIONS, 9; EVIDENCE, 17; FRAUD, 8; INJUNCTION, 15; NUISANCE, 1–17; PARTNERSHIP, 5–8; PUBLIC LANDS, 14, 17–19; STATUTE OF FRAUDS, 2.

MINING CLAIM.

See MECHANICS' LIENS, 21.

MINORITY.

See INFANTS, 1.

MISDEMEANORS.

See APPEAL, 50.

MISJOINDER.

See DEMURRER, 8, 9, 17.

MISTAKE.

1. SUIT TO REFORM A CONTRACT.—The evidence necessary to support a bill to reform a contract must show certainly in what the mistake consists, and that it was mutual. *Spare* v. *Home Mut. Ins. Co.* (U. S. Cir. Ct., Or.), I, 542.
2. IDEM.—The owners of a warehouse applied to an insurance company, of which they were agents to receive and transmit applications for insurance, for a policy on the same as the property of their judgment creditor, and the company, knowing nothing to the contrary, issued the policy accordingly, and upon the destruction of the property by fire, refused to pay the insurance, on the ground that the assured had no insurable interest therein; the assured having failed in an action on the policy to recover the insurance, on the ground that it did not appear but that his debt could be otherwise made out of the remaining property of his debtors (8 Saw. 618), brought a suit in equity to reform the policy, alleging that by mistake it was issued in the name of the creditor, as owner, when it should have been issued in the name of the debtor, and for his benefit, in case of loss: *Held*, that the evidence did not support the allegation of mistake; but, on the contrary, showed that the company was induced to issue the policy by the false representation of the owners and applicant, on account of which deception it was entitled to rescind the contract or treat it as null. *Id.*
3. AGREEMENT TO CONVEY LAND—MUTUAL MISTAKE—REFORMATION—HOMESTEAD.—An agreement to convey certain premises vests the equitable title thereto in the grantee; and if, through a mutual mistake, the deed executed in pursuance of such agreement does not include all of such premises, either party may have it reformed. Subsequent to the date of the agreement, the wife of the grantor can not, by filing a declaration of homestead on the land omitted from the deed, defeat the right of the grantee to a reformation. *Hayford et al.* v. *Kocher et al.* (Cal.), III, 293.
4. A WRITTEN INSTRUMENT MAY BE REFORMED SO AS TO EXPRESS THE INTENTION of the contracting parties as verbally agreed upon, when, through a mistake of the plaintiff, the instrument fails to contain an important stipulation, which, at the time of signing, the defendant knew was omitted, although such mistake might have been discovered by the party aggrieved. *Higgins* v. *Parsons* (Cal.), III, 31.
5. REFORMATION OF DECREE—MISTAKE—DEGREE OF EVIDENCE.—Equity has jurisdiction to correct and reform a decree of partition, for a mistake in the description of a division line in the report of the referee, which, not being noticed at the time, was confirmed by the court without objection, and incorporated in such decree. Such mistake must be clearly shown by satisfactory evidence; mere preponderance of evidence is not enough. *Smith* v. *Butler* (Or.), III, 566.
6. A CITY MUST REFUND TO THE COUNTY ALL MONEY RECEIVED BY IT through a mistake of its officers in the performance of their duties, which, under the law, should have been paid into the county treasury. *Los Angeles* v. *Los Angeles* (Cal.), III, 441.

See ACCOUNTING, 1, 2; EVIDENCE, 17; NEW TRIAL, 5; PRINCIPAL AND AGENT, 1.

MORTGAGE.

1. DEED, WHEN A MORTGAGE.
2. ASSIGNMENT OF.
3. FORECLOSURE AND REDEMPTION.
4. MORTGAGE BY RAILROAD.
5. CHATTEL MORTGAGE.

1. DEED, WHEN A MORTGAGE.

1. DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE.—Whether a deed given in consideration of the grantee's assuming and paying the debts of the grantor is an absolute sale of the land conveyed, or a mere mortgage to secure the repayment of such debts, depends upon the intention of the parties at the time of conveyance. Such intention may be ascertained by evidence, oral or otherwise, of the situation of the parties, the value of the consideration in connection with the value of the property conveyed, the conduct of the parties before and after the conveyance, and of all the surrounding circumstances tending to explain the real character of the transaction. The evidence in this case reviewed, and the conveyance in question held to be a mortgage. *Stephens* v. *Allen et al.* (Or.), II, 193.
2. DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE.—A deed absolute on its face, given by A. to B., for real estate therein described, and a bond given by B. to A., agreeing to convey to A. a portion of the same property at a stipulated time, although given on the same date and for the same price, if not intended to be a mortgage or security for money by the parties themselves, and do not appear to be such on the face of the instruments, will be held to be an absolute bargain and sale, and not a mortgage. *Winters* v. *Swift et al.* (Idaho), II, 184.
3. THE INTENTION OF THE PARTIES IS TO BE LEARNED, first, from the instruments themselves; secondly, from parol testimony; and when ascertained, will be carried out by the courts. *Id.*
4. DEED, WHEN A MORTGAGE—PAROL EVIDENCE.—A deed, absolute on its face, may be shown by parol evidence to have been intended as a mortgage. Such evidence must be clear and satisfactory, and sufficient to overcome the presumption that the instrument is what it purports to be. *Albany and Santiam Water Ditch or Canal Co.* v. *Crawford* (Or.), III, 232.
5. EVIDENCE REVIEWED, AND THE DEED IN QUESTION HELD NOT TO BE A MORTGAGE. *Id.*
6. A DEED, ABSOLUTE IN FORM, GIVEN MERELY TO SECURE A DEBT, is to be deemed a mortgage as between the parties thereto and as to subsequent purchasers with notice; and parol evidence of such facts is admissible in actions at law as well as in equity. *Taylor* v. *McLain* (Cal.), I, 585, 586.
7. A FINDING OF THE LOWER COURT THAT A CERTAIN CONVEYANCE OF LAND, ABSOLUTE ON ITS FACE, and a bill of sale of personal property, were intended as mortgages to secure a loan made by the grantee to the grantors, reviewed, and held to be supported by the evidence. *Miller* v. *Ausenig* (Wash.), I, 839.
8. A DEFENDANT IN AN ACTION TO HAVE A DEED ABSOLUTE IN FORM DECLARED A MORTGAGE, and to redeem the same, who asserts, by cross-complaint, that such deed is not a mortgage but a conveyance indefeasible, may ask, and if he maintain his averments by proof, or if the plaintiff fails to establish his case, is entitled to, a judgment for possession of the premises. *Taylor* v. *McLain* (Cal.), I, 585, 586.
9. WHERE, ON A FORMER APPEAL, THE COURT HAS HELD THAT THE ACTION WAS ONE TO REDEEM a mortgage, it will hold the same on a subsequent appeal, when no changes have been made in the pleadings. *Id.*
10. A MORTGAGE OF CERTAIN PROPERTY OF A CORPORATION, held to be created by a sheriff's sale, and certain contracts made by the defendant with two of the directors of the corporation, in their names, but for the benefit of the corporation. *Pioneer Gold Mining Company* v. *Baker* (U. S. Cir. Ct., Cal.), II, 383.
11. IN A SUIT BY THE CORPORATION TO REDEEM from such mortgage, the directors who made the contracts are not necessary or indispensable parties, where they claim no individual interest, and no relief is asked against them. *Id.*

2. ASSIGNMENT.

12. THE ASSIGNMENT OF ONE OF SEVERAL PROMISSORY NOTES SECURED BY THE SAME MORTGAGE, in the absence of an agreement to the contrary, carries with it a *pro rata* interest in the security. *Redman* v. *Purrington* (Cal.), III, 30.
13. ASSIGNMENT OF MORTGAGE—ASSIGNEE'S RIGHT OF FORECLOSURE.—A covenant in in a mortgage, that, upon default in the payment of the note secured thereby, the mortgagee might, at his option, institute a suit for foreclosure, inures to the benefit of an assignee of the mortgagor. *Id.*
14. EQUITABLE ASSIGNMENT OF MORTGAGE.—Where, in pursuance of an agreement between a mortgagor and mortgagee, a third party pays off the mortgage debt and takes a conveyance of the mortgaged premises, such transaction will be construed as being an equitable assignment of the mortgage so as to entitle the grantee to pri-

ority and protection as against a judgment creditor of the mortgagor whose rights accrued subsequent to the execution of the mortgage, although at the time of such conveyance the mortgagee satisfied the mortgage on the record. *Matzen* v. *Shaeffer* (Cal.), II, 126.

3. FORECLOSURE AND REDEMPTION.

15. FORECLOSURE OF MORTGAGE—PERSONAL JUDGMENT AGAINST GRANTEE OF MORTGAGOR—PLEADINGS.—In a complaint to foreclose a mortgage, an allegation that the grantee of the mortgagor covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain a personal judgment against him, although such allegation is made upon information and belief. *Pellier* v. *Gillespie* (Cal.), IV, 500.

16. FORECLOSURE OF MORTGAGE—DECREE, WHAT TO EMBRACE.—A decree in an action to foreclose a mortgage can not direct a sale of a greater interest than that mortgaged. Thus where the mortgage merely covered certain lands and improvements owned by the mortgagor at the time of the execution of the mortgage, the decree must be limited to such property, and can not embrace property of the mortgagor subsequently acquired. *Marshall* v. *Livermore S. V. W. Co.* (Cal.), IV, 631.

17. FORECLOSURE OF SEPARATE MORTGAGES—DECREE—SALE.—The decree in an action for the foreclosure of two mortgages, each being on separate parcels of land, must provide that each parcel should be sold to satisfy the sum for which it was separately mortgaged. *Home and Loan Associates* v. *Wilkins* (Cal.), IV, 108.

18. A DECREE OF FORECLOSURE SHOULD DIRECT A SALE OF THE PARTICULAR ESTATE or interest of the mortgagor in the mortgaged premises, as the same has been described in the mortgage. If such decree directs the sale of any greater or less estate than that so described, it is erroneous, and should be corrected on motion. *Schwartz* v. *Palm* (Cal.), I, 852.

19. A DECREE OF FORECLOSURE WHICH DIRECTS THE SALE OF ALL the interest which the mortgagor had in the premises described in the mortgage on the date when the same was given is erroneous when the mortgage described the estate mortgaged as an "undivided fourth interest, being all the interest which the mortgagor owns." *Id.*

20. AN AVERMENT AND FINDING THAT AT THE DATE OF A MORTGAGE THE MORTGAGOR WAS IN POSSESSION of a certain tract of land, described by metes and bounds, is not supported by evidence of a mortgage in which the mortgaged premises are described as "all of the mortgagor's right, title, and interest in and to nine lots of land in block No. 113, as per map of Clinton, said property being now in possession of" the mortgagor. *Borel* v. *Donohue* (Cal.), I, 347.

21. SALE OF MORTGAGED PREMISES WILL NOT BE STAYED, PENDING AN APPEAL from the judgment against a subsequent purchaser from the mortgagor in possession, unless an undertaking be filed for the payment of the deficiency, if any shall arise on said sale. The rule is otherwise if the judgment is against such a purchaser not in possession. *Home Loan Association* v. *Wilkins* (Cal.), I, 119.

22. IMPLIED PROMISE—LIABILITY EX ÆQUO ET BONO—VALUABLE CONSIDERATION.—Where, in the final judgment in a suit for the foreclosure of a mortgage, the court, with the consent of the plaintiff—the mortgagee—allows to the defendant—the mortgagor—as a credit upon or part payment of the mortgage debt, a sum which had not actually been paid, and which the mortgagee was not, as between said parties, equitably bound to pay, but which the mortgagor himself was equitably bound to pay to a third person, and which was therefore a virtual advance by the mortgagee to the mortgagor, and the final decree so made is executed by a sale of the mortgaged premises in satisfaction of the debt so reduced, so that the mortgagor obtains and enjoys the full benefit of the credit as a virtual advance, the mortgagor defendant thereby becomes bound *ex æquo et bono* to refund to the mortgagee plaintiff the amount so credited, and the law implies a promise on his part to make such repayment, which is a valuable consideration sufficient to sustain and validate a second mortgage, executed previously to the rendition of said judgment, by the same mortgagor—defendant—to the same mortgagee—plaintiff—to secure the repayment of the said sum so finally credited. And it makes no difference with this result that at the time of rendering said final judgment, the mortgagor defendant refused to consent to said credit, since his subsequent acceptance of the judgment and enjoyment of its benefits was a waiver of his previous objection, and was itself a legal consent. *De Celis* v. *Porter* (Cal.), I, 575.

23. STATUTE OF LIMITATIONS—CAUSE OF ACTION.—In such a case, the liability to repay the amount of said credit, and the cause of action to recover the same, arose and

accrued at the date of the rendition of the final judgment when the credit was made, and an action begun within two years from that date is not barred by the statute of limitations. *Id.*

24. FORECLOSURE OF MORTGAGE—PARTIES—GRANTEE OF MORTGAGOR.—The owner of the legal title is a necessary party to the foreclosure of a mortgage executed by his grantor. *Porter* v. *Muller et al.* (Cal.), III, 619.

25. THE SAME—SALE OF MORTGAGED PREMISES.—There is but one action for the recovery of any debt secured by mortgage in this state, and the proceeds of a sale of the whole of the mortgaged premises is the primary fund out of which the mortgage debt is to be paid. *Id.*

26. AN ORAL AGREEMENT FOR THE RELEASE OF A MORTGAGE is not binding. *Id.*

27. MORTGAGE CLAIM—FORECLOSURE—PRESENTATION OF CLAIM.—Under section 1500 of the code of civil procedure, as amended in 1876, in an action to foreclose a mortgage against the estate of a deceased mortgagor, it is not necessary to present the mortgage claim for allowance or rejection, when all recourse against any property of the estate, other than the mortgaged premises, is expressly waived in the complaint. *Security Savings Bank* v. *Connell et al.* (Cal.), III, 681.

28. MORTGAGE FORECLOSURE—JUDGMENT.—Judgment foreclosing a mortgage, given to secure the mortgagee for liabilities he had incurred or might incur on account of the mortgagor, must be limited to the amount paid by the mortgagee under such liabilities, with interest from the day of payment. *Vogan, Adm'x, etc.*, v. *Caminetti, Adm'r, etc.* (Cal.), III, 431.

29. MORTGAGE—FRAUDULENT CONSPIRACY—FORECLOSURE.—A mortgagee is entitled to a decree foreclosing his mortgage, notwithstanding the mortgagor was induced to execute the same by reason of a fraudulent conspiracy, if the mortgagee was not a party to such conspiracy. *Thatcher* v. *Edsall et al.* (Cal.), III, 205.

30. NOTE SECURED BY MORTGAGE—WAIVER OF REMEDY BY FORECLOSURE.—Where a note and mortgage are both contained in the same instrument, the mortgagee may waive his remedy by foreclosure, and sue on the note and recover a money judgment. *Frank et al.* v. *Pickle* (Wash.), II, 570.

31. HEIRS OF A DECEASED MORTGAGOR NEED NOT BE MADE PARTIES in an action against his executor or administrator to foreclose the mortgage. *Bayley* v. *Muehe* (Cal.), III, 195, 364.

32. PAROL EVIDENCE TO VARY THE DISCHARGE OF A MORTGAGE.—In an action to foreclose a mortgage which had been fully and completely discharged and canceled on the record by the mortgagee, parol evidence is inadmissible to show that such discharge was merely conditional. *Ivinson* v. *Hutton* (Wy.), I, 703.

33. THE SAME.—Even if such evidence were admissible, it would have to be as full, clear, positive, and satisfactory as if it were offered for the purpose of reforming the discharge as entered on the record for fraud, accident, or mistake. The facts of the case reviewed, and held not to comply with such requirements. *Id.*

34. A DEBT SECURED BY MORTGAGE IS NOT NECESSARILY RELEASED by a discharge of the mortgage on the record. *Id.*

35. IN AN ACTION TO REDEEM A MORTGAGE, WHERE MORE THAN FOUR YEARS HAVE ELAPSED since the maturity of the indebtedness, a decree quieting the plaintiffs' title and possession, and enjoining the defendant from asserting any claim to the premises, is erroneous, when not authorized by the plaintiffs' pleadings. *Taylor* v. *McLain* (Col.), I, 585, 586.

4. MORTGAGE BY RAILROAD.

36. MORTGAGE EXECUTED BY A RAILWAY COMPANY ON ITS ROAD-BED, rolling stock, and buildings, together with all lands which are or may be necessary for the use and operation thereof, and also "all rights, privileges, franchises, and property whatever, now belonging, or hereafter to be acquired by" said company, will be construed to convey only such property as was or would be useful or necessary in the construction, operation, preservation, or security of the railroad mortgaged, and not lands which were to be used for other purposes. *State* v. *Glenn* (Nev.), I, 50.

5. CHATTEL MORTGAGE.

37. A CHATTEL MORTGAGE, UNTIL IT HAS BEEN FORECLOSED, CONVEYS NO TITLE or interest in the property covered by it, except a mere lien to the mortgagee. *Knowles* v. *Herbert* (Or.), III, 230.

38. CHATTEL MORTGAGE—CHANGE OF POSSESSION—FRAUD.—A mortgage of personal property is not valid as against existing creditors of the mortgagor unless the same is accompanied by an open, notorious, and continued change of possession. But the fact that the mortgagee employed the mortgagor as his clerk for a time after the execution of the mortgage is not *per se* a fraud that admits of no explanation, or which conclusively shows that the mortgagee was not in the sole, visible, and exclusive possession of the property. Whether there was such a possession is a question of fact for the jury. *Ewing* v. *Merkley* (Utah), III, 277.

39. THE SAME—VERDICT.—The verdict, that the mortgage in question was accompanied by an open, exclusive, and notorious change of possession, held supported by the evidence. *Id.*

40. CHATTEL MORTGAGE—UNCERTAINTY IN DESCRIPTION.—A chattel mortgage is void for uncertainty as against a subsequent attaching creditor of the mortgagor, where the property mortgaged is described as a certain number of horses and mules, giving their names and color, without mentioning the place where such animals were kept, or situated, or for what purposes they were used. This is especially so when it appears that the mortgagor has a large number of other animals of the same kind. *Tabor* v. *Sampson et al.* (Col.), III, 129.

41. CHATTEL MORTGAGE—RECORDING—ATTACHING CREDITORS.—Failure to record a chattel mortgage in the county where the property mortgaged, or the greater part thereof, is situated, renders the same inoperative as against a subsequent attaching creditor of the mortgagor without notice. *Id.*

42. AN UNRECORDED MORTGAGE OF PERSONAL PROPERTY IS ABSOLUTELY VOID as to the creditors of the mortgagor, although such creditors had actual notice thereof. *Baxter* v. *Smith* (Wash.), II, 794.

43. CHATTEL MORTGAGE—ACKNOWLEDGMENT OF—POSSESSION OF MORTGAGOR.—The failure to properly acknowledge a chattel mortgage is fatal to its validity while the property mortgaged remains in possession of the mortgagor. *Wilcox et al.* v. *Jackson* (Col.), IV, 326.

44. THE SAME—CHANGE OF POSSESSION—ATTACHING CREDITORS.—A chattel mortgage of the stock in trade of a merchant, although followed by an actual change in possession, is invalid as against subsequent attaching creditors of the mortgagor without notice actual or constructive of the mortgage, unless such change in possession is accompanied by the assumption on the part of the mortgagee of the usual *indicia* of ownership. And the mere employment of another clerk is not sufficient notice of a change of ownership to put creditors and purchaser upon inquiry. *Id.*

45. BILL OF SALE ABSOLUTE IN FORM, WHEN A CHATTEL MORTGAGE—RECORDING—NOTICE.—A bill of sale absolute is form is considered a chattel mortgage upon proof by parol that it was given to secure a debt, not only as to the parties to it, but also as to third parties who are affected with notice. Such bill of sale is entitled to be filed with the county clerk as a chattel mortgage, under section 46 of the code, page 522; and thereafter if imparts notice to third parties, although the clerk may omit to index the instrument. *Necklin* v. *Nelson et al.* (Or.), IV, 682.

46. CHATTEL MORTGAGE TO SECURE FUTURE ADVANCES—LIEN OF, WHEN ATTACHES.—In the absence of fraud, a chattel mortgage to secure future advances is valid, whether such object be expressed in the mortgage or not. The lien of such mortgage attaches from the date of the advance, and not from the date of the mortgage. *Id.*

47. VALIDITY OF A CHATTEL MORTGAGE CAN ONLY BE ATTACKED by one not a party thereto on the ground of fraud, in that it was given to hinder, delay, or defraud the mortgagor's creditors, and the facts determining its invalidity must be submitted to the jury. *Smith* v. *Montoya* (N. M.), I, 152.

48. FACT THAT A CHATTEL MORTGAGE WAS GIVEN TO SECURE FUTURE ADVANCES, if done in good faith, does not render such instrument invalid as to the mortgagor's creditors. *Id.*

See ATTACHMENT, 18; COUNTER-CLAIM, 4; DEMURRER, 10; DIVORCE, 7; EVIDENCE, 58, 59; GROWING CROPS, 1, 3; GUARDIAN AND WARD, 3; HOMESTEAD, 12; INJUNCTION, 6; MARRIED WOMEN, 1, 5, 6; MECHANICS' LIENS, 22, 23; SURETIES, 6; TAXATION, 16–28; USE AND OCCUPATION, 2.

MULTIPLICITY OF SUITS.

See TAXATION, 40, 69.

MUNICIPAL BONDS

See BONDS.

MUNICIPAL CORPORATIONS.

See CORPORATIONS.

MUNICIPAL COURT OF APPEALS.

See PLEADING AND PRACTICE, 46.

MURDER AND MANSLAUGHTER.

1. IN GENERAL.
2. EVIDENCE OF

1. IN GENERAL.

1. MURDER, WHAT IS.—Under the statutes of this territory, the killing of a human being in the commission of an unlawful act, which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, is murder. *People* v. *Mooney* (Idaho), II, 124.
2. MURDER IN THE FIRST DEGREE.—Under the statute, all murder committed in the perpetration or attempt to perpetrate robbery is murder of the first degree. *Id.*
3. MURDER—MANSLAUGHTER.—In case of a homicide committed by the defendants, where the fatal shot was fired while the deceased was retreating, and after all danger from him was over, and while defendant was pursuing him, then the defendant is guilty of murder or manslaughter, as the case may be. *People* v. *Pierson* (Idaho), II, 809.
4. MURDER—INSTRUCTIONS—DUELING.—When there is nothing in the circumstances attending a killing to bring the case within the crime of dueling, an instruction that "when parties by mutual understanding engage in a conflict with deadly weapons, and death ensues to either, the slayer is guilty of murder," is correct. *People* v. *Bush* (Cal.), II, 575.
5. THE SAME—KILLING AFTER QUARREL—QUESTIONS OF FACT.—If, between the quarrel and the killing, there is a space or interval of time sufficient for an ordinary man to cool, that may be deemed a *reasonable time* within the meaning of the rule on the subject. And if, between the quarrel and the infliction of the mortal wound, the mind of the defendant is directed to and is taken up by any other subject not in any manner connected with the cause of the quarrel, it may be reasonably supposed that his attention was called off from the subject of the provocation, and any subsequent killing of his adversary without other provocation, and with a deadly weapon, would be murder. An instruction to such effect is not erroneous, as being an instruction upon matters of fact. *Id.*
6. THE SAME—JUSTIFIABLE HOMICIDE—CONFLICTING INSTRUCTIONS.—A defendant may justify a killing, although he was the assailant, if he, in good faith, endeavors to decline any further struggle before the act of homicide was committed. An instruction to the contrary is erroneous, and is not cured by another instruction, in a different portion of the charge, where the law is correctly stated. In such case it would be impossible to determine under which of the two contradictory instructions the jury acted. *Id.*
7. KILLING AS THE RESULT OF A SIMPLE ASSAULT—MANSLAUGHTER.—The defendant, after an exchange of words with the deceased, struck him several blows on the head or face with his fist. The blows did not seem at the time, or immediately afterwards, to produce any serious results. How severe the blows were did not appear, but they must have been dealt with considerable force, as the deceased was found dead on the following day from their effect. It did not appear that the defendant had any intention to kill the deceased. *Held*, that such killing amounted to merely manslaughter, and not murder. *People* v. *Munn* (Cal.) II, 745.
8. THE SAME—DISTINCTION BETWEEN MURDER AND MANSLAUGHTER—MALICE.—In cases of homicide committed by violence, it is important to consider the character of the weapon with which the homicide was committed. If the means employed be not dangerous to life, or if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of

malice aforethought, which must exist to make the crime murder. Unless such malice exists, the homicide amounts simply to manslaughter. *Id.*

9. THE SAME—INSTRUCTIONS.—An instruction in this case, to the effect that "if a man knowingly and willfully does an act unlawful in itself, and produces harm, the law conclusively infers that such harm was intended; the law presumes that the natural, necessary, and even possible consequences were intended by the author of the act; if of sound mind, the natural and proximate consequences; and if the act intended was unlawful, even the possible consequences," is erroneous, as ignoring all distinction between the intent to commit an act amounting only to a misdemeanor and one that would, if committed, be a felony. *Id.*

10. WHERE THE DEFENDANT SEEKS TO JUSTIFY A HOMICIDE ON THE GROUND that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be the wife of the defendant, and that she kept a house of prostitution, with a view of showing that the deceased was upon the premises for purposes other than felonious, is proper. *People* v. *Pierson* (Idaho), II, 809.

11. AN INSTRUCTION that "if the jury believes from the evidence, beyond a reasonable doubt, that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder," is proper. *Id.*

12. WHEN THE DECEASED WAS SLAIN WHILE ENDEAVORING TO ESCAPE from the defendant, and had succeeded in wholly withdrawing in good faith from the vicinity of defendant and his house, and all danger to the person of defendant, to his habitation, or to any one residing therein, was over, then the killing can neither be justified, excused, or mitigated by declarations of defendant made to another person shortly before the homicide, and evidence thereof was properly refused. *Id.*

13. ACCESSARY AFTER THE FACT—CONCEALMENT OF DEAD BODY.—If a defendant has done no act which would make him responsible for a murder, the fact that he aided in concealing the dead body would render him liable only as an accessary after the fact. For such offense he could not be found guilty under an indictment for murder. *People* v. *Keefer* (Cal.), II, 878.

14. CONSPIRACY TO COMMIT MISDEMEANOR—MURDER.—One who simply encourages another to commit a misdemeanor upon the body of a third person, which did not and could not cause death, or any serious injury, is not liable for the murder of such third person by his co-conspirator, when such killing was neither aided, advised, nor encouraged by him, nor involved in nor incidental to any act by him aided, advised, or encouraged. *Id.*

15. ONCE IN JEOPARDY—NEW TRIAL—MURDER.—A defendant having been once tried upon an indictment for murder, and found guilty of murder of the second degree, who afterwards, on his own motion, has the verdict set aside and a new trial granted him for errors in the admission of evidence, may on such new trial be convicted of murder of the first degree. *Id.*

16. PLEA OF ONCE IN JEOPARDY—MURDER OF TWO PERSONS AT SAME TIME AND BY SAME ACT.—The murder of two persons by the same act, according to the weight of authority, constitutes two offenses, for each of which a separate prosecution will lie, and a conviction or acquittal in one case does not bar a prosecution in the other. But where two persons are directly concerned in the murder of two others, although the killing takes place at the same point of time, it does not follow necessarily that the murder of the two was accomplished by the same act. *People* v. *Majors* (Cal.), II, 580.

17. JURISDICTION WHEN DEFENDANT IS UNDER LIFE IMPRISONMENT.—The court has jurisdiction to try a defendant for murder, although he is at the time under sentence of life imprisonment for another crime. *Id.*

18. MOTION FOR NEW TRIAL—PLEA OF FORMER CONVICTION—APPEAL.—The superior court has jurisdiction to try a defendant for the crime of murder, although an appeal has been taken, and is still pending in the supreme court, from an order denying him a new trial on a plea of former conviction. No appeal lies from such order. *Id.*

19. SCRUPLES AGAINST DEATH PENALTY—IMPANELING JURY.—In a prosecution for murder, although such crime is not necessarily punishable by death, still it may be, and therefore, under subdivision 8 of section 1074 of the penal code, persons who entertain conscientious scruples against inflicting the death penalty can neither be permitted nor compelled to serve as jurors. *Id.*

20. MURDER BY INDIAN—JURISDICTION OF UNITED STATES COURT OVER.—The United States branch of the district court has exclusive jurisdiction of a prosecution for the murder of a white person committed by a Mescalero Apache Indian on the

Mescalero Apache Indian reservation. The indictment for such a crime should be in the name of the United States. *United States* v. *Monte* (N. M.), II, 265.

21. INVOLUNTARY MANSLAUGHTER.—The testimony of the defendant showed that he knocked down the deceased for assulting him while the latter was drunk. That after so doing, and while the deceased lay prone and helpless, he jumped with both feet upon his face, and that death ensued from such act. *Held*, that such killing was felonious, that it had none of the elements of involuntary manslaughter, and that the court could so instruct the jury. *People* v. *Biggins* (Cal.), II, 887.

22. A JUDGMENT CONVICTING THE DEFENDANT OF MANSLAUGHTER held supported by the evidence. *People* v. *Forsythe* (Cal.), II, 288.

23. HOMICIDE—INSTRUCTIONS—INTENT—SELF-DEFENSE.—In a prosecution for a homicide when there is no evidence tending to show that the act producing the death was accidental or done in self-defense, an instruction is not erroneous which omits all reference to the intent with which such act was committed, and is silent upon the law of self-defense. *Doctor Jack* (*an Indian*) v. *Territory* (Wash.), II, 780.

24. THE REFUSAL OF THE COURT TO PERMIT THE COUNSEL OF A PRISONER CHARGED WITH MURDER, on cross-examination of a witness for the prosecution, to question him in regard to the desperate character of the deceased, and as to what the witness had told the defendant of threats made by deceased against the defendant, is not error, when none of such matters were gone into on the direct examination *People* v. *Forsythe* (Cal.), II, 288.

25. WHEN TWO PERSONS ARE MURDERED IN THE EXECUTION OF A CONSPIRACY, entered into for the purpose of robbing one of them, the act of each conspirator in furtherance of such design is the act of each and every of the others, and each is guilty of the murder of each of the murdered men, and liable to prosecution therefor. *Id.*

26. MURDER—INSTRUCTION AS TO IMPLICATION OF MALICE.—Where the statute provided that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart,' an instruction is sufficient to the effect that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart." *People* v. *McDonald* (Idaho), I, 141.

27. LANGUAGE OF SUCH STATUTE IS IN THE ALTERNATIVE, AND IS EQUIVALENT to the provision that malice shall be implied in either case, when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, and it was proper for the court below to instruct the jury upon either ground, for the implication of which, in its judgment, there was evidence applicable. *Id.*

28. OMISSION FROM THE INSTRUCTION OF THE WORD "ALL" as given in such statute was not error. The word "all" in the connection used in the statute is a word of emphasis only, and is not in any sense essential to the completeness of the direction. *Id.*

29. INSTRUCTION AS TO DEGREES OF MURDER.—On the trial of an indictment for murder, it is the duty of the court, even without a request from the prisoner, to properly instruct the jury with respect to each and every of the degrees of that crime, within the definition of which there is any evidence whatever which can possibly bring the case; and the omission of the court so to instruct the jury concerning a particular degree of murder, even though not requested to do so by the prisoner or his counsel, where there was any evidence whatever tending to bring the case within that degree, is error requiring a new trial. *Territory of N. M.* v. *Nichols* (N. M.), I, 688.

30. MURDER IN THE SECOND DEGREE.—The statutory definition of murder in the second degree—"the killing of a human being without authority of law, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual"—does not contemplate a homicide committed "upon a sudden impulse and great heat of passion," but a killing perpetrated by an act imminently dangerous to others, without design to effect the death of any particular person, and evincing a reckless disregard of human life—such as recklessly firing a pistol into a crowd, or casting a stone from the top of a house into a crowded street, without thought or regard of the consequences of such acts, or as to who should be injured or killed thereby. *Id.*

40. ERRONEOUS INSTRUCTION.—The evidence showed that the prisoner was playing clards with the deceased and another person at a table. The prisoner charged the deceased with cheating, and then jumped up and drew a pistol, when the deceased clinched with him, and both fell to the floor, the deceased being uppermost. One

of the by-standers took prisoner's pistol away from him. The two then got up, and after getting up the prisoner stepped about four feet to where his overcoat was, drew from it another pistol, and immediately shot at and killed the deceased. Upon these facts the court instructed the jury that "if the prisoner premeditated the death of deceased, it is murder in the first degree. If he killed him upon a sudden impulse, and in great heat of passion, but under circumstances which showed an abandoned mind, regardless of human life, he is guilty of murder in the second degree." *Held*, that the instruction concerning murder in the second degree was error; that the evidence pointed either to murder in the first degree, or to murder in the fourth degree, which is defined by the statute to be "the killing of another in the heat of passion, without design to effect death, by a dangerous weapon." *Id.*

41. EVIDENCE IN THIS CASE HELD SUFFICIENT TO SUSTAIN the judgment of conviction of murder. *People* v. *Biddlecome* (Utah), I, 691.

42. JUSTIFIABLE HOMICIDE—MURDER—MANSLAUGHTER—INSTRUCTION.—In a prosecution for murder, when there is evidence upon which a conviction of manslaughter could be based, an instruction that "insulting words, gestures, *or actions* will not reduce an unlawful killing from murder to manslaughter, unless the gestures or actions are such as to reasonably induce the belief of danger to life, or of great bodily harm, in the mind of the person against whom they are used," is erroneous. If the person against whom actions are used *reasonably* believes that he is in danger of losing his life, or of receiving great bodily harm, the killing of his assailant is justifiable, and not unlawful. *People* v. *Biggins* (Cal.), III, 678.

43. FILING INFORMATION—CONFESSION OF DEMURRER.—In a prosecution for murder, an order allowing the counsel for the people to confess a demurrer to the information, and directing a new information to be filed, is equivalent to an order allowing the demurrer, within the meaning of section 1007 of the penal code. *Id.*

44. INFORMATION—TITLE OF COURT—OMISSION OF NAME OF COUNTY.—The omission to name the county in the title of an action in which an information is filed is not a fatal defect, when the body of the information designates by what district attorney the same is filed. *Id.*

45. THE CONCLUSION OF AN INFORMATION IN THE LANGUAGE of the penal code, section 951, is sufficient. *Id.*

46. MURDER—MANSLAUGHTER—REPEAL OF STATUTE—HABEAS CORPUS.—The petitioner was indicted on March 15, 1881, for a murder alleged to have been committed on May 23, 1880, tried under such indictment, found guilty of murder, and sentenced to a life imprisonment. Such judgment of conviction was subsequently reversed by the supreme court, and the cause remanded to the lower court, for the reason that after the commission of the offense the legislature had so amended the statute concerning murder as to render it impossible for the petitioner to be convicted of such crime: *Held*, that neither such amendment nor reversal repealed, quashed, or rendered void such indictment as a pleading; that upon the going down of such case to the lower court the petitioner could be tried and convicted under such indictment for manslaughter, but that a judgment for manslaughter rendered upon the former verdict convicting the petitioner for murder, without a retrial under the indictment, was absolutely void, and that the petitioner was entitled to his discharge from an imprisonment thereunder upon *habeas corpus*. *In re Garvey, on habeas corpus* (Col.), III, 1.

47. WILLFUL SHOOTING OF HUMAN BEING—SELF-DEFENSE—BURDEN OF PROOF.—The shooting of a human being, if not justifiable or excusable, is presumed to have been done willfully, unlawfully, wrongfully, and maliciously, and in an action to recover for such shooting, the burden of proving the same to have been done in self-defense is upon the defendant. *Brooks* v. *Haslam* (Cal.), III, 366.

48. CAUSE OF DEATH—CHRONIC ALCOHOLISM.—In a prosecution for homicide, where death ensued soon after the infliction of the wound, and evidence is offered on the part of the defendant tending to show that death was occasioned by chronic alcoholism, the cause of the death is a question for the jury. *People* v. *Moan* (Cal.), III, 632.

49. ACCELERATION OF DEATH BY VIOLENCE—HOMICIDE.—If a person accelerates the death of another by violence, he is guilty of homicide, although death might be and probably would have been the result of the disease which then afflicted the deceased. *Id.*

50. CRIME DISTINGUISHABLE INTO DEGREES—VERDICT.—Whether the verdict rendered on an information charging prisoner with murder was sufficient under the rule re-

quiring the degree of the crime to be found, raised but not determined. *People* v. *Wasson* (Cal.), III, 642.

51. A VERDICT IN A PROSECUTION for murder, that "we the jury do find the defendant guilty of murder in the second degree," is sufficient in form. *Cornish* v. *Territory* (Wy.), III, 89.

52. MURDER AND MANSLAUGHTER—MALICE, WHEN INFERRED.—The distinction between murder and manslaughter lies in the presence or absence of malice. The existence of malice, like any other fact, may be logically inferred by the jury from all the facts and circumstances of the case, legally proved, the weapon used, the action of the defendant at the time of the killing, and his previous acts and conduct. *People* v. *Samuels* (Cal.), IV, 382.

53. MURDER—DEFENDANT'S GOOD CHARACTER.—If the jury believe the defendant guilty of murder, they must so find, notwithstanding his good character. *Id.*

54. CRIMINAL LAW—MURDER—SELF-DEFENSE—FEAR OF ASSAULT—INSTRUCTIONS.—An instruction given in a prosecution for murder, at the request of the people, that "the bare fear of an assault upon the defendant will not justify homicide, nor the fear that deceased was about to commit a felony, unless defendant believed there was imminent danger thereof," is no ground for reversal. Such instruction was more favorable to the defendant than he was entitled to, as it omitted the element of the reasonableness of the belief. *Id.*

55. JUSTIFICATION OF HOMICIDE—BURDEN OF PROOF—INSTRUCTIONS.—In a prosecution for murder, where, from all the circumstances surrounding the homicide, as detailed in evidence by the prosecution, nothing is disclosed in any way tending to excuse or justify the homicide, it is incumbent upon the defendant to show such justification or excuse, if any there be. If he neglect to offer any evidence in justification, an instruction which omits to charge concerning the law of self-defense is not error. *Cook* v. *Territory* (Wy.), IV, 340.

56. INDICTMENT FOR MURDER—VERDICT, SUFFICIENCY OF.—Under an indictment framed in but one count, which charges murder in the first degree, a verdict is sufficient which finds the defendant guilty as charged in the indictment. *Id.*

57. CRIMINAL LAW—CONCLUSION OF INDICTMENT.—Under the Montana statute, if the substantive averments in an indictment for murder are good and sufficiently describe the crime, the formal concluding words are immaterial. *Id.*

58. CRIMINAL LAW—MURDER—INDICTMENT—POSSESSION OF WEAPON.—An indictment for murder need not allege that the weapon with which the homicide was committed was had or held by the defendant at the time of the alleged killing. *Territory* v. *Young* (Mont.), IV, 468.

2. EVIDENCE OF.

59. DYING DECLARATIONS.—Decedent's statement that "I think that this man, H. W., is the man that shot me," is inadmissible. *People* v. *Wasson* (Cal.), III, 642.

60. DYING DECLARATION—BELIEF IN IMPENDING DEATH—RES GESTÆ.—In a prosecution for murder, the statements of the deceased, made in the presence of the defendant shortly after the infliction of the mortal wound, and after he had expressed a belief that he was about to die, and had given directions for the settlement of his affairs, to the effect that the defendant was "the man who cut him with a knife, and that he had no cause for it whatever," are admissible in evidence as dying declarations, and also as part of the *res gestæ*. *People* v. *Abbott* (Cal.), IV, 132.

61. VOLUNTARY CONFESSION TO OFFICER.—In such case the voluntary confession of the defendant made to the arresting officer is admissible in evidence. *Id.*

62. EVIDENCE OF SURROUNDING CIRCUMSTANCES—RES GESTÆ.—In a prosecution for murder, the surrounding circumstances, such as the condition in which the body and clothing of the person killed were found, are admissible as part of the *res gestæ*. *People* v. *Majors* (Cal.), II, 580.

63. CONDUCT, ACTS, AND EXPRESSIONS OF PRISONER—EVIDENCE.—The conduct, acts, and expressions of a person accused of crime, at the time of his arrest, are always admissible in evidence against him. *People* v. *Abbott* (Cal.), IV, 132.

64. FORMER CONVICTION OF A FELONY MAY BE SHOWN BY THE EXAMINATION of the witness or by the record of the judgment. *Id.*

65. UNLAWFUL KILLING—MALICE—BURDEN OF PROOF.—When an unlawful killing is proved, malice will be presumed, and the burden of proof is on the defendant to show the absence or want of malice. *Id.*

66. THE CREDIBILITY TO BE ATTACHED TO DYING DECLARATIONS is a matter for the jury. *Id.*

67. CO-DEFENDANT IN CRIMINAL PROSECUTION—EVIDENCE OF.—A defendant in a criminal case, both at the common law and under section 166, title 1, chapter 16, of the criminal code, is incompetent to testify for and on behalf of one jointly indicted with him, although the defendant offered as a witness is not on trial at the time. *State* v. *Drake* (Or.), IV, 574.

68. NEW TRIAL—EVIDENCE OF ACQUITTED CO-DEFENDANT—DISCRETION.—Whether a new trial will be granted on behalf of a defendant convicted in a criminal case because a co-defendant tried at the same time and acquitted, or, upon severance, subsequently tried and acquitted, is a material witness for him, *quære*. Conceding, however, that it would be a matter addressed to the sound judicial discretion of the court below, and in a proper case ought to be allowed, the record here does not show an abuse of such discretion. *Id.*

69. EVIDENCE OF THE DEFENDANT'S MANNER AND CONDUCT WHEN ARRESTED, and comments upon the same made by a third person at the time, in the presence and hearing of the defendants, is admissible. *People* v. *Shem Ah Fook* (Cal.), I, 112.

70. WHETHER LEADING QUESTIONS SHALL BE ALLOWED TO BE PUT by the prosecution to its own witnesses is a matter of judicial discretion. *Id.*

71. REFUSAL TO STRIKE OUT THE TESTIMONY AS TO CERTAIN ADMISSIONS by the defendants, made after their arrest, while in the sheriff's office and in the jail, is not error, where there is nothing to show that such admissions were not voluntary. *Id.*

72. ADMISSIONS MADE BY ONE DEFENDANT IN A CONVERSATION with a third person are competent evidence against him on a trial of two defendants jointly for murder. *Id.*

73. EVIDENCE IS ADMISSIBLE IN A PROSECUTION FOR MURDER THAT THE DEFENDANT HAD IN HIS POSSESSION such an instrument as might have caused the wounds inflicted on the body of the deceased. *People* v. *McDowell* (Cal.), I, 478.

74. EVIDENCE AS TO THE PLACE WHERE THE DECEASED WAS SUPPOSED TO HAVE BEEN KILLED is admissible, merely for the purpose of locating the spot as a foundation for further examination. *Id.*

75. MOTIVE OF WITNESS—EVIDENCE OF.—Where, on a prosecution for murder, a witness for the people has testified that he saw the deceased and the prisoner together, and on cross-examination stated that he had a motive for watching them, it is error for the court to allow the witness to testify, in answer to a question by the prosecution, and against the defendant's objection, as to what his motive was. And after testifying that his motive was the expectation of seeing a fight, because the deceased had told him that he had a difficulty with the prisoner, it is error for the court to refuse to strike out such evidence of a difficulty, or to caution the jury that the statement of the witness was not evidence of such difficulty. *People* v. *Biddlecome* (Utah), I, 691.

76. THE EXCLUSION FROM EVIDENCE OF AN UNAUTHENTICATED COPY OF AN ACCOUNT OFFERED BY THE DEFENSE for the sole purpose of fixing a date, and thus corroborating the testimony of a witness, is not error. *Id.*

77. REFUSAL OF THE COURT TO CHARGE THE JURY THAT THERE IS NO EVIDENCE that the prisoner ever shot the deceased, or ever molested or premeditated shooting or killing him, or ever had any malice or ill-feeling against him, is not error, unless the evidence entirely failed to support such facts. *Id.*

78. WHERE A WITNESS HAS TESTIFIED TO A HOSTILITY TOWARD ONE OF THE PARTIES to the action, and has been permitted to detail the grounds of his hostility, the refusal of the court to permit such party to give evidence contradicting the statements of the witness as to such hostility, is not an abuse of discretion. *Busby* v. *Carpenter* (Wash.), I, 837.

79. MURDER—STRANGULATION—EVIDENCE.—In a prosecution for murder caused by strangulation, a witness may be asked whether certain wounds found upon the neck of the deceased could have been produced by the hands of defendant. *Cornish* v. *Territory* (Wy.), III, 89.

80. EVIDENCE OF CONVERSATIONS BETWEEN CONSPIRATORS—STRIKING OUT EVIDENCE, EFFECT OF.—All matters talked about between conspirators at the time the main subject of the conspiracy was discussed are admissible in evidence in a criminal prosecution against one conspirator for a crime growing out of the conspiracy, although such matters, if talked about at a different time, would have been inadmissible. Even if the admission of such evidence was erroneous, the error would be cured if the court struck it out and instructed the jury not to consider it. *People* v. *Majors* (Cal.), II, 580.

81. RES GESTÆ.—Statements by the deceased, made some days after the shooting, are but a narrative of a past transaction, and are incompetent. *People* v. *Wasson* (Cal.), II, 642.

82. PREJUDICE OF WITNESS.—On cross-examination it is incompetent to ask witness questions that will show that he entertains feelings of hostility and prejudice toward the party against whom he is called. *Id.*

83. EVIDENCE OF AN ACCOMPLICE IS SUFFICIENT TO SUSTAIN A CONVICTION of murder when the same is corroborated by evidence of an admission made by the defendant connecting himself with the killing of the deceased. *People* v. *Zimmerman* (Cal.), III, 59.

84. THE SAME—A WITNESS HAVING TESTIFIED TO SUCH ADMISSION could not remember the date on which it was made. *Held*, that the testimony of a constable to whom he had told what the defendant had said was admissible, not for the purpose of having the conversation repeated, but for the purpose of fixing the date. *Id.*

85. DUTY OF PROSECUTION TO CALL WITNESS PRESENT AT KILLING—MURDER.—The prosecution in a trial for murder must call every person who was present and witnessed the alleged homicide, if it is within their power, and a failure so to do is ground for reversal. *Territory* v. *Hanna* (Mont.), IV, 471.

86. CRIMINAL LAW—MURDER—EVIDENCE—REASONABLE DOUBT.—The evidence of the only witness who testified to the act of killing, or connected the defendant with the homicide, reviewed and held so contradictory and improbable as not to exclude every reasonable doubt of the defendant's guilt. *Territory* v. *Adolphson* (Mont.), IV, 474.

87. RECORD OF CONVICTION OF MURDER, EVIDENCE OF.—The record of conviction is admissible in evidence for the purpose of showing that the person convicted was implicated in a murder. *Harris* v. *More et al.* (Cal.), IV, 696.

88. DEFENDANT'S REPUTATION FOR PEACE AND QUIET, EVIDENCE OF.—The refusal of the court to allow a witness to answer a question as to the defendant's general reputation for peace and quiet, in a prosecution for a homicide, is not error, if the witness has never heard such reputation discussed, or if such good reputation has already been established by a great number of other witnesses, and no evidence to the contrary is offered by the prosecution. *People* v. *Moan* (Cal.), III, 632.

89. RECALLING WITNESS—DISCRETION OF COURT.—Upon a review of all the circumstances: *Held*, that the court's refusal to permit the defendant to recall a witness who had already been on the stand twice was not an abuse of discretion. *Id.*

90. INSTRUCTIONS BY THE COURT — CIRCUMSTANTIAL EVIDENCE. —Where defendant's counsel made attacks upon circumstantial evidence as a ground for conviction, and called the attention of the jury to certain cases found in books, where it was claimed innocent persons had been convicted upon circumstantial evidence, an instruction of the court cautioning the jury against attaching too much importance to such cases in connection with other and proper instructions concerning circumstantial evidence, is not error. *People* v. *Shem Ah Fook* (Cal.), I, 112.

91. REFUSAL OF THE COURT TO INSTRUCT THE JURY IN REFERENCE TO CIRCUMSTANTIAL EVIDENCE, "that it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any rational probability of any other hypothesis being true," is not error. In such instruction the words "absolute moral certainty" are not synonymous with "moral certainty." *People* v. *Davis* (Cal.), I, 341.

92. WHEN A DEFENDANT IS A WITNESS IN HIS OWN BEHALF, the court may instruct the jury that in weighing his evidence they must consider the circumstances under which he testified, and his interest in the result. *People* v. *Wheeler* (Cal.), II, 70.

93. AN INSTRUCTION AS TO THE CREDIT THAT SHOULD BE GIVEN TO A WITNESS, and one that the same weight should be given to the testimony of defendant when corroborated as to that of any other witness, invades the province of the jury and is properly refused. *People* v. *Pierson* (Idaho), II, 809.

94 REOPENING OF CASE.—After the testimony in a criminal case has closed, and the opening argument for the prosecution has begun, it is a matter of discretion with the court whether it shall allow the defendant to reopen his case, for the purpose of introducing evidence on his plea of once in jeopardy, as to which no evidence had been given. *People* v. *Ross* (Cal.), II, 291.

See ARREST AND BAIL, 6; APPEAL, 10, 11; INDIANS, 1-7; INSTRUCTIONS, 5, 27; JURY AND JURORS, 26; WITNESSES, 9.

NAVIGABLE STREAMS.

See NUISANCE, 1-17; WATER RIGHTS, 1-14.

NEGLIGENCE.

1. INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANTS.—The rule first suggested in *Priestly* v. *Fowler*, 3 Mee. & W. (1837), 1, that a master who has exercised due care and skill in the employment and retention of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision, so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions, under the direction and control of local bosses, superintendents, or heads of departments, who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen, and to provide the necessary material and appliances for their convenient and safe employment. *Gilmore* v. *Northern Pacific Railway Company* (U. S. Cir. Ct., Or.), I, 455.
2. WHEN FELLOW-SERVANT STANDS FOR MASTER.—It seems well established that a master is responsible to his servant for an injury sustained by him without his fault, in consequence of the negligence of a fellow-servant: 1. When the latter, having authority over the former, orders him to do an act not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and he is injured in so doing; 2. Where the master has charged the latter with the duty of providing proper material and appliances for carrying on a work in which he is personally engaged with the former, or not, and by the negligence to do so he is injured. *Id.*
3. CASE IN JUDGMENT.—In February, 1883, the Northern Pacific Railway was engaged in constructing its road through western Montana, and had many gangs of men, numbering not less than fifty each, at work on the line of the route, at from three to five miles apart, under the control and direction of foremen, or local bosses, with the power to employ and discharge, subject themselves to the control of a general superintendent and assistant, who passed along the route and inspected the camps at certain periods. Some of these gangs used giant-powder for blasting the rocks and frozen earth, and in such case the foreman was charged specially with the duty of handling the powder, and thawing it when frozen. The general superintendent was aware of the danger of thawing powder before a fire, and had given general notice not to do it, and provided a safe appliance, called a "heater," for the purpose, subject to the requisition of the local boss. The plaintiff was employed as a common laborer in one of these gangs where powder was always thawed without a "heater," before the fire, and while assisting in so thawing powder, by direction of the local boss, was injured by its explosion. *Held*, that the local boss, so far, stood in the place of the defendant, and that the neglect of the former to obtain and use the proper appliance for thawing powder, and his directing the plaintiff to assist in thawing powder without the security of such appliance, were wrongful acts, for which the defendant is responsible to the plaintiff so far as he was injured thereby. *Id.*
4. OWNER OF A MINE WHO WORKS IT IN A DANGEROUS BUT THE ONLY PRACTICABLE MANNER is not liable for injuries to an employee caused by a fellow-servant in the course of the employment, if such employee had knowledge of the danger, unless the injury complained of resulted from the wrongful act, neglect, or default of the owner. *Lopez* v. *Cent. Ariz. Mining Co.* (Ariz.), I, 41.
5. NEGLIGENCE—WORK DANGEROUS IN ITSELF—MASTER AND SERVANT.—A railroad company, whenever it calls upon an employee to perform work under dangerous conditions, is bound to provide him with the ordinary means of protection; and its failure to do so is negligence, unless the right to have such means of protection furnished has been waived by the employee. *O'Rorke* v. *U. P. R. R. Co.* (U. S. Cir. Ct., Col.), IV, 203.
6. THE SAME—ASSUMPTION OF RISK BY EMPLOYEE.—Where an employee has been accustomed to do such work day after day for several months, knowing the same to be dangerous, but without making complaint, or demanding the ordinary means of protection, it must be presumed that he assumed the risks of his employment, and if he is injured therein the company is not liable. *Id.*
7. WHERE A RAILROAD COMPANY HAS PROVIDED A PLATFORM ON ONE SIDE OF ITS TRACK on which passengers may alight, an attempt of a passenger to get off on the other side is not negligence *per se*. *McQuilkin* v. *Central Pacific R. R. Co.* (Cal.), I, 479.

8. THE ACT OR OMISSION ON THE PART OF A PASSENGER, CLAIMED TO HAVE CONTRIBUTED TO THE INJURY complained of, must have direct relation to the act or omission charged to be negligence on the part of the carrier. Whether such act or omission was negligence, and whether such negligence was to any extent an immediate concurring cause of the injury, are matters to be decided by the jury. *Id.*
9. IF THE NEGLIGENCE OF THE PASSENGER CONTRIBUTED DIRECTLY OR PROXIMATELY TO THE INJURY COMPLAINED OF, no recovery can be had against the carrier, whatever may have been his negligence. It is not giving the defendant the benefit of this rule as to contributory negligence to charge the jury that the negligence of the plaintiff which contributed as a proximate cause to the injury, will prevent a recovery, provided the defendant has not been guilty of negligence. *Id.*
10. PLAINTIFF IN SUCH ACTION CAN NOT RECOVER IF HIS OWN WANT OF CARE or negligence in any degree contributed to the result complained of. It is no defense, however, if the plaintiff's act might have, or did, contribute to the injury. It must have been by his fault, not merely by his act. *Lopez* v. *Central Arizona Min. Co.* (Ariz.), I, 41.
11. RAILROAD—NEGLIGENCE—ESCAPE OF FIRE—LOCOMOTIVE.—A railroad company is not liable for damages caused by sparks emitted from one of its locomotives, if the same was in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, unless the sparks escaped through the negligence of the agents and servants of the company. *Smyth* v. *Stockton & C. R. R. Co.* (Cal.), III, 575.
12. RAILROAD—INJURY TO HORSE AND RIDER—FAILURE TO FENCE ROAD.—Under section 485 of the civil code, a railroad corporation is liable for injuries inflicted by it on both a horse and the person riding it, when such injuries are occasioned, without negligence on the part of such rider, on a portion of such road which is not inclosed as required by such section. *Hynes* v. *S. F. & N. P. R. R. Co.* (Cal.), III, 99, 101.
13. WHETHER THE RIDER WAS GUILTY of contributory negligence, under the particular circumstances of this case, was a question for the jury. *Id.*
14. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—A foreman of a mine, who has practically the entire charge of the working of the same, with authority to employ and discharge the workmen as he sees fit, can not recover for personal injuries resulting from an accident occasioned by defective machinery, when such accident could have been prevented by the employment of an additional hand; nor, when he assumes and continues in such employment, without objection, and with full knowledge of such defect in the machinery of the mine. *Alexander* v. *Tennessee and Los Cerrillos Silver Mining Co.* (N. M.), III, 71.
15. BREAKING OF DAM—NEGLIGENCE—INSTRUCTIONS.—In an action for damages caused by the breaking away of a dam through the defendant's negligence, the court can not instruct the jury that the defendant's failure to have waste-water gates, or to constantly examine the dam, was negligence. Whether such facts constituted negligence was a question for the jury. *Weidekind* v. *Tuolumne County W. Co.* (Cal.), III, 376.
16. RAILROAD COMPANIES OWE A DUTY TO THEIR EMPLOYEES, TO KEEP THE TRACKS OF THEIR RAILWAYS FREE from obstructions that would endanger the lives of the latter. The duty thus imposed is that of ordinary care, to be determined by the danger of the service, and proportioned to it, but such company neither warrants nor insures against defects. *Wilson* v. *Denver, South Park & Pacific R. R. Co.* (Col.), I, 595.
17. ALLEGATION THAT AN INJURY TO AN EMPLOYEE WAS OCCASIONED BY AN OBSTRUCTION OF THE TRACK does not make out a *prima facie* case of liability against a railroad company; but when it is further alleged that such obstruction was upon the track by reason of the negligence of the company, and that the employee was in the discharge of his duty, and exercising due care and skill at the time of the injury, such allegations are sufficient to constitute a *prima facie* case against the company. *Id.*
18. EXPRESS COMPANY IS LIABLE FOR LOSS RESULTING FROM THE FAILURE of its agent to seal a valuable package, if it were their custom so to do, or for negligence in receiving such package unsealed, and afterwards shipping it in such condition, if it were their custom not to receive such packages until sealed by the shipper. Nor can it escape from liability for such loss on the ground that it may have occurred on one of their connecting lines. *Overland Mail etc. Co.* v. *Carroll* (Col.), I, 281.
19. RAILROAD COMPANY MUST CONSTRUCT ITS WORKS, SUCH AS DITCHES FOR DRAINING WATER, with proper skill and care, having due regard to the features of the ground over which it passes, and must keep the same in repair; and it is liable for in-

juries resulting to an adjoining owner of land from failing so to do, although such injuries do not happen immediately after the completion of the work. *Davidson* v. *Oregon etc. R. R. Co.* (Or.), I, 421.

20. EXPULSION OF PASSENGER—DUTY OF EXPELLED PASSENGER—CARE AND CAUTION REQUIRED OF.—A passenger expelled from a railroad car is not required to use the utmost care and caution to avoid injury; it is sufficient if he uses such prudent care as is reasonable under the circumstances. Whether it was prudent for a passenger, after his expulsion from a car, during which he received an injury, to walk to a place other than the nearest dwelling-house, is a question for the jury. Under section 487 of the civil code, the passenger expelled is under no duty to go to the nearest dwelling-house. *Bland* v. *S. P. R. R. Co.* (Cal.), IV, 78.

21. OWNER OF BUILDING—NEGLIGENCE—INJURY FROM AWNING.—An owner of a building who erects an awning thereon over a public street, or who allows an awning erected by a prior owner to remain, under a license so to do from the city authorities, on condition that the same be securely fastened, is liable to any one who, without fault, is injured through the owner's neglect to keep the awning in repair. Such liability exists, although at the time of the injury the building was occupied by a tenant. *Jessen* v. *Sweigert* (Cal.), IV, 586.

22. ACTION FOR NEGLIGENCE—VARIANCE BETWEEN ALLEGATIONS AND PROOF.—In an action to recover damages for a fire alleged to have been caused by a defective flue, evidence that such fire was caused by the entire want of a flue is not a fatal variance, when it appears that the party objecting was not misled as to the meaning of the averment. *Denver, South Park & Pacific R. R. Co.* v. *Conway* (Col.), IV, 682.

23. NEGLIGENCE—ACTION FOR—INTEREST NOT ALLOWED.—In an action to recover damages for injury to property caused by negligence, interest on the value of the property injured or destroyed is not recoverable, as the same is not authorized by the statute. *Id.*

24. NEGLIGENCE OF RAILROAD, ACTION TO RECOVER FOR.—In an action to recover damages for a loss occasioned by the negligence of a railroad company, when the complaint therein is framed to recover on the common-law liability of the company, the defendant's negligence must be proved. If the plaintiff fails in such proof on the trial, he can not abandon the action as brought and claim a recovery under a statute which makes the company liable as an insurer against a loss such as the one suffered by him. *Davis* v. *Utah S. R. R. Co.* (Utah), II, 453.

25. CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS AS TO.—Whether a plaintiff has been guity of contributory negligence in placing his property, for the destruction of which an action is brought, in a house so constructed and situated as to be subjected to great risk through the ordinary operation of defendant's road, is a question for the jury. An instruction to the contrary, although erroneous, will not warrant a reversal, when it is evident that the jury disregarded it. *Id.*

26. ACT OF THE TERRITORIAL LEGISLATURE OF 1879, PROVIDING FOR THE SCALING OF LOGS by the lumber inspector, is not within the inhibition of section 1889 of the revised statutes. *Crawford et al.* v. *Cochrane et al.* (Wash.), II, 784.

27. SALE OF LOGS BY AGENT WITHOUT SCALING.—A gratuitous agent for the sale of certain booms of logs, who sells the same without having them scaled by the lumber inspector, is guilty of gross negligence, and is liable to his principal for the damage caused thereby. *Id.*

28. EVIDENCE OF THE CONDITION OF THE REMAINS OF THE DECEASED is admissible in an action for damages for a negligent killing. *Leahy* v. *S. P. R. R. Co.* (Cal.), II, 693.

29. CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.—In an action to recover damages for personal injuries, caused by the alleged negligence of the defendants, when the defense relied on is contributory negligence on the part of the plaintiff, and the evidence is such that the question of contributory negligence is properly submitted to the jury, it is error for the court to remark to the jury that he does not see how the facts alleged to constitute contributory negligence were unreasonable, "or something which an ordinary man would not do." *Andrews* v. *Runyon* (Cal.), IV, 81.

30. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WANT OF CARE.—In an action to recover damages for negligence, the plaintiff can not recover if he contributed to the disaster by his own negligence, or want of ordinary care and caution, to such an extent that but for such negligence or want of care on his part the accident would not have happened. *Colorado Central R. R. Co.* v. *Martin* (Col.), IV, 563.

31. THE SAME—RAILROAD COMPANY—MASTER AND SERVANT.—The plaintiff in error, in anticipation of an attack upon its train by robbers, provided breech-loading shotguns and ammunition for their defense. These guns were placed by the superin-

tendent of the company in charge of the train baggage master, with instructions to keep the guns unloaded and wrapped up in a blanket, except when passing over that portion of the road where an attack was apprehended. Upon reaching a certain station on the road the guns were to be unpacked and charged, ready for use; and after passing the same on the return of the train, the cartridges were to be withdrawn and the guns again wrapped up, and, upon reaching the headquarters of the company, the package was to be delivered to the station baggage-master, to be kept over night, and upon the return of the train he was to replace the package. The plaintiff, a conductor on the train, who had entire command thereof, and knew of the foregoing regulations, was injured by the accidental discharge of one of the guns when the same were being replaced on the train by the station baggage-master. *Held*, that whether the company was guilty of negligence in not providing gun-racks or other suitable means for transporting the guns, was a question for the jury; that the plaintiff, as conductor of the train, was charged with the duty of seeing that the instructions of the superintendent were observed; and that the injury resulted from the negligence of a fellow-servant, for which the company was not liable. *Id.*

32. CARRIERS OF PASSENGERS—NEGLIGENCE—COLLISION—PARTIES.—When a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another vehicle, the party injured may recover from the proprietors of either or of both. Where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turn out that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other. *Tompkins* v. *Clay-street Hill R. R. Co. et al.* (Cal.), IV, 537.

33. THE SAME—PROOF OF NEGLIGENCE—INSTRUCTIONS.—A passenger by one carrier, in an action against a different carrier to recover for an injury occasioned by a collision between such carriers, must prove negligence on the part of the defendant. As against such latter carriers there is no presumption of negligence arising from the fact of the injury. The defendant is entitled to an instruction in conformity with this rule; and a general instruction to the effect that the plaintiff must make out his case by a preponderance of evidence is not equivalent thereto. *Id.*

34. THE SAME—RELEASE OF ONE CARRIER—ESTOPPEL.—Such passenger, if he receives compensation from one carrier, in consideration of which he discharges and releases it from all liability on account of the injury, is estopped from denying the liability of such carrier, and he can not afterward maintain an action against the other carrier for the same injury. *Id.*

35. STREET RAILROAD—NEGLIGENT KILLING OF CHILD IN STREET.—In an action against a street railroad company for killing a child of very tender years, as it was attempting to cross the street, the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the company in the management of the car, and that the person having care of the child took all proper precaution for its safety. *Roller* v. *Sutter-street R. R. Co.* (Cal.), IV, 691.

See ADMIRALTY, 6; ATTORNEYS, 5; BANKS AND BANKING, 1; COMMON CARRIERS, 6–8; CONTRACTS, 13; CORPORATIONS, 54, 55; MARRIED WOMEN, 7; MASTER AND SERVANT, 3–5; PLEADING AND PRACTICE, 7; TELEGRAPH COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. PARTY TO A BILL OF EXCHANGE.—In a suit upon the following bill of exchange, duly protested for non-acceptance: "$10,000. Santa Fé, N. M., Nov. 25, 1876. Three days after sight, pay to the order of J. M. Luna & Bro. ten thousand dollars, and charge the same to the account of (signed) Max Lichtenthal, Ag't. To Messrs. Mohr & Mohr, Cincinnati, Ohio"—*held*, that the action can not be maintained on this bill against the defendant Paul Mohr, as a drawer thereof, by means of parol evidence tending to show that in drawing said bill Max Lichtenthal acted as agent for the firm of Mohr & Mohr, the drawees thereof, that the bill was thus in reality drawn by said firm as drawers upon themselves, and that defendant was a member of said firm. *Luna* v. *Mohr* (N. M.), I, 673.

2. PARTIES TO NEGOTIABLE INSTRUMENTS.—In general, a person can not be held liable as a party to a negotiable instrument where his name does not in any way appear on the instrument as such party. *Id.*

3. LIABILITY FOR THE ORIGINAL CONSIDERATION.—A person not liable on a negotiable instrument, because he is not a party thereto, may still be held liable in a suit

brought, or upon a separate count, upon the original consideration for which the note or bill was given. *Id.*

4. EVIDENCE OF PAYMENT OF A PROMISSORY NOTE IN A MANNER AGREED UPON by the maker and payee at the time of the execution thereof, is admissible in an action thereon by a transferee, under a plea of payment. Such agreement as to the manner of payment is not void for want of consideration. *Jones* v. *Snow* (Cal.), I, 465.
5. TERMS OF A PROMISSORY NOTE PROVIDING FOR THE PAYMENT OF EXCHANGE, where the instrument is made payable at a particular bank in a designated city, may be rejected as surplusage, and do not render the note non-negotiable by reason of the amount due thereon being uncertain. *Orr* v. *Hopkins* (N. M.), I, 157.
6. NEGOTIABLE PROMISSORY NOTE IMPLIES A CONSIDERATION for the promise therein contained. *Id.*
7. DECLARATION ON A PROMISSORY NOTE, WHICH DESCRIBES SUCH INSTRUMENT as payable generally or absolutely, can not be supported by evidence of a note in which the place of payment is specifically designated. *Id.*
8. PROMISSORY NOTE—FAILURE OF CONSIDERATION.—A promissory note given in part for a definite sum, which was represented to have been allowed the payee by the probate court for his services as guardian of the maker, is wanting in consideration to the extent of such sum if the probate court never made such allowance. *Estudillo* v. *Aguirre* (Cal.), IV, 694.
9. INADEQUACY OF CONSIDERATION IS NO DEFENSE TO AN ACTION ON A PROMISSORY NOTE, unless there was fraud also on the part of the promisee. *Caldwell* v. *Ruddy* (Idaho), I, 295.
10. A HOLDER OF A NOTE IS NOT EXCUSED FROM PRESENTING IT FOR PAYMENT so as to charge the indorsers, by the fact that the maker of the note, before its maturity, notified the president of the bank in which it was left for collection that he would not be able to pay it at maturity. *Appelgarth* v. *Abbott* (Cal.), I, 469.
11. MERE AUTHORITY TO EXECUTE A PROMISSORY NOTE DOES NOT INCLUDE authority to pay the same when it becomes due. *Luning* v. *Wise* (Cal.), I, 138, 257.
12. PRESENTMENT OF A PROMISSORY NOTE FOR PAYMENT TO A JOINT MAKER THEREOF IS EXCUSED, if at the time of the execution and maturity of the note such maker resided in a state other than that in which payment should be made. *Id.*
13. INDORSEMENT OF A PROMISSORY NOTE IS PRESUMED TO HAVE BEEN MADE for a valuable consideration, and before maturity, in the absence of evidence to the contrary. *Id.*
14. NEGOTIABLE PROMISSORY NOTE, WHAT IS.—The following instrument: "$284. Denver, Colorado, January 12, 1882. On or before March 12, 1882, I promise to pay to the order of J. O. Allen, two hundred and eighty-four dollars, at the City National Bank, with interest ten per cent per annum, value received. This note becomes due and payable when (if before March 12, 1882) Allen, Burke & Co. shall dispose of a part or all of their interest in the New York Hotel, or when the interest of M. C. Burke may be sold or disposed of. [Signed] M. C. Burke, [and indorsed] William Kiskadden"—is a negotiable promissory note. It is payable at a day certain, and not upon any contingency. *Kiskadden* v. *Allen* (Col.), II. 320.
15. INDORSEMENT BEFORE DELIVERY TO GIVE THE MAKER CREDIT.—When a promissory note, made payable to a particular person or order is first indorsed by a third person, such third person is held to be an original promisor, or a guarantor, or an indorser, according to the nature of the transaction, and the understanding of the parties at the time the transaction took place. *Id.*
16. THE SAME.—If the indorser put his name on the back of such a note at the time it was made, before its delivery to the payee, or as surety to the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. *Id.*
17. PARTNERSHIP IN NOTE—EVIDENCE OF.—A negotiable note payable to two or more persons jointly is not evidence that it is owned in partnership; nor is the fact that such note is in the actual manual possession of one of the payees such evidence. The evidence reviewed and held not to establish a partnership in the notes in question. *Haydon* v. *Nicoletti* (Nev.), II, 632.
18. ASSIGNEE OF JOINT PROMISSORY NOTE—INDORSEMENT BY ONE PAYEE.—The assignee before maturity of a negotiable promissory note, payable to the joint order of two persons not partners, indorsed by one only of the two joint payees, takes the same subject to all the equities existing in favor of the maker, the same as though

it had not been indorsed by either. Such note can not be transferred except by the joint indorsement of all the payees. *Id.*

19. STIPULATION FOR ATTORNEY'S FEES IN NOTE—PUBLIC POLICY—USURY.—A stipulation in a promissory note, whereby the maker agrees to pay such additional sum as the court may adjudge reasonable as attorney's fees, in the event of an action being instituted to collect such note, is not void *per se*, as being contrary to the policy of the usury laws, although such note bears the highest rate of interest permitted by the law. *Peyser* v. *Cole* (Or.), III, 560.

20. PROMISSORY NOTE—DEFAULT IN PAYMENT OF INTEREST—ELECTION.—A provision in a promissory note to the effect that, on default in the payment of interest as it became due, the principal sum shall become due and payable, upon the option of the payee, and shall thereafter bear interest at a higher rate, can not be taken advantage of until the payee has in some manner manifested his election. Until such election has been made, the principal sum bears interest at the original rate. After the maturity of the note, the provision in regard to an election has no effect. *Dean* v. *Applegarth* (Cal.), III, 305.

21. INTEREST ON INTEREST IN DEFAULT.—A promissory note can not provide that the interest on the interest in default shall be at a greater rate than that borne by the principal debt. *Id.*

22. PROMISSORY NOTE—INTEREST UPON INTEREST.—A promissory note, given for the payment of interest upon interest which had previously become due, is valid. *Hathaway* v. *Meads et al.* (Or.), III, 554.

23. ASSIGNMENT OF PROMISSORY NOTE—PAYMENT—NOTICE.—A promissory note in the hands of an assignee, by an assignment after maturity, is discharged by a payment made to the payee, before notice of the assignment has been given to the maker. *Bank of Stockton* v. *Jones* (Cal.), III, 432.

24. PROMISSORY NOTE—RECEIPT—PAROL EVIDENCE.—In an action on a promissory note, a receipt given contemporaneously therewith is admissible, where there is evidence that both papers were parts of one transaction; and parol testimony may be given to show that such receipt was the only consideration for the note. *Talmadge* v. *Stretch* (Cal.), III, 52.

25. NOTE FROM ONE PARTNER TO ANOTHER—CONSIDERATION.—A promissory note given to secure the plaintiff for money advanced by him for the defendant on account of the latter's share of the capital, which he was to contribute and invest in their business, is supported by a sufficient consideration, and the plaintiff may recover thereon, although at the time of giving the note the plaintiff and defendant were partners. *Id.*

See ACCOUNT STATED, 2; CONSIDERATION, 4; CORPORATIONS, 21, 24, 25, 31; COSTS, 7; COUNTER-CLAIM, 5; DECEIT; EVIDENCE, 7–11; FRAUD, 11; GUARDIAN AND WARD, 3; INSOLVENCY, 13; MARRIED WOMEN, 5, 6; MORTGAGE, 12; PLEADING AND PRACTICE, 12, 17, 18, 24; PLEDGE, 1; SURETIES, 1, 6; TIME-CHECK; WAREHOUSEMAN; WARRANTS, 1, 2.

NEW CITY HALL COMMISSIONERS.

See SAN FRANCISCO, 4.

NEW TRIAL.

1. MOTION FOR NEW TRIAL, JURISDICTION OF COURT OVER.—The jurisdiction of a court to hear and determine a motion for a new trial lies dormant until it is called into exercise by the final submission of the motion, in a legal manner, upon a bill of exceptions, statement of the case, or other papers designated in the notice of motion. And it may be called into exercise by the submission of the motion itself, or by a motion to deny or dismiss the motion for want of prosecution, upon the ground that the party moving for the new trial has failed or neglected to serve or file within legal time the statement or other paper upon which he proposed to move; and when thus called into exercise, and the court, in the exercise of its jurisdiction, has heard and decided the motion, its order is final and conclusive; and it is not erroneous to dismiss or deny a motion afterward made to set it aside. Such order is reviewable only on appeal. But it is otherwise if such order has been inadvertently or prematurely made. *Odd Fellows' Savings Bank* v. *Deuprey* (Cal.), IV, 533.

2. NEW TRIAL—GROUND FOR AFFECTING ONE PARTY ONLY.—An objection, good as a ground for a new trial on the part of one party only, if not raised by him, can not be relied on by another party. *Beach* v. *Hodgdon* (Cal.), IV, 610.

3. AFFIDAVIT FOR A NEW TRIAL ON THE GROUND OF SURPRISE SHOULD BE MADE BY THE ATTORNEY of the beaten party, and not by his client. Such affidavit must show that the facts constituting the surprise had a material bearing upon the case, and that the verdict was mainly attributable to them. *Martin* v. *Hill* (Utah), I, 624.
4. SURPRISE—NEW TRIAL.—Where depositions had been taken for the purpose of being used on a trial, and the successful party conducts the trial without using them, but resorts to other testimony, such as the oral testimony of witnesses, this does not constitute a legal suprise upon the unsuccessful party entitling him to a new trial. *Heath* v. *Scott* (Cal.), III, 644.
5. NEW TRIAL—MISTAKE AND SURPRISE—ABSENCE OF ATTORNEY.—A new trial will not be granted for the reason that the attorney for the beaten party was prevented by mistake and surprise from attending the trial of the case, when it appears that such attorney, in the exercise of ordinary prudence, could have been present, and that his non-attendance was not due to any fault or omission of duty on the part of his adversary. *Cox* v. *O'Neil* (Cal)., III, 445; *Cox* v. *Ireland* (Cal.), III, 446.
6. ALLEGED NEWLY DISCOVERED EVIDENCE IS NO GROUND FOR A NEW TRIAL, if the moving party knew of the same before trial. *Id.*
7. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.—An order refusing a new trial on the ground of newly discovered evidence will not be reversed if the newly discovered evidence is merely cumulative, and every material fact stated in the moving party's affidavits is contradicted by counter-affidavits. *Kelleher* v. *Kenney et al.* (Cal.), IV, 432.
8. NEWLY DISCOVERED EVIDENCE OF FACT KNOWN AT TRIAL—EVIDENCE FOR IMPEACHING WITNESS.—Newly discovered evidence of a fact, known at the trial, as to a matter about which one of the witnesses testified, is no ground for a new trial when no diligence is shown for not using the fact as evidence, or when such evidence would tend to impeach a witness. *People* v. *Lyle* (Cal.), IV, 349.
9. AFFIDAVITS FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE must show that due diligence was used by the defeated party to procure such evidence for the trial; and the acts performed by such party must be particularly stated, so that the court may determine whether they constitute due diligence or not. The same amount of diligence is required of the defeated party, whether he be the real or only a nominal party to the action. *Pinschower* v. *Hanks* (Nev.), I, 369.
10. DEFENSE OR QUESTION NOT MADE TO JURY.—Where a party has a defense to an action arising out of the testimony in the case, and omits to present it to the jury, but relies upon a defense involving a different, if not inconsistent, conclusion from the testimony, a new trial will not be granted to enable him to submit the case to another jury upon this untried question, unless it clearly appears from the evidence that he is entitled to a verdict on that ground, and then only upon the payment of the costs of the first trial. *McCune* v. *Northern Pacific Railway Company* (U. S. Cir. Ct., Or.), I, 461.
11. NEW TRIAL GRANTED on the ground of newly discovered evidence. *People* v. *Carty* (Cal.), II, 591.
12. MOTION FOR NEW TRIAL, WHEN MUST BE MADE.—The provisions of the compiled laws of Wyoming, sections 308 and 309, regulating the time within which motions for new trials may be filed, are mandatory, and the lower court can not extend such time upon the oral *ex parte* application of the party desiring to move. Unless such motion is made within the required time, an appeal therefrom will not be considered by the appellate court. *Kent* v. *Upton* (Wy.), I, 700.
13. A PARTY INTENDING TO MOVE FOR A NEW TRIAL HAS TEN DAYS ALLOWED HIM BY STATUTE, AFTER THE SERVICE ON HIM of the notice of the filing of the findings and the entry of judgment, to give notice of such intention and serve his bill of exceptions; and an order of the court, made before such ten days have elapsed, extending the time within which such notice and service may be made for thirty days, will be construed as extending such time from the end of the period of ten days allowed him by statute. *Emeric* v. *Alvarado* (Cal.), I, 708.
14. NOTICE OF MOTION FOR A NEW TRIAL IN AN ACTION TRIED BY A REFEREE, and subsequent proceedings instituted thereon, are ineffectual for any purpose if made before the date of filing the decision and judgment of the referee. *Harris* v. *Carraga* (Cal.), I, 467.
15. WHERE THERE IS NOTHING IN THE TRANSCRIPT TO SHOW THAT ANY OBJECTION WAS MADE in the lower court to the hearing of a motion for new trial on the ground that the motion was made too late, the appellate court will presume that the time was extended by consent of the parties. *Patrick* v. *Morse* (Cal.), I, 477.

16. STATEMENT ON MOTION FOR NEW TRIAL—TRANSCRIPT—WHAT MUST SHOW.—Papers purporting to be a statement on a motion for a new trial will not be considered by the appellate court when the transcript fails to show that either a motion for a new trial was filed in the lower court, or that a notice thereof was served upon the adverse party, as required by section 287 of the code of civil procedure. *First National Bank of Helena* v. *McAndrews* (Mont.), IV, 478.

17. PRACTICE—FILING STATEMENT FOR A NEW TRIAL—EXTENDING TIME.—When a party, having filed and served a notice of motion for a new trial, suffers more than five days thereafter to elapse without filing a "statement," and without taking any steps to enlarge the time for its filing, he thereby waives the right to move for a new trial, and no power exists in the district court to reinstate this right. An order made by the district court under such circumstances after the expiration of five days, granting the party ten days' additional time to prepare and file his statement on motion for new trial, is nugatory. *Elder* v. *Frevert et al.* (Nev.), II, 414.

18. DECISION—FINDINGS—NOTICE OF MOTION FOR A NEW TRIAL.—Under the provision of the practice act requiring the party moving for a new trial to give notice of his intention "within ten days after receiving written notice of the rendering of the decision of the judge," where the action has been tried by the court, the "decision" referred to is the announcement by the court of its judgment, and is separate and distinct from the "findings," which may be made and filed by the court either before or after its decision. The time within which notice of intention to move for a new trial must be given begins to run from the service of notice of the announcement by the court of its judgment, and not from notice of its "findings." *Id.*

19. STATEMENT ON NEW TRIAL AND ON APPEAL.—A "statement" not filed in time for a motion for a new trial may be treated as a sufficient "statement on appeal," if filed within the time required for such statements. *Id.*

20. NEW TRIAL—JUDGMENT—DECISION.—A motion for a new trial can not be based on the ground of the insufficiency of the evidence to justify the judgment, or that the judgment is against law. Such motion should be directed at the decision, which consists of the findings of facts and conclusions of law. *Sawyer et al.* v. *Sargent* (Cal.), II, 900.

21. STATEMENT ON NEW TRIAL—CERTIFICATION OF.—A statement on motion for a new trial will not be considered by the appellate court when it is neither signed nor certified by the judge of the lower court. *Id.*

22. MOTION FOR NEW TRIAL, WHEN MUST BE MADE.—Court has no power to extend the time for making a motion for a new trial upon the oral *ex parte* application of the party desiring to move. Such extension can only be made upon written grounds showing how the moving party has been unavoidably detained. The provisions of the compiled laws governing this subject, sections 308 and 309, are mandatory, and unless they are observed the appellate court acquires no jurisdiction. *McLaughin* v. *Upton, Assignee, etc.* (Wy.), II, 57.

23. AN OBJECTION TO A MOTION FOR A NEW TRIAL ON THE GROUND that the same was not made in time is not waived by arguing such motion. *Id.*

24. NEW TRIAL—CONFLICT OF EVIDENCE.—An order granting a defendant a new trial after a verdict convicting him of embezzlement will not be reversed, when the evidence is conflicting. *People etc.* v. *Burt* (Cal.), II, 721.

25. WHEN THE EVIDENCE IS CONFLICTING, an order denying a motion for a new trial will not be disturbed on the ground that the same is insufficient to justify the verdict. *People* v. *Forsythe* (Cal.), II, 288.

26. WHERE THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE on a material issue, the appellate court will not reverse an order of the lower court granting a new trial. *Davis* v. *Utah Southern Railroad Co.* (Utah), II, 453.

27. NEW TRIAL—ORDER GRANTING WILL NOT BE PRESUMED ERRONEOUS.—The appellate court will not presume error nor an abuse of discretion in the action of the lower court in granting a new trial. *Johnston, Executor,* v. *Hancock et al.* (Cal.), VI, 418.

28. CONFLICT OF EVIDENCE—VERDICT—NEW TRIAL.—A verdict rendered upon substantially conflicting evidence can not be disturbed and a new trial granted, except for errors of law occurring at the trial. *Winans* v. *Sierra Lumber Co.* (Cal.), IV, 277.

29. ERRORS ALLEGED TO HAVE OCCURRED ON THE TRIAL WILL NOT BE CONSIDERED by the appellate court when the statement used on the motion for a new trial was

not signed when filed, either by the appellant, or his attorney, or other person for him, in the manner required by statute. *Snow* v. *Crow* (Utah), I, 698.

30. APPLICATION FOR A NEW TRIAL ON THE GROUNDS OF INSUFFICIENCY OF THE EVIDENCE to justify the findings of fact, conclusions of law, and judgment of the court, and that the same were against law, and for errors of law occurring at the trial, must be made upon a statement prepared as the statute requires. *Simpson* v. *Ogg* (Nev.), I, 303.
31. APPEAL FROM AN ORDER DENYING AN APPLICATION FOR A NEW TRIAL made on such grounds will be dismissed, unless the transcript contains a statement of the case properly certified as to its correctness by the judge. *Id.*
32. ERRORS APPEARING IN THE JUDGMENT ROLL CAN NOT BE REVIEWED on an appeal from an order denying a motion for a new trial only. *Id.*
33. CONFLICTING CHARGE TO THE JURY, IF NOT PREJUDICIAL TO THE BEATEN PARTY, is not ground for a new trial. *Overland Mail etc. Co.* v. *Carroll* (Col.), I, 281.
34. NEW TRIAL WILL BE GRANTED WHEN THE JURY ARE INSTRUCTED to find upon a material fact, concerning which no evidence has been introduced at the trial. *Toguini* v. *Hansen* (Nev.), I, 146.
35. NEW TRIAL, WHEN NOT GRANTED WHERE EVIDENCE IS CONFLICTING.—Where the evidence is conflicting, an appellate court will not grant a new trial upon the ground that the findings are contrary to the evidence, unless the preponderance is so apparent and marked that the court can have no hesitancy in declaring that the particular finding under review is against the evidence. *Harrington et al.* v. *Chambers* (Utah), I, 63.
36. WHETHER AN APPELLATE COURT SHOULD GRANT A NEW TRIAL FOR AN ERROR in admitting evidence of a parol agreement between the parties when a written agreement was alleged, unless it is plain from the case that a different result would be reached on a new trial, *quære*. *Tweed* v. *Lowe* (Ariz.), I, 658.
37. WHERE A CAUSE IS REMANDED BY THE SUPREME COURT for further proceedings, unless the order of the court is restricted, the cause goes back to the superior court to be retried, subject to the views expressed by the supreme court. *Chandler* v. *People's Savings Bank et al., Margaret Poorman, Intervenor* (Cal.), III, 523.
38. WHEN MATERIAL ISSUES ARE NOT DISPOSED of by the verdict of a jury or the findings of a court, a new trial must be had. *West* v. *Girard* (Cal.), III, 648.
39. NEW TRIAL—CONFLICT OF EVIDENCE.—Where the evidence is conflicting, an order granting a new trial on the ground that the verdict was excessive, not sustained by the evidence, and contrary to law and evidence, will not be interfered with. *Herzog* v. *Julien* (Cal.), III, 525.
40. NEW TRIAL—CONFLICT OF EVIDENCE.—An order granting a new trial on the ground of insufficiency of evidence to justify the decision and judgment will not be disturbed in the absence of a manifest abuse of discretion, when there is a substantial conflict in the evidence upon the main issues. *Nelson* v. *Floyd; Fraser* v. *Nelson et al.* (Cal.), III, 144.
41. NEW TRIAL—CONFLICT OF EVIDENCE.—An order denying a motion for a new trial will not be reversed for insufficiency of the evidence to justify the verdict, when the evidence is conflicting. *Salisbury et al.* v. *Brown* (Cal.), III, 618.
42. AN ORDER DENYING MOTION FOR A NEW TRIAL will not be reversed where there is a material conflict in the evidence. *Jack et al.* v *Saunders et al.* (Cal.), III, 480.
43. AN ORDER GRANTING A NEW TRIAL WILL NOT BE DISTURBED when the evidence is conflicting. *Reynolds* v. *Scott* (Cal.), III, 291.
44. ORDER GRANTING DEFENDANT A NEW TRIAL affirmed. *Heinlen* v. *Centerville etc. Ditch Company* (Cal.), III, 436.
45. DIVORCE—NEW TRIAL OF PORTION OF ISSUES.—In an action for a divorce and a division of the community property, the lower court has power to order a new trial of the issues relating to the character and disposition of the property alone, if material error occurred in the trial of and affecting that branch of the case only, without ordering a retrial of all the issues presented by the pleadings. *Lake* v. *Lake* (Nev.), IV, 159.

See AMENDMENTS, 1; APPEAL, 11, 76; BILL OF EXCEPTIONS, 5, 6; FINDINGS, 14, 33; JUDGMENT, 25, 26; SUPERSEDEAS.

NONSUIT.

1. A NONSUIT MAY BE GRANTED AFTER THE EVIDENCE ON BOTH SIDES HAS BEEN HEARD, in a case where, if the motion for the same had been denied and a verdict

found for the plaintiff, it would have been set aside as not supported by the evidence. Such practice, however, should be rarely resorted to, especially where the plaintiff has introduced evidence in support of all the averments of his complaint, and the materiality of establishing a further fact only appeared after the defendant had made out his affirmative defense. *Vanderford* v. *Foster* (Cal.), I, 857.

NOTARIAL PROTEST.

See EVIDENCE, 43.

NOTICE.

1. NOTICE OF PRIOR EQUITY.—A purchaser of real property for a valuable consideration is not affected by notice of a prior adverse equity received from a stranger or person not interested in the property; nor will mere rumors or hearsay concerning such equity, and communicated by such person, be sufficient to put him on inquiry and charge him with knowledge of the facts that he might have thereby learned. *Parkhurst* v. *Hosford* (U. S. Cir. Ct., Or.), IV, 311.

NOTICE OF APPEAL.

See APPEALS.

NOTICE OF LOSS.

See INSURANCE.

NUISANCE.

1. PUBLIC AND PRIVATE NUISANCE FROM MINING DEBRIS.—The Yuba river rises in the Sierra Nevada mountains, and after flowing in a westerly direction about twelve miles across the plain after leaving the foot-hills, joins the Feather. At the junction, within the angle of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles and empties into the Sacramento. These three rivers were originally navigable for steamboats and other vessels for more than one hundred and fifty miles from the ocean, as least as far as Marysville—the Sacramento being navigable for the largest-sized steamers. The defendants have for several years been and they are still engaged in hydraulic mining, to a very great extent, in the Sierra Nevada mountains, and have discharged and they are discharging their mining debris—rocks, pebbles, gravel, and sand—to a very large amount, into the head waters of the Yuba, whence it is carried down, by the ordinary current and by floods, into the lower portions of that stream, and into the Feather and the Sacramento. The debris thus discharged has produced the following effects: It has filled up the natual channel of the Yuba above the level of its banks and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It has buried with sand and gravel and destroyed all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It is only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public expense by the property owners of the county and inhabitants of the city, which levees continually and yearly require to be enlarged and strengthened to keep pace with the increase in the mass of debris thus sent down, at a great annual cost, defrayed by means of special taxation. It has polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It has filled to a large extent, and is filling up the bed and narrowing the channels of these rivers, and the navigable bays into which they flow, thereby lessening and injuring their navigability, and impeding and endangering their navigation. All these effects have been constantly increasing during the past few years, and their still further increase is threatened by the continuance of the defendants' said mining operations: *Held*, that these acts, unless authorized by some law, constitute a public and private nuisance, destructive, continuous, increasing, and threatening to continue, increase, and be still more destructive. *Woodruff* v. *North Bloomfield Gravel Min. Co.* (U. S. Cir. Ct., Cal.), I, 183.

2. SPECIAL INJURIES TO THE COMPLAINANT.—During all this time the complainant was and he now is owner in fee of a block of buildings in Marysville, in the business portion of the city, about five hundred feet from the levee on the Yuba. Originally the steamboat landing for the city was on the Yuba, nearly opposite to this block, but by reason of the filling up of that river its navigation has been prevented, and the landing is now in the Feather, three fourths of a mile distant from said block. By a break in the levee of the Yuba during one of its annual floods, the city of Marysville was inundated, the water stood several feet deep in this block, debris was deposited in it; its underpinning was washed out so that the roof fell in, and the repairs of these injuries cost between two thousand and three thousand dollars. The building is liable in the same manner to similar injuries from every flood in the river. The complainant, also, owns two farms, one of nine hundred and fifty-two acres abutting on the Feather a few miles below Marysville, upon which there was formerly a public steamboat landing for shipping and receiving freight and passengers, but which has become useless by the filling up of the river in front; the other of seven hundred and twenty acres abutting on the opposite bank of the Feather. Seventy-five acres of one of these tracts and fifty acres of the other have been completely buried and destroyed by the debris, and the remaining portions are only protected from destruction by the levees, which, on several occasions, have broken, and the lands have been damaged by water charged with debris, and they are in danger of being overflowed and injured in a similar manner from a breach of the levees at any flood. The value of the complainant's land has been depreciated from these causes; his access to the river from his farms for the purpose of shipping or receiving freights has been cut off; he has been obliged to pay an extraordinary, onerous, annual tax for the erection and maintenance of the levees to protect his property from the constantly increasing danger of loss or destruction. *Held*, that these facts constitute special injuries to the complainant, which entitle him to maintain a suit in equity to restrain the further commission of the public nuisance created by the defendants. *Id.*

3. SUIT BY A PRIVATE PERSON TO RESTRAIN A PUBLIC NUISANCE.—When a private person has sustained special injuries from a public nuisance, he thereby gains a standing in court which enables him to maintain a suit for such injury. In the suit so brought, the plaintiff acts on behalf of all others who are or may be injured, as a public prosecutor rather than on his own account. The court, in deciding such suit, has regard to the interests of the public, as well as to those of the plaintiff. *Id.*

4. SUCH NUISANCE NOT AUTHORIZED BY LEGISLATION.—The acts of defendants creating such a public and private nuisance are not authorized or justified by the legislation of congress recognizing, permitting, and regulating mining on the public lands of the United States, or on lands granted by the government to private owners (U. S. R. S., sec. 2338, act of 1866); or by statutes providing for the improvement of the navigable rivers of California, which recognize the injuries above described as existing facts (river and harbor bills of 1880 and 1882); or by the legislation of California regulating mining operations, or purporting to permit the condemnation of lands for the uses of miners (C. C. P., sec. 1238, subd. 5); or by the act of 1878 (sec. 1, subd. 8), concerning the Sacramento and San Joaquin rivers, and recognizing the injuries as above described from the mining debris. *Id.*

5. NUISANCES NOT AUTHORIZED BY IMPLICATION.—Under the provisions of the California civil code, section 3482, defining nuisances, acts otherwise constituting a nuisance can not be justified and legalized by implication, but only by the express authority of some statute. *Id.*

6. SAME, IN SUIT BY A PRIVATE PERSON.—The same doctrine applies to a suit brought by a private person who has sustained special injuries from a public nuisance, as to a suit brought by the attorney general, or by some corporate portion of the public. A public nuisance is not unlawful as to the whole public, and lawful as to its constituents; it is absolutely and wholly unlawful. *Id.*

7. POWERS OF THE STATE TO AUTHORIZE SUCH A NUISANCE.—A statute of the state of California expressly authorizing the acts of the defendants, and the injuries caused by them, would be in conflict with the fourteenth amendment of the United States constitution, and with similar provisions of the state constitution. Such legislation would either deprive the complainant and others of their property without due process of law, or would take or damage their property for alleged public use without compensation. *Id.*

8. NO PRESCRIPTIVE RIGHT ACQUIRED.—The defendants have acquired no right or title by prescription to commit or continue the nuisance complained of, whether regarded

as a public or a private nuisance; there has been no acquiescence, either by the public or by complainant, in the acts of defendants as done under an adverse claim of right. *Id.*

9. NO PRESCRIPTION IN FAVOR OF A PUBLIC NUISANCE.—No right or title can be acquired by prescription to commit, or continue, a public nuisance. *Id.*

10. CUSTOMS OF MINERS.—The acts of defendants are not authorized by the "customs of miners" recognized by the legislation of California and of congress, which customs so recognized are only local, not general customs. A custom which authorized such acts, if it existed, would be "in conflict with the laws and constitution of the state," and would be illegal and void. *Id.*

11. HYDRAULIC MINING—PUBLIC NUISANCE TO NAVIGABLE STREAM—RIGHT OF PUBLIC TO ENJOIN.—The record of the case shows that the Gold Run Ditch and Mining Company has been since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the North Fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty millions cubic yards of material composed mostly of sand, gravel, small stones, cobbles, and bowlders, mixed with small particles of gold—is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses and will continue to use, under a vertical pressure of several hundred feet, discharging water through "little giants" and "monitors," and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to wit, of bowlders, cobbles, gravel, and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land. Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluents, but mostly in the American, and upon lands adjacent to both rivers. The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet, and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from six to twelve feet. In consequence, the beds of the two rivers have shallowed and their channels widened so that the depths of the rivers have greatly lessened and their liability to overflow has been materially increased, causing the frequent floods to extend their area and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining debris. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier debris, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land—probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And from the same cause the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draft, to wit, by boats drawing nine or ten feet of water, has been, since the year 1862, unnavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the

American, will be so filled and choked up by tailings and other deposits that said rivers will be turned from their channels, cutting new waterways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigation of the Sacramento river. *Held*, that such acts of the defendant constituted a public nuisance, which might be enjoined in an action in the name of the people of the state, although other mining companies, acting separately and independently of each other, contributed in producing such nuisance. *People* v. *Gold Run Ditch and Mining Co.* (Cal.), IV, 511.

12. COURTS WILL TAKE JUDICIAL NOTICE OF THE NAVIGABILITY OF THE SACRAMENTO RIVER. *Id.*

13. THE SAME—NUISANCE UPON NAVIGABLE STREAM.—Navigable streams are public highways, in which the people of the state have controlling and paramount rights, and all unauthorized intrusions upon the same for purposes unconnected with the rights of navigation or passage are nuisances. *Id.*

14. THE SAME—JOINDER OF PARTIES CONTRIBUTING TO NUISANCE.—In an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally. *Id.*

15. PUBLIC NUISANCE—RIGHT TO CONTINUE CAN NOT BE ACQUIRED BY CUSTOM.—The right of private individuals or corporations to make use of the waters of navigable streams as a place of deposit for their mining debris, so as to destroy the navigability of such streams, can not be acquired by custom. *Id.*

16. THE SAME—CAN NOT BE ACQUIRED BY PRESCRIPTION.—The right to continue a public nuisance can not be acquired by prescription. Against such nuisance, however long continued, the state is bound to protect the people; and for that purpose the attorney general has the power to institute a proceeding in equity in the name of the people to compel the discontinuance of the acts which constitute the nuisance. *Id.*

17. HYDRAULIC MINING—INJUNCTION SUBJECT TO CONDITIONS.—The plaintiff being entitled, upon the facts found, to a perpetual injunction to compel the discontinuance of the acts complained of, as stated in the preceding opinion, the court can not make the injunction subject to the condition that "the defendant may at any time, as it may be advised, apply to the court to have the decree and restraining order modified, or vacated and set aside. And whenever, upon such showing, it shall appear that sufficient means have been provided to impound, detain, and hold back such tailings at any point on said American river above Alder creek, and that such means are sufficient to detain all bowlders, cobble-stones, gravel, and the heavier sand, then said defendant shall be entitled to have said decree vacated and set aside." *Id.*

18. NUISANCE—ABATEMENT OF, BY MUNICIPALITY.—A city, the charter of which empowers it to "make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same," may by ordinance define, classify, and enact what things or classes of things, and under what conditions and circumstances such specified things, are to constitute and be deemed a nuisance. But it can not, by a mere resolution, declare a particular thing, such as a water ditch, a nuisance, which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination, and order its summary removal. Whether such ditch is a public nuisance must be judicially determined before it can be lawfully abated, either by the public or an individual. *City of Denver* v. *Mullen* (Col.), II, 852.

19. THE SAME—BESIDES THE REMEDY BY INDICTMENT, a civil action lies to prevent or abate a public nuisance, on behalf of the public, by its proper officers. *Id.*

20. ABATEMENT OF NUISANCE—JUDGMENT—FINDINGS—VERDICT.—Section 5 of article 6 of the constitution confers jurisdiction upon the superior court of actions to prevent or abate a nuisance, as a special and not as an equitable tribunal, with reference to such actions. When, therefore, an action to abate a nuisance, and for damages, is tried by a jury, the general verdict for damages includes a finding in favor of plaintiff upon all the issues, and the judgment, besides adjudging damages, may order an abatement of the alleged nuisance. In such action the findings of the jury are not merely advisory upon the court. *Learned et al* v. *Castle et al.* (Cal.), III, 154.

21. SUPERVISORS—ROADMASTER—NUISANCE, ABATEMENT OF.—The board of supervisors of a county can not authorize a roadmaster to do an unlawful act, and their direction to do a lawful act which operated an injury would constitute no defense to an abatement thereof as a nuisance, unless it at least affirmatively appeared that the

work could not be done equally well in such manner as would not produce the injurious result. *Id.*

22. NUISANCE—PUBLIC ROAD—PARTIES.—In an action to abate a nuisance caused by the interference of private individuals with a public road, neither the county nor its supervisors are necessary parties. Such county is not responsible for injuries suffered by private parties, because it did not restore the road to its former condition. *Id.*

23. POSSESSION AS EVIDENCE OF TITLE—NUISANCE.—Actual possession of land is evidence *prima facie* of ownership; and one in possession may maintain an action upon a nuisance which injuriously affects his enjoyment of the possession. *Id.*

24. RIGHTS OF PERSONS TO USE AND ENJOYMENT OF PROPERTY.—Any person may use his own property in such lawful manner as to him may seem fit, having reference always to the right of others to use their property. But a person can not use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his property. *Tuebner et al.* v. *California Street Railroad Co.* (Cal.), IV, 529.

25. THE SAME—NUISANCE—STREET-RAILROAD—LICENSE, WHEN NOT A JUSTIFICATION.—The defendant corporation operated a street-railroad along a street in that portion of San Francisco usually devoted to dwelling purposes, and, for the purpose of using steam as a motive power in propelling its cars by means of a cable, constructed a building on a lot adjoining the plaintiff's premises for use in connection with its street-railroad, as a car and engine house. Such use produced a loud and continuous noise; caused the plaintiff's house to be constantly shaken and jarred; cracked the plastering in his rooms, and covered his premises and furniture with soot. *Held*, that such acts of the defendant constituted a nuisance for which it was liable, although the municipality of San Francisco had granted it a franchise to operate its road, and all its structures and machinery were necessary to that end, and were properly constructed. *Id.*

26. ABATEMENT OF PENDING ACTION—DAMAGES.—In an action to recover damages for injuries caused by such nuisance, the fact that the defendant has, since the commencement of the action, remedied the evil complained of does not interfere with plaintiff's right to recover for injuries sustained before the commencement of the action. *Id.*

27. MEASURE OF DAMAGES—VALUE OF INJURY.—In such action the plaintiff need not prove his injury by value; it is for the jury to determine a reasonable sum as proper compensation. *Id.*

See ACQUIESCENCE, 1; SAN FRANCISCO, 1.

NUL TIEL RECORD.

See JUDGMENT, 61.

OAKLAND SEWER.

See CONSTITUTIONAL LAW, 19.

OATH.

See JURY AND JURORS, 24.

OBLIGATION.

See CONTRACTS, 12.

OBSTRUCTING THE MAIL.

1. OBSTRUCTING THE PASSAGE OF THE MAIL.—The defendant and others, discharged railway laborers, to the number of one hundred and fifty, assembled at Pendleton, Oregon, and by threats of violence prevented the daily train of the Oregon Railway and Navigation Company, including the mail-car with the United States mail therein, from proceeding to Portland, because the conductor would not permit them to ride thereon to Portland free of charge, on the ground that they had no money, and the company having "passed them up," ought to "pass them down;" and for the same reason, and by the same means, prevented the conductor from detaching said mail-car from said train and sending it to Portland with the United States

mail therein. *Held*, that whether the company was under any legal obligation to carry the defendant to Portland free of charge or not, he had no right to prevent the conductor from sending the mail-car on to Portland, as he did; and that the conduct of the defendant and his associates being unlawful, and necessarily causing the passage of the mail to be obstructed, the law imputes to him an intention, whatever the primary purpose of his conduct was, to cause such obstruction, and therefore he is guilty of obstructing and retarding the passage of the mail, contrary to section 3995 of the revised statutes. *United States* v. *Kane* (U. S. Cir. Ct., Or.), I, 653.

2. PASSENGER ON TRAIN.—A person who is entitled to travel on a railway car may go upon the same peacefully, and remain therein until he arrives at his destination; and if the conductor undertakes to put him off on the ground that he is not entitled to travel thereon, he may resist force with force; but if the conductor stops the train on his account, and undertakes to detach the mail-car therefrom and send it on with the mail, he has no right to prevent him from so doing, and if he does his act is unlawful. *Id.*

OCCUPATION.

See POSSESSION.

OPINION OF COURT.

See JURISDICTION, 4.

ORDERS.

See APPEAL, 12-16; CERTIORARI, 13; NEW TRIAL, 27.

ORDINANCE.

See CORPORATIONS, 57; EMINENT DOMAIN, 6; LAUNDRY ORDINANCE; PLEADING AND PRACTICE, 6.

OREGON DONATION ACT.

1. "OREGON DONATION ACT," TITLE UNDER.—Under this act, by which there "is granted" to every man answering to a certain description, or if married, to him and to his wife in equal parts, a tract of land of specified area, upon certain prescribed conditions of selection, and in consideration of residence and cultivation for a certain period, the United States holds the position of seller and the donee that of purchaser. As soon as the necessary selection has been made, and the prescribed residence and cultivation completed, the transaction is closed, so far as the sale is concerned. Final proof is no part of the consideration which the grantee gives, but is merely evidence to satisfy the land-office that the right of the grantee is perfect, and entitles him to a patent. The act, and not the patent, works the transfer of title. The patent is formal and solemn evidence, and when issued relates back as of the date when a fit grantee, rendering full consideration, had appeared. Title under this donation act is always complete before a patent issues, and the patent issues by virtue of a title complete, and not otherwise. *Brague* v. *Schofield et al.* (W. T.), II, 485.

2. THE SAME—PARTITION BY MINORS—ACQUIESCENCE—ESTOPPEL.—Previous to 1853, Amos Short, who was married, had duly selected, under the Oregon donation act, a tract of land, which is the subject-matter of the present controversy, and with his wife had resided upon and cultivated it in full compliance with said act, so as to entitle himself and wife to a patent, subject to survey by the United States surveyor. In 1853 he died, leaving a widow and children. All the requirements of said act had been complied with, and the widow and children of Amos Short held, prior to and in the year 1855, in undivided shares, all disposable interest in and to said tract of land, and were entitled to a patent therefor from the United States. In 1855 they agreed to make, and did make, a parol division or partition of this whole tract into halves; the east half was assigned to the widow, and the west half to the children. This partition was, of course, subject to the survey and division made by the surveyor-general, and to the division line which he might determine. The children, assuming that the west half belonged to themselves, pro-

ceeded in 1856 to make a partition of it and to determine their own shares in severalty. To this end, those who were of age applied personally, and those who were minors applied by guardian, to the proper probate court for a partition. Proceedings were thereupon had, by which the probate court, in form at least, decreed a partition of the west half among the children. To this partition all of the children actually and willingly consented by each, either personally or by guardian, taking possession and control of his or her portion in severalty, and by mutually paying and accepting owelty sufficient to fully equalize all the allotments. In 1874 the United States surveyor-general divided the land between the widow and the heirs. and among the heirs themselves, in exactly the same manner in which they themselves had partitioned it in 1856. Under these partitions, G. H. Short, one of the minor children, became entitled to and possessed of a share of said west half known as lot 7, which is the land in controversy. He held and used that lot as his own until 1865. In that year, his guardian, acting under direction of the court of probate, sold said lot to the appellee, Schofield, for a fair price, which, under direction of the court, was applied in paying a mortgage upon the premises and other debts proved and allowed against said minor's estate. G. H. Short became of age in 1866. In 1878, twelve years after attaining his majority, during which interval he had not, by word or act, objected to any of the foregoing proceedings, he gave to the appellant's grantor a quitclaim deed of all his right, title, and interest in the said donation claim; and about the same time the other heirs gave to the appellant's grantor similar deeds of their respective interests. At the execution of these latter conveyances, periods varying from one to twenty-one years had elapsed since each one of the heirs had become of age, during which times none of them had made any objection to the various proceedings above described. Meanwhile the appellees have put upon the premises permanent improvements of great value. *Held*, that even if the proceedings in the probate court for the partition and for the sale were irregular, the said heirs were estopped by their long acquiescence, after attaining their majority, from objecting to the regularity and validity of the partitions which had been made, or of the sale of the land by order of the probate court; and that their quitclaims to appellant's grantor conveyed no right, title, or interest in the premises. *Id.*

See PUBLIC LANDS, 11, 12.

OUSTER.

See EJECTMENT, 7.

OWNERSHIP.

See LARCENY, 11; STREETS AND HIGHWAYS, 18.

PARENT AND CHILD.

See CHINESE RESTRICTION ACT, 4, 9.

PAROL EVIDENCE.

See EVIDENCE.

PARTICULARS.

See BILL OF PARTICULARS.

PARTIES.

1. AN ACTION ON A FORTHCOMING BOND MAY BE BROUGHT in the name of the sheriff, for the use and benefit of the real parties in interest, against the sureties on such bond, without joining their principal, and without showing that judgment has been obtained against the principal or that the plaintiff has exhausted his remedies against him. *Wagner* v. *Romero* (N. M.), II, 269.
2. DEFECT OF PARTIES IN ACTION AGAINST PARTNERSHIP.—In an action against a partnership a defect of parties, consisting in a failure to name the individuals composing the firm, is waived by the appearance of the defendants, without specifically objecting to the defect. *Baxter et al.* v. *Scoland et al.* (Wash.), II, 552.

3. ASSIGNEE—REAL PARTY IN INTEREST.—An assignee of a note and account sued on is the real party in interest, within the meaning of the code of civil procedure, although the consideration for the assignment is a payment to be made to the assignor after recovery in the suit. *Bassett* v. *Inman* (Col.), II, 534.
4. "PARTY," MEANING OF.—The word "party" imports the person or persons having a joint right or liability, whether one or more. *People* v. *O'Loughlin* (Utah), I, 164.
5. FORECLOSURE OF MORTGAGE—PARTIES TO ACTION FOR.—In an action to foreclose a mortgage, after a conveyance of the mortgaged premises and the death of the mortgagor, when no judgment against the estate of the latter is asked for, it is unnecessary for the mortgagee to present the note and mortgage to the administratrix of such estate for allowance. The mortgagee may maintain such action against the grantee of the mortgaged premises alone, without serving the administratrix, as she was not a necessary party to the action. *Rickards* v. *Hutchinson* (Nev.), I, 659.
6. THE INFANT SUCCESSORS IN INTEREST OF DECEASED DEFENDANTS IN AN ACTION FOR PARTITION may be substituted for such defendants on motion, without the issuance of a summons to bring them in. Such infants may appear by their general guardians, or by guardians *ad litem* appointed for them, and where the record is silent as to their manner of appointment, the regularity of such appointment will be presumed. *Emeric* v. *Alvarado* (Cal.), I, 708.
7. MISJOINDER OF PLAINTIFFS IN A MORTGAGE FORECLOSURE SUIT.—In a suit to foreclose a mortgage, where, in addition to the proper plaintiffs, other parties were unnecessarily and improperly joined as co-plaintiffs, and a demurrer was interposed to the complaint on that ground, the supreme court, on appeal, may render a final judgment in favor of the proper plaintiffs, and direct the court below to amend the complaint by striking out the parties improperly joined as co-plaintiffs, with such provisions as may be necessary to protect their rights. *De Celis* v. *Porter* (Cal.), I, 575.
8. PLAINTIFF WHO IS NOT THE REAL PARTY IN INTEREST in an action on a promissory note can not assign the same so as to entitle his assignee to prosecute such action in his own name. *Skewes* v. *Dunn* (Utah), I, 628.
9. SUBSTITUTION OF A DIFFERENT PLAINTIFF WILL NOT BE ALLOWED when it would result in injury to any right of the defendant. *Id.*
10. SUBSTITUTION OF A WIFE AS PLAINTIFF IN THE PLACE OF HER HUSBAND SHOULD NOT BE ALLOWED, when the effect of such substitution would be to permit her to testify in her own behalf, unless such substitution is made on condition that she does not testify. *Id.*
11. PRINCIPALS AND SURETIES ON AN INJUNCTION BOND MAY BE SUED TOGETHER in an action for the breach of the conditions thereof, and the damages assessed and awarded in such action. *Duckett* v. *Price* (Col.), I, 495.
12. TENANTS AT WILL OF A TRUSTEE ARE NOT NECESSARY OR PROPER PARTIES in an action against the trustee to compel a conveyance of the trust estate. *Reynolds* v. *Lynch* (Cal.), I, 344.
13. HEIRS OF A DECEASED MORTGAGOR NEED NOT BE MADE PARTIES in an action against his executor or administrator to foreclose the mortgage. *Bayley* v. *Muche* (Cal.), I, 125, 263.
14. ONE TO WHOM LANDS ARE GRANTED FOR THE PURPOSE OF MAINTAINING AN ACTION connected with the ownership thereof may prosecute such action in his own name, notwithstanding there is an oral agreement between him and his grantors that upon the termination of the litigation he would reconvey such lands to his respective grantors. *Smith* v. *Logan* (Nev.), I, 391.
15. IN AN ACTION BETWEEN CERTAIN APPROPRIATORS OF WATER TO DETERMINE THEIR RELATIVE RIGHTS THERETO, another appropriator, higher up the stream, who returns the water taken by him, undiminished in quantity, before the stream reaches the appropriator whose rights are interfered with, is not a necessary party. *Id.*

See APPEALS, 16, 31, 73; CANCELLATION, 6; CORPORATIONS, 27; FRAUD, 7–9, 15; INSURANCE, 2; JUDGMENT, 38, 39; LEASE, 3; LIBEL; MARRIED WOMEN, 7, 8; MORTGAGE, 11, 24, 31; NEGLIGENCE, 32; NEGOTIABLE INSTRUMENTS, 1–3; NUISANCE, 11, 13, 22; PARTNERSHIP, 15; PLEADING AND PRACTICE, 32; STREETS AND HIGHWAYS, 16, 17; SUPPLEMENTARY PROCEEDINGS, 3, 4; SWAMP LANDS, 8, 9; TRUSTS; WATER RIGHTS, 20.

PARTITION.

1. PARTITION OF GRANT BY JUDGE OF FIRST INSTANCE—POWER OF, TO MAKE.—In a proceeding before the judge of first instance for the partition of land granted by

the Mexican government to several grantees within larger and unlocated boundaries, the attempt of such judge to fix the boundaries of the land granted could give no additional force to the judgment of partition. If juridical possession had previously been given, its effect would be to confine all the rights of the grantees within the limits of such juridical possession, and the judge could not, *pendente lite*, or by his judgment, extend their rights beyond such limits. If juridical possession had not been given, the right of the grantees or their assigns to the temporary possession of all the lands, as the same appeared from the *diseño* and grant, could not be extended beyond the exterior limits thus appearing. *Mound City Land and Water Association* v. *Phillips* (Cal.), I, 579.

2. SUCH JUDGMENT OF PARTITION was binding and conclusive, if at all, only with respect to its subject-matter. It affected merely the right to the temporary possession previously held in common. The lands beyond the boundaries which the United States, as successor of Mexico, established, continued to be government property until such boundaries were established. The right of the grantees to possess the same was not an equitable right which ripened into a legal title to the same lands upon final measurement; it was contingent, and limited in time, as to the lands which should be excluded by the final measurement. *Id.*

3. SUCH PARTITION AS TO LANDS WITHOUT THE LIMITS OF THE FINAL SURVEY AFTERWARDS MADE had effect, even as to the parties to it, only while their occupation lasted with the consent of the government, and ceased to operate, as a whole, if it made no provision for the separate disposition of the specific portion with respect to which the rights of the grantee ultimately became perfect, when the boundaries of such specific portion were determined. *Id.*

4. IN ALL ACTIONS FOR PARTITION, INCLUDING THOSE PROVIDED FOR IN SECTION 760 OF THE CODE OF CIVIL PROCEDURE, BEFORE ANY PARTITION IS ORDERED OR CAN BE MADE, the interests and shares of all the parties must be determined and adjudged by the court, and also the moieties in which the land is to be divided. Such moieties must be specified in the interlocutory judgment, so that the referees appointed to make the partition may have no question of title to determine, and may intelligently discharge the duties as to making the allotments devolved on them by the decree. An interlocutory decree which fails to observe such requirements is erroneous. *Emeric* v. *Alvarado* (Cal.), I, 708.

5. EVIDENCE OF THE PETITION OF A TESTAMENTARY EXECUTOR TO THE BOARD OF LAND COMMISSIONERS for the confirmation of a Mexican grant to his testator, is admissible in an action for the partition of such grant, when offered along with a copy of the will attached to the petition, the opinion of the board confirming the claim, and the decree of confirmation. *Id.*

6. AN ATTEMPTED PARTITION OF A MEXICAN GRANT, THE BOUNDARIES OF WHICH HAD NEVER BEEN DETERMINED by the United States, in pursuance of a written agreement for partition, in which all the tenants in common of such grant are named as parties, is null and void when it appears that some of such parties never executed such agreement, or where a much larger tract of land was included in such attempted partition than was included within the boundaries of such grant as the same were finally determined by the survey approved by the United States courts. And the same is true of all other deeds and transactions between such parties, the object and purpose of which are to facilitate and perfect such partition, when the same is the only consideration on which they are founded. *Id.*

7. PARTITION—TENANCY IN COMMON—PARTNERSHIP.—A tenant in common of land is entitled to a partition, although he has never been in actual occupancy, and notwithstanding his grantor and the defendant co-tenant were copartners in the crops raised on the land. *Voce* v. *Daveggio* (Cal.), III, 491.

8. A SUIT TO SET ASIDE A DECREE FOR THE PARTITION OF LAND SHOULD BE BROUGHT in the county where such land is situated. *Bent* v. *Maxwell etc. Co.* (N. M.), III, 8.

9. PENDENCY OF A SUIT FOR PARTITION IN THE STATE COURTS, such suit being in the nature of a proceeding *in rem*, is a bar to a subsequent suit for partition of the same land in the United States courts, brought by a successor in interest, *pendente lite*, of some of the parties to such former suit against the successors in interest of the other parties. *Martin* v. *Baldwin et al.* (U. S. Cir. Ct., Cal.), II, 8.

See APPEAL, 75, 76; FRAUD, 15; MISTAKE, 5; MINES AND MINING, 49; OREGON DONATION ACT, 2; RECEIVERS, 1; STATUTE OF LIMITATIONS, 20.

PARTNERSHIP.

1. PARTNERSHIP, HOW CREATED—ESSENTIAL ELEMENTS OF.—A partnership is a contract between two or more competent persons to place their money, effects, labor, and

skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. *Cogswell* v. *Wilson* (Or.), IV, 489.

2. THE SAME—AGREEMENT TO SHARE PROFITS AND LOSS.—To constitute a partnership *inter se*, mere community of interest is not sufficient; there must be an agreement to share in the profits and loss. Such agreement must provide for an interest in the profits as profits, and not for a mere division of the gross earnings, and such profits must be shared as the result of the adventure or enterprise, and not simply as a measure of compensation. *Id.*

3. THE SAME—BREACH OF PARTNERSHIP AGREEMENT—DISSOLUTION OF PARTNERSHIP.—The existence of a partnership does not depend upon the fact that each of the partners has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced, the partnership continues until legally dissolved. *Id.*

4. THE EVIDENCE REVIEWED, and held that a partnership existed between the defendant and the plaintiff's vendor. *Id.*

5. A MINING PARTNERSHIP IS NOT RESTRICTED TO CASES WHERE THE MINE IS OWNED by the parties working it. Such partnership may exist as well where the parties have a joint interest and co-operation merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself. *Manville* v *Parks* (Col.), I, 603.

6. THE RELATION OF MINING PARTNERSHIP BETWEEN THE DEFENDANTS, WITH RESPECT TO THE MINING OPERATIONS, for the carrying on of which the debt sued for was created, held to be established by the facts. *Id.*

7. CO-WORKERS IN A MINING OPERATION, TO THE EXTENT OF THEIR INTEREST IN THE PROPERTY, are tenants in common, and in the working of the mine are considered as partners. *Id.*

8. ONE MEMBER OF A MINING PARTNERSHIP HAS IMPLIED AUTHORITY TO BIND THE FIRM for articles purchased, essential to the carrying on of the business, and the accomplishment of the purpose of the partners in working the mine, notwithstanding there is a secret agreement between such partners by which some of them were not to be liable for the expenses of the business. Such agreement could not affect the rights of those who dealt with the partnership without any notice of the limitation upon the individual liability of particular members. *Id.*

9. DEFENSE OF SPECIAL PARTNERSHIP AND NOTICE THEREOF BY THE PLAINTIFF must be pleaded, or evidence thereof is inadmissible. *Id.*

10. THE FAILURE TO JOIN A DORMANT PARTNER AS DEFENDANT, in an action against a partnership, can not be pleaded in abatement; and the refusal to admit in evidence the deposition of such partner, when all his acts and declarations in reference to the subject-matter of the controversy are already in evidence, is not error. *Pinschower* v. *Hanks* (Nev.), I, 369.

11. JUDGMENT AGAINST A PARTNERSHIP ON ACCOUNT OF GOODS SOLD AND DELIVERED TO IT will be reversed when the evidence shows that many of the items of such account were furnished to one of the partners individually, and that the same were included in the findings and judgment against the firm. *Burt* v. *Collins* (Cal.), I, 566.

12. PARTNERSHIP AGREEMENT REDUCED TO WRITING, BUT NOT EXECUTED by the partners, is not evidence of the terms and conditions of the partnership. *Tweed* v. *Lowe* (Ariz.), I, 658.

13. FINDING AS TO PARTNERSHIP HELD SUPPORTED BY THE EVIDENCE. *Snead* v. *Little* (Cal.), II, 496.

14. PARTNER'S INTEREST IN FIRM ASSETS—ATTACHMENT FOR INDIVIDUAL DEBT—SALE BY SHERIFF—POSSESSION—ACCOUNTING.—A sheriff may attach and sell the interest of one partner in the partnership property, for his individual debt. Upon so doing, the sheriff may take possession of the entire firm assets, and transfer such possession to the judgment purchaser, who thereupon becomes a tenant in common with the other partners. If such property is sold by the judgment purchaser, and the entire proceeds converted to his own use, he is guilty of conversion, and an action by the remaining partners for an accounting will not be held barred by the statute of limitations, unless the date of such conversion is made affirmatively to appear. *Wright* v. *Ward* (Cal.), III, 626.

15. THE SAME—ACCOUNTING—INDISPENSABLE PARTIES.—In an action for such accounting, the partner whose individual interest has been sold is an indispensable party, although he is out of the state and his whereabouts unknown. *Id.*

16. PARTNERSHIP—ASSIGNMENT BY ONE PARTNER.—One partner, in the voluntary absence of his copartner from the state, has authority to assign any portion of the copartnership property to a creditor. *Bernheim & Co.* v. *Porter* (Cal.), III, 434.

17. THE VOLUNTARY ABSENCE OF ONE PARTNER FROM THE STATE does not operate as a dissolution of the partnership. *Id.*
18. THE TRANSFER BY ONE PARTY OF HIS INDIVIDUAL INTEREST in a portion of the firm property does not give his transferee the right to maintain replevin therefor as against a *bona fide* purchaser from the firm. *Id.*
19. PARTNER SELLING PARTNERSHIP PROPERTY IN BAD FAITH does not make the other partner a tenant in common thereof with a purchaser who acts in good faith. *Crites* v. *Muller* (Cal.), III, 649.
20. PARTNERSHIP LANDS—SALE BY ONE PARTNER TO BONA FIDE PURCHASER.—The equitable interest of a partner in land purchased by his copartner is discharged by a transfer of the legal title by the latter to a purchaser for value and without notice. *McNeil* v. *First Congregational Soc.* (Cal.), IV, 421.
21. ACTION BETWEEN PARTNERS TO RECOVER ASCERTAINED BALANCE—PLEADINGS.—An action may be maintained by one partner against his copartner for the balance found due upon a settlement of the partnership affairs. In such action no express promise to pay such balance need be shown; it is sufficient if the sum has been ascertained and agreed upon by the act of both partners. But an averment of the settlement by the plaintiff is material, and without it his complaint is fatally defective. An averment that at the time of dissolution there was in the hands of the defendant "clear profits," amounting to a sum stated, is not equivalent to an allegation of settlement. *Bean* v. *Gregg* (Col.), IV, 241.
22. ASSIGNMENT OF FIRM PROPERTY BY ONE PARTNER FOR BENEFIT OF CREDITORS.—A voluntary assignment of all the firm property, made by one partner in favor of a creditor, without the knowledge or assent of his partner, and against his previously expressed wishes, is invalid. *Wilcox* v. *Jackson* (Col.), IV, 326.

See ACCOUNT STATED, 3; ACCOUNTING, 1, 5, 6; ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; JUDGMENT, 27, 31; LIENS, 1; NEGOTIABLE INSTRUMENTS, 17, 18, 25; PARTIES, 2; PARTITION, 7; SURETIES, 12.

PATENT.

1. VERIFICATION OF PLEADINGS.—Under section 914 of the revised statutes the pleadings in an action for the infringement of a patent must be verified as provided in section 79 of the Oregon code of civil procedure. *Cottier* v. *Stimson* (U. S. Cir. Ct., Or.), I, 251.
2. DOUBLE PLEAS OR DEFENSES.—Both at common law and under the code special pleas or defenses may be pleaded with the general issue or a denial of the allegations of the complaint. *Id.*
3. DEFENSES TO AN ACTION FOR INFRINGEMENT.—The five matters which may be given in evidence upon notice under the general issue, as provided in section 4920 of the revised statutes, as defenses to an action for the infringement of a patent, may be pleaded specially with the general issue, and other defenses thereto may be pleaded specially, either with or without the general issue and such notice. *Id.*
4. SPECIAL PLEAS CRITICISED.—*Quære:* Is it sufficient to allege in a special plea that the thing patented was not marked with the word "patented," without also alleging that the defendant was not otherwise notified of the infringement? and is not a plea that the thing patented was not an invention when produced by the patentee a mere repetition of the special matter that said patentee was not the original and first inventor thereof? But a defense that an invention is not useful must be specially pleaded. *Id.*
5. INOPERATIVE PATENT—REISSUES.—A patent need not be inoperative in its entirety to entitle the patentee to a reissue. If it be inoperative in part, so far as not to secure all that the inventor is entitled to claim, and what he is entitled to claim appears in his specifications, it is inoperative within the meaning of the provisions of the statute, and entitles the patentee to a reissue in such form as to cover his entire invention. *Giant Powder Company* v. *Safety Nitro Powder Company* (U. S. Cir. Ct., Cal.), II, 79.
6. FRAUD IN REISSUE IS A QUESTION FOR THE PATENT OFFICE.—Whether a patentee innocently or fraudulently seeks a reissue of his patent is a question of fact for the officers of the patent office alone to determine; and their decision is conclusive in a collateral attack upon the patent. *Id.*
7. REISSUES IN IDENTICAL LANGUAGE OF A PRIOR PATENT VALID.—The owner of patent 78,317 surrendered it, and obtained a reissue in patent No. 5,619. The latter was surrendered and reissued in patent No. 5,799, for the purpose of correcting a clerical error. Reissue No. 5,799 was held by the circuit court of the ninth circuit

to be void, as embracing more than was shown or claimed in the original patent. There were conflicting decisions in different circuit courts upon the validity of the last reissue. After it had been adjudged void, the owner surrendered patent No. 5,799, and procured another reissue in the identical language of original patent No. 78,317. *Held*, that the last reissue is not void under the circumstances, in consequence of its being in the identical language of the original patent. *Id.*

8. SUBCOMBINATIONS—INDEPENDENT PATENTS.—Where a patent is issued for an invention consisting of a combination of a number of elements, and there is, at the same time, an invention made by the patentee consisting of a subcombination of a part of the elements entering into the larger combination, and the patent issued does not embrace such subcombination, the inventor of both, at the same time, may afterwards obtain an independent patent for the subcombination, provided he applies therefor within two years after the invention has gone into public use or been on sale. *Cahn* v. *Wong Town On* (U. S. Cir. Ct., Cal.), II, 7.

9. PATENT FOR "REVOLVING DIP-NET."—The patent issued to Thornton F. Williams on August 2, 1881, and numbered 245,251, for an "improvement in revolving dip-nets," declared void for want of both invention and novelty, the same having been invented and put in operation by Samuel Wilson, at the cascades of the Columbia, in the spring of 1879, and from which machine the said Williams, in the fall of that year and the spring of 1880, constructed his "revolving dip-net." *Williams* v. *McCord et als.* (U. S. Cir. Ct., Or.), II, 503.

10. PATENT—INFRINGEMENT.—A patent for an improvement in the manufacture of boots, consisting of an inside counter-protector at the back of the boot, the sides of which extend over and beyond the eye-seams, at the sides of the boot, and fastened by a row of stitching beyond the eye-seams, covering and protecting them, is not infringed by an outside counter-protector extending into and fastened in lapped seams, at the sides of the boot, and not extending beyond, and not fastened by stitching outside the lapped seams. *Buckingham* v. *Porter et al.* (U. S. Cir. Ct., Cal.), III, 667.

11. PATENT NO. 214,684, ANTICIPATED.—That part of the claim of patent No. 214,684, represented by figure 11 in the drawings annexed to the patent, consisting of an outside counter-protector with its lateral ends extended to the side-seams of the boot, inserted in the side-seams formed by doubling down the back and front leathers of the boot, either with or without a welt, and stitching all together in forming the seams, is old, and on that ground the patent is void as to that part of the claim, being the only part infringed, by a boot having an outside counter-protector extended into and similarly fastened in its lapped side-seams only. *Id.*

12. STATE OF THE ART.—The claim of a patent must be construed in the light of the state of the art. *Id.*

13. PATENTEE MUST MARK PATENTED ARTICLES—SECTION 4900, REVISED STATUTES, CONSTRUED.—The patentee having put his patented article upon the market without marking it "patented," as required by section 4900, revised statutes, defendant, without notice of the patent, from time to time for a numbers of years infringed it. In 1875, while making a steam condenser having in it the patented article, he was notified for the first time that it was patented, whereupon he immediately offered to pay the established royalty for all the patented article he had already introduced into that condenser, and for enough more to finish it; but the patentee refused to accept the offer unless defendant would pay the entire royalty for all previous infringements made without notice of the patent, which defendant refused to do. Defendant thereupon finished that condenser, using sufficient of the patented article for that purpose, but did not otherwise infringe the patent after notice. *Held*, that defendant was only liable for the infringement arising from the making and selling the condenser finished after receiving actual notice of the patent. *Allen* v. *Deacon* (U. S. Cir. Ct., Cal.), III, 381.

14. NOTICE OF SPECIAL MATTER UNDER SECTION 4920, R. S.—Notice of special matter in an action for the infringement of a patent is not a pleading, and instead of being put in the answer, should be served on the adverse party. *Cottier et al.* v. *Stimson et al.* (U. S. Cir. Ct., Or.), III, 472.

15. SPECIAL PLEA IN ACTION FOR INFRINGEMENT.—Special matters which may be given in evidence under the general issue and a notice in such action may also be pleaded specially; but special pleas must conform to the code of civil procedure. *Id.*

16. THE EASTMOND PATENT NO. 171,926, JANUARY 11, 1876.—Neither the Holt patent No. 147,266, issued February 10, 1874, nor "A Treatise on Ventilation" written by Lewis W. Leeds, and printed by John Wiley & Sons, New York, 1871, antici-

pated the invention of Elbert Eastmond, entitled in the application for a patent, made September 22, 1875, "Improvement in Ventilating Water-closets." *Id.*

17. DAMAGES.—The amount of the royalty charged and paid for the use of the invention taken as the measure of damages for an infringement of the patent therefor. *Id.*

18. PROCESS AN INVENTION DISTINCT FROM MECHANISM PRODUCING THE PROCESS.—A process by which a new result is obtained is a different thing from the mechanism by which it is carried out, and is a distinct, severable, and independent patentable invention. *Scrivner et al.* v. *Oakland Gas Co.* (U. S. Cir. Ct., Cal.), IV, 197.

19. REISSUE ENLARGING THE PATENT AFTER LONG DELAY VOID.—The original patent was for the mechanism by which a new and useful result was produced. The patent, after eleven years' delay, was reissued in such form as to embrace a claim for the process as well as for the mechanical means by which the process was carried out. *Held*, that the reissued patent for the process is void. *Id.*

PASSAGE OF ACT.

See CONSTITUTIONAL LAW, 2, 3; STATUTE OF LIMITATIONS, 1, 2.

PAYMENT.

1. PAYMENT FOR SPECIAL PURPOSE—ACTION FOR MONEY HAD AND RECEIVED.—An action for money had and received lies to recover back money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay. *Stewart* v. *Phy* (Or.), II, 536.

2. APPROPRIATION OF PAYMENTS — DEBTOR AND CREDITOR — GENERAL PAYMENT.—A debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. Where money is paid generally on an account without any appropriation it should be applied to the first items in the account. And in an action to recover a balance due on a running account, the debtor can not be heard to dispute the validity of the items so paid. *Mackey* v. *Fullerton et al.* (Col.), IV, 569.

See ADMIRALTY, 25, 27; ASSIGNMENT, 1; BONA FIDE PURCHASERS, 3; CERTIORARI, 2; EVIDENCE, 7, 10, 11; NEGOTIABLE INSTRUMENTS, 4, 5, 7, 10 12, 23; PLEADING AND PRACTICE, 3.

PENALTY.

See CONTEMPT, 11; SPECIFIC PERFORMANCE, 2.

PETIT LARCENY.

See LARCENY, 13, 14.

PERJURY.

1. PERJURY UNDER LAWS OF THE UNITED STATES.—To constitute perjury under the laws of the United States, it must appear that the officer administering the oath was authorized to administer it by the laws of the United States. *United States* v. *Madison* (U. S. Dist. Ct., Cal.), III, 543.

2. THE SAME—TIMBER ENTRIES—AFFIDAVIT.—The affidavit required by section 2 of the act of June 14, 1878, "to encourage the growth of timber on the western prairies," may be made before the clerk of any state court of record, or before any local state officer, such as a notary public residing in the district where the land is situated, authorized by the state law to administer oaths. The maker of such affidavit, so taken, if false, is guilty of perjury under the laws of the United States. *Id.*

3. SUBORNATION OF PERJURY—ACTION FOR—DAMAGES.—A civil action for damages does not lie against a person for suborning a witness to swear falsely in a criminal prosecution against the plaintiff. *Taylor* v. *Bidwell* (Cal.), III, 479.

4. SUBORNATION OF PERJURY, INDICTMENT FOR.—To sustain an indictment for procuring a person to commit perjury, it is necessary that perjury has in fact been committed. It can not be committed unless the witness swears to what was false, willfully and knowingly. Consequently the indictment must aver, not only that the

statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus that the crime of perjury would be committed by him. *United States* v. *Evans* (U. S. Dist. Ct., Cal.), II, 611.

PILOT.

See ADMIRALTY, 1–5.

PLACE OF TRIAL.

See VENUE.

PLACER MINE.

See MINES AND MINING.

PLEADING AND PRACTICE.

1. PARTIAL DEFENSES AT COMMON LAW AND UNDER CODE, HOW PLEADED.—At common law every plea must go to the whole cause of action, and be an entire answer thereto on the record. The same rule prevails under the code, except that matter may be set up by way of answer which constitutes only a partial defense; but in such case it must be pleaded as a partial defense, and not assume to answer the entire cause of action. *Webb* v. *Nickerson* (Or.), IV, 485.
2. DENIAL OF KNOWLEDGE OR INFORMATION.—A defendant is not bound to inform himself concerning the truth of an allegation of which he never had any knowledge before answering the same; and a denial of any knowledge or information thereof is a sufficient denial, and will not be stricken out as sham, unless it plainly appears that the same is false. *Oregonian Railway Company, Limited*, v. *Oregon Railway and Navigation Company* (U. S. Cir. Ct., Or.), IV, 548.
3. FRIVOLOUS PLEADINGS.—A frivolous answer or defense is one which contains nothing that affects the plaintiff's case, and may be stricken out on motion; but a motion to strike out for frivolousness is not well taken if the matter included in it is material if true. *Id.*
4. CAUSE OF ACTION—STATEMENT OF DAMAGES.—An action for damages must rest upon facts showing a right on the part of the plaintiff to require the performance on the part of the defendant of some legal duty, a failure to perform such duty, and that the damages sought resulted therefrom. The complaint in this action held not to state facts in compliance with this rule. *Brandenburg* v. *Miles* (Col.), IV, 336.
5. A COMPLAINT IN AN ACTION TO RECOVER THE AMOUNT OF A DEFICIENCY after a sale of mortgaged premises under a judgment of foreclosure must allege that such deficiency has not been paid; an allegation of the insolvency of the judgment debtor is not enough. *Vogel* v. *Walker* (Utah), I, 699.
6. PASSAGE OF AN ORDINANCE BY THE CITY COUNCIL IS SUFFICIENTLY SHOWN by an allegation which sets forth a copy of the ordinance, and avers that the same was "duly passed and adopted." *Los Angeles* v. *Waldron* (Cal.), I, 335.
7. ABSENCE OF FAULT ON THE PART OF THE PLAINTIFF in an action to recover for personal injuries caused by the defendant's negligence need not be averred or proved by him. *Lopez* v. *Central Arizona Min. Co.* (Ariz.), I, 41.
8. DISTRICT COURTS OF UTAH HAVE JURISDICTION BOTH IN LAW AND IN EQUITY, under the act of congress of June 23, 1874, and by the territorial legislation the distinctions in the forms of actions at law and suits in equity are abolished. There is now but one form of civil action for the enforcement of private rights, and the redress or prevention of private wrongs, and the defendant is permitted to set up by answer as many defenses as he may have. *Kimball* v. *McIntyre* (Utah), I, 316.
9. EQUITABLE DEFENSE SET UP AGAINST AN ASSERTED LEGAL RIGHT should be first considered and passed upon by the court. *Id.*
10. ALLEGATION IN AN ANSWER IN AN ACTION FOR THE FORECLOSURE of an assessment lien for replanking a street in the city and county of San Francisco, to the effect that such street had not been graded to the official grade, is immaterial, and a failure to find on such allegation is not error, if it appears that the grade and width of such street had been established by the board of supervisors before that body ordered it planked. *Knowles* v. *Seale* (Cal.), I, 46.

11. A DENIAL IN AN ANSWER OF ANY KNOWLEDGE OR INFORMATION SUFFICIENT to form a belief as to an allegation in the complaint is a sufficient denial under section 713 of the civil code. *Wilson* v. *Allen* (Or.), I, 687.
12. IN ACTIONS UPON CONTRACTS WHICH DO NOT IMPORT A CONSIDERATION, and where the consideration must, therefore, be averred in the complaint, a denial in the answer of such averment forms a complete issue, and needs no reply; and where the consideration is implied, as in an action on a promissory note, the implication stands in the place of the alleged consideration, and an answer averring want of consideration is, in effect, but a denial of such implication, and needs no reply. *Alden* v. *Carpenter* (Col.), I, 598.
13. PLEA OF SET-OFF MAY BE INTERPOSED BY THE DEFENDANT IN AN ACTION ON A PROMISSORY NOTE, given in final settlement of account, arising from a failure of the plaintiff to deliver some of the goods for which such note was given. Such set-off may be averred as though it arose on an account for goods sold and delivered by the defendant to the plaintiff. *Staab* v. *Ortiz* (N. M.), I, 516.
14. PLEA OF SET-OFF, WITH A BILL OF PARTICULARS OF THE SAME, MUST SET FORTH THE NATURE of the defendant's claim with sufficient particularity to enable the plaintiff to meet it at the trial. It should state the items of the demand, and when and how it arose, but it need not be in any particular form. *Id.*
15. AN ITEM OF A PLEA OF SET-OFF, the plaintiff's liability for which is shown to depend upon a condition precedent, can not be considered by the jury without evidence of the performance of such condition. *Id.*
16. THE DEFENSE OF A PRIOR RECOVERY IS NEW MATTER which the defendant must plead and prove. *Gilson* v. *Price* (Nev.), I, 373.
17. PLEAS IN THE ACTION OF ASSUMPSIT.—The plea of *non est factum* is only proper in actions on written instruments under seal, and can not properly be interposed as a defense to an action of *assumpsit* on any simple contract in writing, such as a promissory note or bill of exchange. *Luna* v. *Mohr* (N. M.), I, 673.
18. PLEAS OF NON EST FACTUM AND NON ASSUMPSIT, in an action on a promissory note, are not so repugnant or inconsistent as to be inadmissible. *Staab* v. *Jaramillo* (N. M.), I, 57.
19. WHETHER AFTER ISSUE JOINED THE PLAINTIFF CAN WITHDRAW CERTAIN COUNTS in the declaration, without leave of the court or consent of the defendant, so as to deprive the latter of a portion of his defense to the plaintiff's case as originally stated, *quære*. *Id.*
20. DEMURRER—AVERMENT OF LEGAL CONCLUSIONS.—A complaint need allege only facts sufficient to constitute a *prima facie* cause of action. If superfluous matters are alleged as legal conclusions, an objection thereto can not be raised by demurrer. The allegations of the complaint, omitting those objected to by the defendant, held to state a good cause of action, and to be free from ambiguity or uncertainty. *Campbell et al.* v. *Taylor* (Utah), II, 541.
21. DEMAND, WHEN MUST BE MADE AND AVERRED.—Where a demand is necessary to fix the liability of sureties on an undertaking, it is parcel of the contract, and must be made before the commencement of an action for the breach of the undertaking, and in the action itself it must be averred and proved. It can not be made after the commencement of the action, except as the basis of a new action. *Morgan* v. *Menzies et al.* (Cal.), II, 882.
22. A DEMAND FOR PAYMENT IS NOT NECESSARY TO THE STATEMENT of a cause of action by an attorney to recover the reasonable worth of his services. *Gibbs* v. *Davis* (Or.), II, 825.
23. CAUSES OF ACTION, STATEMENT OF.—In an action on several bills of exchange, all bearing the same date, payable to the same party, due at the same time, the better practice is for the complaint to contain a separate statement on each bill. If, however, the complaint contains but a single statement, an order overruling a demurrer thereto will not be disturbed. *Dawson* v. *Lail* (Ariz.), II, 396.
24. CROSS-COMPLAINT—JOINDER OF CAUSES OF ACTION—DEMURRER.—An objection to a cross-complaint on the ground that several causes of action are unlawfully joined must be taken by demurrer, which specifically states the objection. If such demurrer is overruled, and an exception saved, the right to be heard thereon upon appeal is waived by afterward pleading over. *Green, Administratrix, etc.*, v. *Taney* (Col.), II, 531.
25. TRIAL BY JURY, CONSENT OF PARTIES TO.—A trial of issues of fact by a jury, which should have been tried by the court, is error. Such error is waived by the parties consenting to a trial by a jury. *Id.*

26. A DEFENDANT WHO CONSENTS TO TRY A CASE WITHOUT A JURY THEREBY WAIVES his right to afterwards object that the plaintiff's remedy was in law rather than in equity. *Walla Walla* v. *Moore et al.* (Wash.), II, 214.
27. PLEADING CONTRACT FOR CONVEYANCE OF LAND.—In pleading a defense arising out of a contract for the conveyance of land, it is not necessary to allege that such contract was in writing. The statute of frauds has changed the rule of evidence, not the rule of pleading. *Tucker, Executrix, etc.*, v. *Edwards* (Col.), II, 400.
28. INCONSISTENT PLEAS—WHEN ALLOWABLE.—Under the practice prior to 1877, the several parts of each plea could not be repugnant to each other; but separate special pleas in the same answer might be inconsistent without rendering the pleading obnoxious to demurrer. *Id.*
29. ACCORD AND SATISFACTION—ELECTION—PLEADING.—In pleading his readiness to perform an accord agreement, where the promisee is given the privilege of electing between two alternative promises on the part of the promisor, it is sufficient for the latter to aver his constant readiness and willingness to perform either, at least until the promisee has indicated his choice. An actual tender of performance need not be averred. *Id.*
30. OVERRULING DEMURRER, WAIVER OF EXCEPTION TO.—In an action on a judgment where the defendant pleads *nul tiel record* and an accord and satisfaction, an exception to the sustaining of a demurrer to each latter plea is not waived by proceeding to trial on the issue raised by the former. *Tucker* v. *Edwards* (Col.), II, 400.
31. PLEADING FACTS CONSTITUTING FRAUD.—In an action to annul a conveyance on the ground of fraud, when the facts constituting the fraud are not clearly known by the plaintiff, the same may be alleged in the alternative. *Rasmussen et al.* v. *McKnight et al.* (Utah), II, 205.
32. IN SUCH ACTION, WHEN THE FRAUD CONSISTS IN TAKING A DEED in the name of a married woman, and in giving a mortgage to the grantor in the name of her husband, he being the person who committed the fraud, the wife is a necessary and proper party whether she was a *particeps criminis* to the fraud or not. *Id.*
33. VENUE, WHEN MUST BE ALLEGED.—In an action to recover the possession of specific personal property, the jurisdiction of the court must be shown by an allegation in the complaint of the place of detention. A failure to make such allegation can not be taken advantage of after verdict when the sheriff's return shows that the property was taken in the county over which the court had jurisdiction. *Stiles* v. *James* (Wash.), II, 212.
34. EQUITABLE DEFENSES MAY BE INTERPOSED to an action at law. *Salisbury* v. *Ellison* (Col.), II, 102, 612.
35. DEFENSE NOT PLEADED, WHEN MAY BE TAKEN ADVANTAGE OF.—If a defense, legal or equitable, of which the defendant is entitled to the benefit, be not averred in the answer, but is fully established by the plaintiff in attempting to make out his case in the first instance, the plaintiff will be deemed to have waived the absence of averment, and can not recover if objection be taken by the defendant. *Id.*
36. PLEA SHOULD PRESENT A SINGLE ISSUE.—The object of a plea is to present and try a single issue, which may decide the suit, without putting the parties to the expense of trying all the issues in the case. But one issue can be presented by plea, without leave of the court, and in a suit upon a patent the court will not ordinarily permit a party to present and try upon pleas all the issues that can be raised, except the single issue as to infringement. *Giant Powder Co.* v. *Safety Nitro Powder Co.* (U. S. Cir. Ct., Cal.), II, 79.
37. PLEADINGS UNDER CODE—CONSTRUCTION OF.—The allegations of pleadings under the code must be liberally construed, with a view to substantial justice between the parties. It is sufficient if the complaint contain, in ordinary and concise language, and with reasonable certainty, allegations of such constitutive facts as will entitle the plaintiff to prove and maintain his case, and give the defendant an opportunity to meet and controvert the same. *Farnsworth et al.* v. *Holderman et al.* (Utah), III, 342.
38. PLEADING—CONTRACT—PERFORMANCE—ACCEPTANCE—WAIVER.—A complaint which sets forth an executory contract for the sale and delivery of "about nineteen hundred head of cattle, more or less, as plaintiffs were able to deliver," coupled with an allegation setting up an acceptance by the defendants of "about seventeen hundred and forty-four," in full for the number to be delivered under the contract, and the promise to pay for the same a certain sum of money, and a failure so to do, is sustained by evidence of a contract, by the terms of which the greater number of cattle were to be delivered and paid for at a certain price per head as classified, with evi-

dence of the defendants' acceptance of the smaller number, and promise to pay therefor. *Id.*

39. PLEADING WRITTEN INSTRUMENT—CONSIDERATION.—A complaint in an action to enforce a written instrument, not under seal and not negotiable, must allege a consideration. *Felt* v. *Judd* (Utah), III, 276.

40. ACTION AGAINST COUNTY—PRESENTATION OF CLAIM—PLEADING.—In an action against a county the complaint must allege the presentation of the plaintiff's claim, demand, or right of action to the county court for allowance, and the rejection thereof. *Fenton* v. *Salt Lake County et al.* (Utah), III, 263.

41. PLEADING—SUFFICIENCY OF ANSWER.—An answer which clearly puts in issue the material allegations of the complaint is sufficient. It need not controvert immaterial matter. *Bay State Silver Mining Co.* v. *Brown* (U. S. Cir. Ct., Nev.), III, 520.

42. THE AVERMENTS OF AN ANSWER MUST BE TAKEN AS TRUE, for the purposes of a judgment on the pleadings. *Fleming* v. *Wells* (Cal.), III, 159.

43. DENIALS—SUFFICIENCY OF ON APPEAL.—A denial of an allegation as a verified pleading, although informal, will be held sufficient on appeal, if the parties treated it as sufficient on the trial. *Hiatt* v. *Board of Trustees of Meridian School District* (Cal.), III, 460.

44. RULING OF THE CIRCUIT JUSTICE OR JUDGE.—A ruling of the circuit justice or judge, on the circuit, ought to be followed by the other judges thereon until the question is determined by the supreme court. *United States* v. *Morris* (U. S. Cir. Ct., Or.), I, 332.

45. UNITED STATES v. LOFTIS, 8 SAW. 194.—The ruling in this case being opposed to the decision of the circuit judge in an unreported case in the district of California, not then known to the district judge of Oregon, the latter is now followed, and the former disregarded, without reference to the personal opinion of said district judge; but in the light of further examination of and information on the subject the case is not regarded as sound, and is overruled. *Id.*

46. NO ORDER OF TRANSFER WAS NECESSARY BY THE COUNTY COURT of the city and county of San Francisco to give the municipal court of appeals jurisdiction over actions pending in the former court. *Canavan* v. *Municipal Court of Appeals* (Cal.), I, 876.

47. PENDING THE CONSIDERATION OF A MOTION, WHICH THE COURT HAS TAKEN UNDER ADVISEMENT until a subsequent day, it is not an irregularity, assignable for error fatal to the judgment, for the court to try another case, unless a party has been prejudiced thereby or deprived of some right affecting the fairness and verity of the judgment. *Alden* v. *Carpenter* (Col.), I, 598.

48. THE COURT WILL NOT HESITATE TO REVERSE A PRIOR RULING made in the same case, on a mere matter of practice, when satisfied that such ruling is erroneous. *Kent* v. *Upton* (Wy.), I, 700.

49. AN ORDER OF A TRIAL COURT SETTING ASIDE A VERDICT IS REVIEWABLE upon a statement on appeal, in the same manner as an order made on motion for a new trial. Such order is within the legal discretion of the court making it, and an appellate court will not interfere with it, unless the circumstances of the case and the principles of law applicable to them show an abuse of discretion. *Hynes* v. *Nelson* (Cal.), I, 473.

50. AN OPINION OF A COURT IS NOT DECISIVE OF A QUESTION NOT MENTIONED therein, although the same might, and perhaps should, have been passed upon. *Denver* v. *Bayer* (Col.), I, 505.

51. DELAY IN ASKING LEAVE TO FILE SEVERAL PLEAS will not be encouraged. *Id.*

52. THE COURT MAY GRANT LEAVE TO FILE AN ANSWER after the time for answering has expired, where no default has been entered. *Sieber* v. *Frink* (Col.), II, 98.

53. A DEFENDANT IS BOUND BY AN ADMISSION IN HIS ANSWER as to the amount due from him to the plaintiff, and it is error for the court to order judgment to be entered upon a verdict for a less amount. *Coffman* v. *Brown* (Col.), II, 98.

54. PERMITTING COUNSEL IN HIS ARGUMENT TO READ TO THE JURY A PORTION OF AN OPINION OF THE SUPREME COURT is not error sufficient to warrant a reversal. Such practice, however, is not to be commended. *People* v. *Forsythe* (Cal.), II, 288.

55. A PLAINTIFF CAN NOT DISMISS AN ACTION ON HIS OWN MOTION after the defendant has answered and averred matters upon which affirmative relief is asked, growing out of the transactions set forth in the complaint. *Clarke et al.* v. *Hundley, Judge, etc.* (Cal.), II, 215.

56. SERVICE OF PAPERS—SECTION 685 OF THE CODE OF CIVIL PROCEDURE OF IDAHO, WHICH PROVIDES that service of papers may be made by leaving the same in the office of an attorney in a conspicuous place, etc., is in derogation of the common law, and must be strictly construed. *Warner* v. *Teachenor et al.* (Idaho), II, 21.

57. AN AFFIDAVIT IN PROOF OF SUCH SERVICE must state that all the conditions of the statute authorizing such service have been substantially complied with, or it will be disregarded. *Id.*

58. DISMISSAL OF PARTY—JUDGMENT.—The entry of an order dismissing an action as to a certain defendant ousts the court of jurisdiction of such person, and a judgment subsequently entered against him, without vacating such order, is void. *Sere* v. *McGovern et al.* (Cal.), II, 892.

59. A PAPER IS FILED WHEN IT IS DELIVERED TO THE PROPER OFFICER, and by him received for filing, whether the same is indorsed as filed or not. *Wescoat* v. *Eccles* (Utah), II, 446.

60. EXCEPTIONS TO STATEMENTS OF COUNSEL.—Mere objections or "exceptions" made by defendants on the trial to statements by the counsel for the prosecution in his argument before the court and jury, can not be considered by the appellate court, where no action by the trial court in the matter was demanded, and no exception was taken to any ruling or action of the court. *People* v. *Shem Ah Fook* (Cal.), I, 112.

61. JUDGMENT WILL BE AFFIRMED WHERE NO POINTS AND AUTHORITIES ARE FILED within the required time. *People* v. *Lee Hung* (Cal.), I, 485.

62. JUDGMENT WILL NOT BE REVERSED FOR FAILING TO SERVE AMENDED COMPLAINTS on a defendant against whom a default has been entered for not answering the original complaint, where it does not appear from the record that such amended complaints were not served. *Heinlen* v. *Erlanger* (Cal.), I, 561.

63. SHAM AND IRRELEVANT ANSWERS—NOTICE OF MOTION TO STRIKE OUT. — Only sham or irrelevant answers may be stricken out on motion. But where a rule of court requires notice of every motion not *ex parte*, it is error to allow such an answer to be stricken out without notice. *Arata* v. *Tellurium etc. Mining Co.* (Cal.), III, 151.

64. CAUSES OF ACTION TO SET ASIDE A FRAUDULENT CONVEYANCE, and to recover possession of the land affected thereby, may be joined when all the matters complained of relate to the same property, are parts of one transaction and one design to defraud all the parties who defend the action. *Pfister* v. *Dascey* (Cal.), III, 303.

65. MISJOINDER OF DEFENDANTS—DISCLAIMER — DEMURRER. — Misjoinder of certain parties as defendants can not be taken advantage of by the defendants properly joined, when the defendants improperly joined disclaim all interest in the subject-matter of the litigation, and their disclaimer is acted upon by the court and accepted by the plaintiffs. *Id.*

66. CAUSES OF ACTION WHICH DO NOT AFFECT THE SAME PARTIES can not be united. *Johnson* v. *Kirby* (Cal.), III, 482.

67. ERRONEOUS ORDER CONSOLIDATING ACTIONS, WHEN NO GROUND FOR REVERSAL.—An erroneous order consolidating certain actions is not ground for reversal, if it appears from the findings that the appellant is not entitled to a judgment. *Bouge* v. *Dunn* (Cal.), IV, 352.

68. EQUITY RULE 69—BURDEN OF PROOF.—Where the time of taking testimony has expired under equity rule 69, and the case is heard on the bill, plea, and replication to the plea, without evidence to support the plea, the plea will be overruled for want of evidence. The burden of proof is on the party pleading the facts relied on to oust the jurisdiction. *Sharon* v. *Hill* (U. S. Cir. Ct., Cal.), IV, 199.

69. AMENDED COMPLAINT—SERVICE OF, ON DEFENDANTS.—Where a plaintiff amends his complaint in matter of substance, he must serve his amended pleading upon all the defendants, including those in default. *Miliken* v. *Houghton* (Cal.), IV, 221.

70. RECORD HELD TO DISCLOSE NO MATERIAL ERROR. *Board of Education* v. *Franklin et al.* (Cal.), IV, 608.

See AFFIDAVIT OF MERITS; AMENDMENTS; APPEAL; ASSIGNMENT; ASSUMPSIT; ATTACHMENT; BANKRUPTCY; BILL OF EXCEPTIONS; BILL OF PARTICULARS; CERTIORARI; CLAIM AND DELIVERY; CONTEMPT; CONTINUANCE; COUNTER-CLAIM; DEFAULT; DEMURRER; DEPOSITIONS; DISMISSAL OF ACTION; EJECTMENT; EMINENT DOMAIN; FINDINGS; FORCIBLE ENTRY AND DETAINER; GOODS SOLD AND DELIVERED; INSOLVENCY; INJUNCTIONS; INSTRUCTIONS; INTERPLEADER; JUSTICES' COURTS; NEW TRIAL; PARTIES; QUIETING TITLE; REMOVAL OF CAUSES; REPLEVIN; SUMMONS; TRESPASS; VARIANCE; VENUE; VERIFICATION.

PLEDGE.

1. PLEDGEE—BONA FIDE HOLDER—NEGOTIABLE NOTE.—A pledgee of negotiable paper as collateral security is entitled to be protected as a *bona fide* holder to the same

extent as one who becomes the absolute owner, and may maintain suit thereon in his own name, as the real party in interest. The only difference between the rights of such parties, as against the maker, is that the absolute owner may recover in full, while the pledgee, if there be equities, is restricted to the extent of his advances. *Haydon* v. *Nicoletti et al.* (Nev.), II, 632.

2. EXECUTION ON PLEDGOR'S INTEREST IN PROPERTY PLEDGED.—The interest of a pledgor in property pledged, with a limited power of sale for the protection of the pledgee, may be levied upon and sold under an execution against the pledgor. The pledgor holds the legal title to the property pledged, and not merely an equitable interest. *Williams* v. *Gallick* (Or.), II, 537.
3. PLEDGE OF CERTIFICATES OF STOCK BY DEPOSITARY—RIGHTS OF OWNER AND PLEDGEE.—The real owner of certificates of stock, who indorses and delivers the same to a third person for safe keeping, can not recover such certificate from the pledgee of the depositary, until the demand for which they were given in pledge is satisfied. *Ambrose* v. *Evans* (Cal.), IV, 297.
4. THE SAME—SALE OF CERTIFICATES BY PLEDGEE, PENDING ACTION FOR POSSESSION.—If, pending an action to recover possession of such certificates, the pledgee sells the same for more than enough to satisfy his demand, the owner is not entitled to a judgment for such excess, because it did not constitute any part of his cause of action. *Id.*
5. PLEDGOR AND PLEDGEE—ACTION TO RECOVER DEBT SECURED.—A pledgee may maintain an action to recover the debt secured, without first exhausting the subject of the pledge. *Ehrlich* v. *Ewald* (Cal.), IV, 380.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; GUARANTY; INSURANCE, 9, 10.

POINTS AND AUTHORITIES.

See APPEAL, 72; PLEADING AND PRACTICE, 61.

POLICE COMMISSIONERS.

1. THE POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO are not elective officers. *People ex rel. Hoy* v. *Alvord et al.* (Cal.), IV, 78.

See SAN FRANCISCO, 2, 3.

POLICE JUDGE.

See CONSTITUTIONAL LAW.

POLL TAX.

See TAXATION, 59.

POLYGAMIST.

See JURY AND JURORS, 6.

POSSESSION.

1. POSSESSION OF LAND—PRESUMPTIONS ARISING FROM—OCCUPANT.—One lawfully in possession of land may maintain an action for any interference with the possession thereof. And the actual occupant will be presumed to be lawfully in possession unless the contrary appears on the trial. *Simpson* v. *Williams* (Nev.), IV, 580.

See ADVERSE POSSESSION; EJECTMENT, 1–3; EVIDENCE, 18; FRAUD, 17; LANDLORD AND TENANT; LEASE, 1; MECHANICS' LIENS, 21; MINES AND MINING, 5, 38, 39; MORTGAGE, 38, 39, 43, 44; NUISANCE, 23; PUBLIC LANDS, 14–19; QUIETING TITLE, 2; REPLEVIN; SPECIFIC PERFORMANCE, 9; STATUTE OF LIMITATIONS, 26; TENANTS IN COMMON.

PRACTICE.

See PLEADING AND PRACTICE.

PRECEDENT.

See JURISDICTION, 4.

PRE-EMPTION.

See PUBLIC LANDS.

PRELIMINARY EXAMINATION.

See LARCENY, 16.

PRESCRIPTION.

1. PRESCRIPTION, NATURE OF.—The statute of California merely fixes the time in which a right by prescription shall be acquired at five years; but it nowhere determines the circumstances which constitute prescription, and thus leaves them to be determined by the settled law as it stood prior to the code. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct., Cal.), I, 183.

See NUISANCE, 8, 9, 16.

PRESENTMENT FOR PAYMENT.

See NEGOTIABLE INSTRUMENTS, 10, 12.

PRESUMPTIONS.

See BILL OF EXCEPTIONS, 9; CONTEMPT, 12; NEGLIGENCE, 33; POSSESSION; STATUTE OF LIMITATIONS, 19.

PRINCIPAL AND AGENT.

1. BUILDING CONTRACT—ACCEPTANCE BY AGENT—FRAUD—MISTAKE.—Where the promisees under a building contract agree to pay for the work contracted to be done, upon its acceptance by an agent mutually agreed upon, the acceptance by such agent is conclusive, in the absence of any fraud or mistake on his part. *Moore* v. *Kerr et al.* (Cal.), III, 628.
2. AGENT, WHEN PERSONALLY LIABLE ON WRITTEN CONTRACT EXECUTED IN HIS OWN NAME.—Where an agent, in executing a written instrument, does not attempt to bind his principal, and in terms imposes an obligation on himself, he incurs by such act a personal liability, even though he described himself as an agent. *Murphy* v. *Helmrich* (Cal.), IV, 301.
3. PRINCIPAL AND AGENT—SECRET INSTRUCTIONS—GENERAL AGENT.—The power of a general agent can not be restricted by secret instructions of his principal, so as to affect a party dealing with such agent without notice of the secret instructions. *Saxonia Min. etc. Co.* v. *Cook* (Col.), IV, 453.
4. AGENT ADVERSELY INTERESTED TO PRINCIPAL.—The law will not allow a person to act as agent when he has an interest adverse to his principal; and therefore an agent of an insurance company to receive and transmit applications for insurance, when making an application therefor on his own property, directly or indirectly for his own benefit, is acting for himself, and can not be considered the agent of the insurance company. *Spare* v. *Home Mut. Ins. Co.* (U. S. Cir. Ct., Or.), I, 542.
5. COURTS WILL TAKE JUDICIAL NOTICE OF THE AUTHORITY OF THE MANAGING OFFICER of railway corporations, such as a superintendent, and presume that such officer has power to conduct its ordinary business transactions. *Sacalaris* v. *Eureka & Palisade R. R. Co.* (Nev.), I, 398.
6. AN AGENT HAVING THE OVERSIGHT AND CHARGE, WITH THE POWER TO DIRECT, has a general and discretionary power within the scope of his agency. *Id.*

See CORPORATIONS, 7, 9–16; EVIDENCE, 22–25; MASTER AND SERVANT; NEGLIGENCE, 18; VERIFICATION, 2–4.

PRIOR APPROPRIATION OF WATER.

See WATER RIGHTS.

PRIORITY.

See BONA FIDE PURCHASER, 7; MECHANICS' LIENS, 22; MORTGAGES, 41; SPECIFIC PERFORMANCE, 10.

PRIVITY OF ESTATE.

See LEASE, 4, 5.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURT.

1. VERIFICATION OF PETITION IN PROBATE COURT—JURISDICTION.—Proceedings in the probate court of Umatilla county, Oregon, are not void for want of jurisdiction because the petition on which such proceedings were founded was unverified. *McCoy* v. *Ayers, Adm'r, etc.* (Wash.), II, 564.
2. PRESUMPTION AS TO THE SITUS OF PERSONALTY.—The fact that a probate court has assumed jurisdiction over certain personal property is *prima facie* evidence that such property is within the jurisdiction of the court. *Id.*
3. THE PROBATE JURISDICTION OF THE SUPERIOR COURT IS SEPARATE AND DISTINCT from the jurisdiction of such court in ordinary civil actions. *In re Allgier et al.* (Cal.), II, 876.

See CANCELLATION, 2; DIVORCE, 4; ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; HOMESTEAD, 1; JUDGMENT, 4; SALES, 6, 7.

PROBATE SALES.

See GUARDIAN AND WARD, 8–11.

PROHIBITION.

1. WRIT OF PROHIBITION—FUNCTIONS OF—JUDICIAL AND MINISTERIAL POWER.—Under the constitution the only office of the writ of prohibition is to prevent courts or other officers from going beyond their jurisdiction in the execution of judicial power. The legislature can not enlarge or extend the office of such writ so as to include ministerial functions. *Hobart* v. *Tillson, Tax Collector, etc.* (Cal.), IV, 629.
2. THE SAME—TAX COLLECTOR—PROHIBITION DOES NOT LIE AGAINST.—A tax collector is a ministerial officer, and as such he can not be restrained by prohibition from executing the functions of his office. *Id.*
3. PETITION FOR WRIT OF PROHIBITION DENIED, for the reason that the relief asked had already been granted on appeal. *People ex rel. Barnes et al.* v. *District Court, etc., et al.* (Col.), IV, 276.

PROMISE.

1. IMPLIED PROMISE, NOTWITHSTANDING THE DEBTOR'S OBJECTION—CONDUCT AMOUNTING TO CONSENT.—Whenever in any transaction, or under any form, one person receives a sum of money which he is bound, *ex æquo et bono*, to refund to another, the law implies a promise by him to make such repayment. Such promise is implied under the same circumstances, even though the debtor party objected to receiving the money, provided he nevertheless does actually receive it, and use it for his own purposes, or so deal as to retain and enjoy its benefits. Such conduct waives the objection, and amounts in contemplation of law to a previous consent. *De Celis* v. *Porter* (Cal.), I, 575.

See MORTGAGE; 13; STATUTE OF LIMITATIONS, 3–8.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PROSTITUTION.

1. TAKING FEMALE MINOR FOR PURPOSES OF PROSTITUTION.—Evidence held insufficient to sustain the judgment. *People* v. *Murray* (Cal.), III, 525.

PROTEST.

See COSTS, 7.

PUBLIC LANDS.

1. ONE NOT AN ACTUAL SETTLER, WHO FILES HIS APPLICATION TO PURCHASE LANDS suitable for cultivation from the state, prior to the adoption of the present constitution, but who makes no payment thereon, acquires no right to purchase such land after the adoption of such constitution. *Urton* v. *Wilson* (Cal.), I, 775.
2. A SETTLER ON PUBLIC LANDS WHICH HAD BEEN WITHDRAWN FROM SALE, and consequently were not open for pre-emption, acquires no title thereto, as against a subsequent grantee of the government, by virtue of his settlement. *Southern Pacific R. R. Co.* v. *Garcia* (Cal.), I, 586.
3. IMPROVEMENTS UPON THE PUBLIC LANDS ARE LAWFUL SUBJECTS OF SALE, and are sufficient consideration to support promissory notes and other contracts. *Caldwell* v. *Ruddy* (Idaho), I, 295.
4. THE AFFIDAVIT OF AN APPLICANT FOR THE PURCHASE OF STATE LANDS must set out the facts required by the statute to be stated therein. An affidavit which fails to state whether there are or are not settlers on the land which is sought to be purchased is insufficient. *McCoy* v. *Byrd et als.* (Cal.), II, 139.
5. MATTERS WHICH THE STATUTE REQUIRES TO BE STATED IN SUCH AFFIDAVIT can not be held immaterial. *Id.*
6. PURCHASE OF STATE LANDS BY CHINESE.—A citizen and subject of the Chinese empire, who is a *bona fide* resident of the state of Nevada, is entitled, under the laws of the United States and of such state, to locate or purchase any of the public lands belonging to such state. *State ex rel. Fook Ling* v. *Preble* (Nev.) II, 43.
7. SALE OF PRE-EMPTOR'S POSSESSORY RIGHT BY ADMINISTRATOR.—An administrator is entitled to the possession of a tract of land entered under the pre-emption laws by his intestate, and may sell, under direction of the probate court, any right of possession of the land that may have fallen to him by virtue of his administration. Nothing contained in sections 2263 and 2269 of the United States revised statutes prohibits such sale. *Burch, Administrator, etc.*, v. *McDaniel et al.* (Wash.), II, 546.
8. SALE OF "SOLDIERS' ADDITIONAL HOMESTEAD SCRIP."—In the absence of a further equitable showing, money paid for the purchase of "Soldiers' Additional Homestead Scrip" can not be recovered back on the ground of a total failure of consideration. Under sections 2306 et seq. of the United States revised statutes, the right to locate and make entries under such scrip belongs to the soldiers alone, and a contract for a sale thereof is against the policy of the law. *Mackintosh* v. *Renton, Holmes & Co.* (Wash.). II, 777.
9. DISTRICT COURT HAS NO JURISDICTION OF A CONTROVERSY TO DETERMINE the conflicting rights of claimants to a portion of the public domain, when such controversy is already undetermined before the department of the interior. *Hays* v. *Parker* (Wash.), II, 801.
10. DECISION OF THE TIDE LAND COMMISSIONERS.—The commissioners under the acts of 1872 and 1874, to dispose of the state tide lands, were authorized to decide who was entitled, in certain cases, to be preferred as a purchaser thereof, and their determination of the matter can not be questioned elsewhere, except for an error of law or a fraud extrinsic and collateral to the contest, by which a full and fair hearing of the matter was prevented. *Shively* v. *Welch et al.* (U. S. Cir. Ct., Or.), II, 713.
11. SETTLER UNDER THE DONATION ACT.—It does not appear that James Welch was ever a "settler" under the laws of the provisional government or the donation act upon the donation patented to John M. Shively and wife; and if he was, upon his abandonment of all such claims thereto in 1860, and before he was entitled to the grant, his wife had no interest in it or the consideration received therefor. *Id.*
12. CONVEYANCE TO ONE PERSON UPON A CONSIDERATION MOVING FROM ANOTHER.—In 1860 John M. Shively, in consideration that James Welch abandoned his claim to be a "settler" upon the former's donation claim, conveyed a certain portion thereof to said Welch, and a like portion, including 5 and 13 in "Shively's Astoria," to his wife Nancy. *Held*, that Nancy did not hold said blocks under her husband, but the grantor Shively, and therefore she was entitled, under the acts of 1872 and 1874 (Ses. L. 129, 76), to purchase the tide land in front of said blocks, although her husband had quitclaimed the same to Shively in 1850. *Id.*

13. TOWN SITE OF RED BLUFF—STATUTES AFFECTING—CERTIFICATES OF TITLE—TRUST ESTATE—CONVEYANCE BY TRUSTEE.—On May 1, 1865, Ann Wasson, then a widow with a child by a former husband, the plaintiff here, entered upon and took possession of certain lots forming part of the town site of Red Bluff. She resided there with her child until her marriage, in 1866, to Wasson; thereafter she, her husband, and the plaintiff continued to live and occupy said premises as her property until her death in 1867, when she died intestate, leaving surviving her as her heirs at law her husband and the plaintiff. Said town site had been entered at the office of the register of the land-office of the United States, by the county judge of Tehama county, in trust for the several use and benefit of the occupants thereof, under acts of congress providing for the reservation of town sites upon the public lands of the United States. Thereafter said trustee purchased the lands under the provisions of an act of congress applicable to his trust, and on September 29, 1866, a United States patent was issued to the county judge and his successors in office. On March 6, 1868, the legislature passed an act authorizing the trustee to distribute the town lots held by him in trust, and to issue certificates of title to the inhabitants of said town in accordance with their respective interests. On July 9, 1868, Wasson, claiming as heir at law of his wife, obtained from the trustee the certificate of title to the premises in dispute in his own name, which were afterwards conveyed by mesne conveyances to the defendant. *Held*, that the widow, under the aforesaid acts of congress, as the original and *bona fide* occupant of said lots, became vested with an equitable title to the same, as her separate property, which she would have had a right to perfect had she lived, by obtaining from the trustee, when he came to execute his trust under the regulations prescribed by the statute, a certificate of legal title; upon her death before such regulations had been prescribed, her interest vested in her husband and the plaintiff as tenants in common, each entitled to an undivided half of the premises; that the legal title obtained by the husband, and his entry thereunder, inured to the benefit of the plaintiff, and was held by him in trust for her; and that the defendant, who took such land with notice of the equitable rights of the plaintiff, as shown by the county records, could acquire no greater rights therein than his grantor had. *Eversdon* v. *Mayhew* (Cal.), II, 726.

14. RIGHT IN PUBLIC LANDS NOT INITIATED BY TRESPASS.—No right to locate and purchase a portion of "mineral land," as a part of the public domain, can be initiated by an intrusion, against the will of the occupant, upon lands inclosed by a fence, and in the actual possession, occupation, and use of another claiming title under a patent of the United States covering the land, issued under the acts of congress of July 1, 1862 (12 Stat. 489), and July 2, 1864 (13 Id. 356), granting lands to the Central Pacific Railroad Company to aid in the construction of its road. *Cowell* v. *Lammers et al.* (U. S. Cir. Ct., Cal.), III, 504.

15. U. S. PATENT CONCLUSIVE ON COLLATERAL ATTACK.—A patent issued to the Central Pacific Railroad Company under said acts, regular in form, by the proper officers, to "alternate sections of land designated by odd numbers," within the limits of the congressional grant, can not be collaterally attacked by an intruder upon the actual possession of the grantee of the patentee, occupying and claiming title under the patent. *Id.*

16. TRESPASSER UPON ACTUAL POSSESSION OF LAND.—An intruder upon the actual possession of another, of lands held and claimed by the occupant under a patent from the United States, regular upon its face, issued under the said acts of congress granting lands to the Central Pacific Railroad Company, does not occupy a position that entitles him, collaterally, to call in question the validity or effect of the patent, in a suit by the party in possession holding title under the patent, to restrain the commission of trespasses in the nature of waste. *Id.*

17. EXCEPTION OF MINERAL LANDS IN PATENT.—The fact that the patent issued under said acts of congress contains a clause not required by the acts to be inserted in the patent, "excluding and excepting all 'mineral lands,' should any be found to exist in the tracts described in the foregoing," does not change or affect the rule that an intruder on the actual possession of the grantee in a patent, claiming title under the patent, can not assail the patent collaterally, in a suit between such grantee and intruder. *Id.*

18. PATENT CONCLUSIVE OF PATENTABILITY ON COLLATERAL ATTACK.—A patent in all respects regular upon its face, issued by the proper officers under said acts of congress, even though containing a clause excluding and excepting such lands as shall be found to be mineral, is conclusive evidence, upon a collateral attack, that the lands are not mineral, and that they are properly included in the patent. *Id.*

19. CASE IN JUDGMENT.—On June 27, 1867, a patent, in all respects regular on its face was issued by the proper officers, covering the north-east quarter of section 17, township 9, range 9 east, Mount Diablo base and meridian, to the Central Pacific Railroad Company, under said acts of congress of 1862 and 1864, granting lands to aid in the construction of the road of said company, the said lands being within the limits of the grant. There was nothing in the records of the land-office, or in the patent, to indicate that any portion of said lands described in the patent was "mineral land." The patent contained a clause "excluding and excepting from the transfer by these presents 'all mineral lands,' should any be found to exist in the tracts described in the foregoing." In March, 1873, the patentee sold and conveyed said lands, with other lands, to M., who entered into the actual possession and occupation of said lands so conveyed, including the land in question—fenced, built upon, otherwise improved and used it, making lime for sale upon it, cultivating a part, and cutting hay on and pasturing the remainder. The actual occupation and use continued till November 24, 1877, when he sold and conveyed it to complainant, who immediately took possession, and continued in the actual possession, occupation, and use, for similar purposes, till the commission of the acts complained of. In 1881, defendant, claiming a right under the laws relating to mineral lands, assuming the portion intruded upon to be a part of the public mineral lands, entered upon it against the will of complainant, took up a mining claim, and performed the acts stated in the bill. *Held*, that defendant is not in a position which entitles him to attack the patent, collaterally, in this suit, both upon the grounds that he could not initiate a right to a mining claim by an unlawful intrusion upon the actual possession of another claiming title under a patent, as was decided by the supreme court in *Atherton* v. *Fowler*, 96 U. S. 513, and on the ground that the patent is conclusive when collaterally called in question, as decided in *Steel* v. *The Smelting Co.*, 104 U. S. 647, 650–654. *Id.*

20. OCCUPANCY OF PUBLIC LAND—QUITCLAIM DEED—TRUST—GIFT.—A person in the occupancy of public land, having no right or title thereto, who conveys the same by a quitclaim deed as a gift to his wife, does not hold the title subsequently acquired by him in his own name and with his own money, under the United States homestead laws, and by purchase from the state, in trust for his wife. *Brannock et al.* v. *Monroe* (Cal.), III, 481.

21. OCCUPANT OF PUBLIC LANDS—SALE OF INTEREST OF, UNDER EXECUTION.—The interest of any person in the actual occupation of public lands of the United States, on which he has made one hundred dollars' worth of improvements, may be transferred and sold under execution. *Wells* v. *Francis* (Col.), III, 217.

22. PRE-EMPTION OF PUBLIC LAND—PRIORITY OF LOCATION—RELATION OF TITLE.—The right of a pre-emptor of public land relates back to the date of the first proceeding taken by him for its acquisition under the pre-emption laws, and takes priority over a title acquired through a subsequent location under the soldiers' additional homestead act. *Cothrin* v. *Taber et al.* (Cal.), IV, 295.

23. ACT OF CONGRESS GRANTING LAND TO THE SOUTHERN PACIFIC R. R.—CONSTRUCTION OF.—The act of congress of March 3, 1871, in effect provided that "*there be* and *hereby is* granted to the Southern Pacific Railroad Company of California, * * * for the purpose of aiding in the construction of said railroad, * * * every alternate section of public land, not mineral, designated by odd numbers, * * * whenever on the line thereof, the United States having full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land-office." *Held*, that such act constituted a present grant, that could only be defeated by failure to perform the conditions subsequent therein, and upon proper proceedings to take advantage of such failure; that the general right to the land, subject to the exceptions found in the act, vested at the date of the passage of the act on March 3, 1871, and attached to the specific land at the moment of the filing of the plat in the office of the commissioner of the general land office. Thenceforth it was not in the power of any officers of the government, by any action of theirs, to divest, or in any way limit or modify, the rights of the company so vested. *Southern Pacific Railroad Co.* v. *Dull et al.* (U. S. Cir. Ct., Cal.), IV, 639.

24. THE SAME—WHEN GRANT ATTACHED—MEXICAN GRANT.—Such congressional grant attached to lands lying within the exterior limits of a Mexican grant, but outside of the limits thereof as finally surveyed, if prior to the date of filing such plat in the office of the commissioner of the general land-office, the Mexican grant had been finally located. *Id.*

25. THE SAME—CONFIRMATION OF MEXICAN GRANT UNDER ACT OF JUNE 14, 1860.—Under the act of congress of June 14, 1860, proceedings for the confirmation of a Mexican grant are in the nature of proceedings *in rem;* under such act the location of a Mexican grant becomes final after the publication by the surveyor-general of the notice provided for therein, in the absence of any application to have the plat and survey returned to the district court for examination. A survey so made final by publication has the same effect as a patent, and thereafter is in no sense *sub judice;* the jurisdiction of the commissioner of the general land-office is thereupon exhausted as to everything but the ministerial duty of issuing a patent, and any further acts of his, such as ordering a resurvey, are void. All lands outside of the survey, thus made final, become public lands of the United States, and subject to any other disposition under the law. *Id.*

26. STATUTORY GRANTS—PUBLIC RECORD—NOTICE.—All the world must take notice of statutory grants of land clearly defined on the face of the statute, and other public records, indicated by the statute. *Id.*

27. THE SAME—CASE IN JUDGMENT.—The defendant entered upon land within the exterior limits of a Mexican grant, with the intention of securing a pre-emption right, but subsequently abandoned his location under the mistaken supposition that such land was *sub judice*, and located elsewhere; four years afterward, and eighteen months subsequent to the filing of complainant's map, he returned to his original location. *Held,* that such return did not connect itself with his former residence, and continue or reinstate the right first initiated, and that the right of the complainant having attached, it was too late to acquire a new right of pre-emption; and a patent issued to him, based upon such subsequent location, was either void or held in trust for complainant, and the patentee could convey no title to a purchaser for value without actual notice, in fact, of complainant's title. *Id.*

See DEED, 1-5; DENVER TOWN SITE, 2; EASEMENTS, 3; MEXICAN GRANTS; MINES AND MINING; NUISANCE, 4; OREGON DONATION ACT; TRESPASS, 2, 3; UNITED STATES, 1; WATER RIGHTS.

PUBLIC OFFICERS.

1. COUNTY CLERK OF HUMBOLDT COUNTY, SALARY OF.—On February 28, 1876, the offices of county clerk, auditor, and recorder of Humboldt county were united in the same person. On that date the legislature passed an act fixing the annual salary of the person filling such offices at five thousand dollars. Subsequently Humboldt county was organized as a county of the second class, and the offices of auditor and recorder were separated from that of county clerk. The annual salary of the county clerk was thereupon fixed by the board of supervisors at two thousand seven hundred dollars. *Held,* that the act of February 28, 1876, was intended to regulate the salary of such offices only while they were united in the same person. That when the organization of the county government was changed, and the offices were separated, no one of the three officers was entitled to receive the salary intended for the three; and as the act did not provide for the separation of the three offices, it became inoperative when such separation occurred. *Kinsey, County Clerk, etc.,* v. *Kellogg, etc.* (Cal.), II, 368.

2. THE SAME.—As there was no operative law fixing the compensation of the county clerk after Humboldt county became organized as a county of the second class, the board of supervisors had authority to fix the compensation of that officer. *Id.*

3. FEES OF RECORDER FOR SANTA BARBARA COUNTY—COUNTY CLERK.—The county clerk of Santa Barbara county is not the recorder thereof, and fees collected by him, purporting to act in such capacity, must be delivered to the recorder. The county clerk can not escape from liability for such fees by paying them into the county treasury, under the statute of 1878, as the fees of the recorder's office are not subject to such statute. *Stoddard* v. *Williams* (Cal.), III, 440.

4. SECRETARY OF STATE BECOMING GOVERNOR—SALARY AND DURATION OF TERM OF. Under section 8 of article 5 of the constitution, upon the removal of the governor from office, or upon his death, resignation, or inability to discharge the duties thereof, the secretary of state becomes governor, and consequently entitled to the salary appertaining to the office, and continues as such for the remainder of the term of the outgoing governor, although in the mean time he may cease to be secretary of state. *Chadwick* v. *Earhart, Secretary of State* (Or.), IV, 601.

See ASSIGNMENT, 3, 4; COUNTY CLERK; COUNTY GOVERNMENT ACT; IMMIGRATION COMMISSIONERS; ELECTION; JUSTICES' COURTS; LICENSE COLLECTOR; POLICE COMMISSIONERS; STATE INDUSTRIAL SCHOOL.

PUBLICATION OF SUMMONS.

See SUMMONS.

PUBLIC POLICY.

See COMMON CARRIERS, 6.

PUBLIC USE.

See EMINENT DOMAIN.

QUANTUM MERUIT.

See ASSUMPSIT.

QUIETING TITLE.

1. ACTION TO QUIET TITLE—ALLEGATIONS OF COMPLAINT.—A complaint to quiet title is sufficient which alleges ownership in the plaintiff in the land in controversy, and that the defendant claims an estate or interest therein adverse to him, which claim is without right, and that defendant has no estate, right, title, or interest. *Rough* v. *Simmons* (Cal.), II, 831; *Rough* v. *Booth* (Cal.), II, 832.
2. ACTION TO DETERMINE ADVERSE CLAIM—COMPLAINT—POSSESSION.—The complaint in an action brought under section 500 of the code of civil procedure, for the purpose of determining an adverse claim, estate, or interest in land, must allege possession by the plaintiff, either by himself or by his tenants. *Coolidge et al.* v. *Forward et al.* (Or.), III, 702.
3. ACTION TO QUIET TITLE—EXECUTION—JUDGMENT—INJUNCTION.—The legal owner in the actual possession of real property can maintain an action to quiet his title under section 500 of the code of civil procedure as against one asserting an adverse claim thereto under an execution issued on a judgment against a third person. In such action the court may perpetually enjoin the sale of the real property under the execution, but can not declare the judgment a nullity. *Murphy et al.* v. *Sears et al.* (Or.), III, 558.

See EQUITY, 3.

QUITCLAIM DEED.

See DEED, 21; EJECTMENT, 6; PUBLIC LANDS, 20.

QUORUM.

See CORPORATIONS, 23, 24.

RAILROADS.

1. EXPULSION OF PASSENGER FROM CAR—CONFLICT OF EVIDENCE—VERDICT.—As to the fact whether the plaintiff was rightfully expelled from the train of the defendant without unnecessary force and at a proper time, *held*, that the evidence was conflicting, and that a verdict founded thereon should not be disturbed. *Bland* v. *Southern Pacific Railroad Company* (Cal.), IV, 78.
2. RAILROAD—TICKET LIMITED AS TO TIME—RIGHTS OF PASSENGER.—A railroad ticket entitling the purchaser to a continued passage between two given points, if used within a certain time, is good for such continued passage if the same be commenced within the time limited. *Lundy* v. *Central Pacific Railroad Company* (Cal.) IV, 613.

See BONDS, 1; COMMON CARRIERS; CORPORATIONS, 2; EMINENT DOMAIN, 1, 14, 15; MORTGAGE, 36; NEGLIGENCE; OBSTRUCTING THE MAIL; REMOVAL OF CAUSES, 2, 3; STREETS, 1–3; TAXATION, 46–49.

RATIFICATION.

See CONTRACTS, 6.

RECEIPT.

See COMMON CARRIERS, 9; NEGOTIABLE INSTRUMENTS, 24.

RECEIVERS.

1. NO APPEAL LIES FROM AN ORDER OF THE LOWER COURT APPOINTING A RECEIVER in an action for partition, notwithstanding the fact that such order may operate as an injunction in restraining the rights of the parties to the action to hold and manage their lands. *Emeric* v. *Alvarado* (Cal.), I, 708.
2. ORDER SETTLING A RECEIVER'S ACCOUNT WILL BE AFFIRMED when no error appears. *Montgomery* v. *Merrill* (Col.), II, 140.
3. OBJECTIONS AND EXCEPTIONS TO THE ALLOWANCE OF A VERIFIED ACCOUNT of a receiver appointed in an action for the foreclosure of a mortgage need not be verified. *Id.*

See APPEAL, 15, 16.

RECLAMATION OF SWAMP LANDS.

See SWAMP LANDS.

RECORD.

See JURISDICTION, 5; REMOVAL OF CAUSES, 6.

RECORDING.

See MINES AND MINING, 26; MORTGAGE, 41, 45.

REDEMPTION.

1. REDEMPTION BY TENANT IN COMMON—RIGHTS AFD LIABILITIES OF CO-TENANTS.—A tenant in common of land, or his successor in interest, who redeems the whole of the common property from a sale under a judgment against all the co-tenants, acquires thereby an equitable lien upon the interests of his co-tenants for their just proportion of the money paid by him in effecting the redemption, and he may maintain an action to recover such proportion, and a decree to the effect that, in default of such payment, the interests of the co-tenant in the land be foreclosed. *Calkins* v. *Steinbach* (Cal.), IV, 433.
2. THE SAME—EFFECT OF REDEMPTION BY JUDGMENT DEBTOR.—The effect attending a redemption of property sold subject to redemption depends upon the character of the person making the redemption. If made by a "redemptioner," as that term is defined in subdivision 2 of section 701 of the code of civil procedure, and there be no further redemption within the statutory period, the redemptioner is entitled to a deed from the sheriff, conveying to him the interest of the judgment debtor therein. But if made by the judgment debtor or his successor in interest, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption and a note thereof on the margin of the certificate of sale. *Id.*

See MORTGAGES.

REFERENCE.

1. IN AN EQUITABLE ACTION THE COURT HAS POWER TO REFER THE SAME to a referee to take the testimony, and to decide the action upon the testimony so taken. In reviewing such evidence, the appellate court may weigh the same with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses. *Sieber* v. *Frink* (Col.), II, 98.

REFORMATION.

See MISTAKE.

RELATION.

See DEED, 15–19; SHERIFF'S SALE, 2.

RELEASE.

1. EXECUTION AND DELIVERY OF WRITTEN INSTRUMENT—CONSTRUCTION OF CODE.—The execution of a written instrument within the meaning of section 448 of the code of civil procedure includes its delivery. *Clark* v. *Childs* (Cal.), IV, 376.
2. RELEASE—DELIVERY—ESTOPPEL—ADMISSION OF DUE EXECUTION OF INSTRUMENT SET FORTH IN ANSWER.—A release which has never been delivered is not binding. And a defendant who sets up such release in his answer as a bar to the plaintiff's demand, and himself introduces evidence showing that the release was not in fact delivered, is estopped from claiming the benefit of the admission arising out of the plaintiff's failure to deny by affidavit the genuineness and due execution of the instrument. *Id.*

See NEGLIGENCE, 34; SURETIES, 4, 13, 14.

REMANDING CAUSE.

See NEW TRIAL, 37.

REMITTITUR

1. REMITTITUR, WHEN TO ISSUE—JUDGMENT BY DEFAULT.—Where one of the departments of the supreme court, on the eighth of February, 1883, reversed a judgment by default, and on the twenty-third of February modified such judgment and remanded the cause, with leave to the appellant to file an answer within twenty days after the filing of the *remittitur* in the court below, such *remittitur* should not be issued until thirty days after the last date. If issued before such time has elapsed, a judgment by default for failure to answer within twenty days after its filing in the court below will be set aside. And the same effect will be given to a judgment by default for not answering within the time required after the *remittitur* has rightfully issued, where such default was occasioned by the inadvertence of a deputy clerk of the supreme court, in failing to enter of record the date on which such *remittitur* was issued, and in repeatedly informing the attorney for the party in default that no *remittitur* had issued. *Hog's Back Con. Min. Co.* v. *New Basil Con. G. Min. Co.* (Cal.), I, 770.

REMOVAL OF CAUSES.

1. PETITION FOR REMOVAL.—When it appears upon a petition for removal of a cause that the same is removable upon the application of the petitioners, under the second clause of section 2 of the act of 1875, it will not limit or restrain the effect or operation of such petition if the petitioners only ask the court therein to proceed no further "as to them." *Northern Pacific Terminal Company* v. *Lowenberg* (U. S. Cir. Ct., Or.), I, 97.
2. PROCEEDING TO APPROPRIATE PROPERTY.—A judicial proceeding to appropriate private property to the use of a railway corporation is subject to the usual incidents of a civil action or suit, including the liability to removal into the circuit court. *Id.*
3. SEPARABLE CONTROVERSY.—In an action against two or more persons to appropriate property held by them as tenants in common to the use of a railway corporation, there is a separable controversy between such corporation and each of said tenants, which can be fully determined as between them; and if either of such tenants is a citizen of a different state from such corporation, he may remove the whole case into the circuit court, under the second clause of section 2 of the act of 1875. *Id.*
4. IRREGULARITIES IN REMOVAL.—Although there are irregularities in the removal of a cause, still, if it appears from the record that it involves a controversy cognizable by the circuit court, a motion to remand to the state court will not be allowed. *Id.*
5. AMENDMENT.—*Quære:* Can the petition for removal be amended in the circuit court? *Id.*
6. RECORD, WHAT CONSTITUTES UNDER THE ACT OF 1875.—The term "record," as used in sections 3 and 7 of the act of 1875 (18 Stat. 470), held to include the testimony taken and on file in a cause at the time of filing a petition and bond for its removal from a state court. *Miller* v. *Tobin* (U. S. Cir. Ct., Or.), I, 236.
7. JURISDICTION OF STATE COURT, WHEN IT CEASES.—Upon the filing of a petition and bond in due form and effect for the removal of a cause from a state court, whether in vacation or term-time, in a case removable under the act of 1875, the jurisdiction of the state court ceases at once, and depositions taken thereafter before a referee theretofore appointed to take the testimony in the case are no part of the record or proceedings therein. *Id.*

8. RIGHT OF REMOVAL BY DEFENDANT NOT LOST BY INSUFFICIENT DENIALS IN ANSWER.—When it appears from the case made by the complaint that it arises under an act of congress, the right of removal by the defendant is not lost by reason of insufficient denials in the answer. *Id.*

9. TIME FOR FILING PETITION FOR REMOVAL.—A hearing on a demurrer to a complaint, and an order overruling the same and allowing the defendant to answer to the merits of the case, is not a "trial" within the meaning of that term as used in section 3 of the act of 1875, *supra;* but such "trial," whether it be an issue of fact or law, is one upon which a final disposition of the case is made. *Id.*

10. "TRIAL" AND "HEARING."—"Trial" is a common-law term to denote that step in the case by which the facts are ascertained, and is always final, unless the matter is set aside for cause. "Hearing" is an equity term, and may denote the argument and consideration of a case at more than one stage of its progress; but when it results in an absolute disposition of the case, it is called "final;" but the term "trial," as used in the act of 1875, *supra*, comprehends that step or proceeding in a cause at law or in equity which results in a final judgment or decree, whether the "trial" be of an issue or question of law or fact. *Id.*

11. REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES.—The petition for the removal of an action on the ground that the parties are citizens of different states must show that such ground of removal existed both at the time of the commencement of the action and at the time of the application for removal. A petition which only alleges that the defendant is, and always has been, a citizen of California, and that the plaintiff is a citizen of Missouri, is insufficient. *McNaughton* v. *South Pacific Coast R. R. Co.* (U. S. Cir. Ct., Cal.), II, 662.

12. THE SAME—AMENDMENT OF PETITION.—The citizenship of the parties, under such circumstances, is a jurisdictional fact, and must be alleged in the petition. If such allegations are not made, whether the petition may be amended in the circuit court so as to show them, *quære*. If the power to allow such amendments be conceded, it is not a matter which the party removing can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. Such an amendment should not be allowed where, after an amendment of the petition in the circuit court, the record in each court would show upon its face jurisdiction which would authorize it to proceed to final judgment. *Id.*

13. THE SAME—APPLICATION, WHEN SHOULD BE MADE.—This action was commenced in the fourth district court of the state of California, on August 1, 1879; defendant demurred August 22, 1879. The demurrer was overruled. It answered September 12, 1879. Plaintiff demurred to that part of the answer, setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the mean time taken effect, the case was transferred into the superior court as the successor of the district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained. An amended answer was filed April 1, 1880, which put the case at issue. The constitution of 1879, and the statutes passed in pursuance thereof, provide that "the superior courts shall always be open (legal holidays and non-judicial days excepted) and they shall hold * * * regular sessions commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof." On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the parties were citizens of different states. *Held*, that under the act of congress of 1875, providing that the application for removal must be made "before or at the term at which said cause could be first tried," the application in this case came too late; that the four general sessions of the superior court required to be held are "terms" within the meaning of the act. *Id.*

14. TRANSFER OF CAUSE TO FEDERAL COURT.—An order of the lower court refusing a motion to transfer the cause to the federal court can not be reviewed on an appeal from the judgment alone. *Rough* v. *Booth; Rough* v. *Simonds* (Cal.), II, 72.

15. THE BOND REQUIRED ON SUCH TRANSFER MUST BE SIGNED by the principal. *Id.*

16. CONSOLIDATION OF ACTIONS — TRIAL IN ONE ACTION — REMOVAL OF CAUSES—WAIVER.—When two actions are brought in the state court on the same cause of action, and between the same parties, or their successors in interest, the court may require the parties to elect in which they will proceed, or may consolidate them. If the same are not consolidated, any steps taken in one of them will bind the parties in the other. Consequently, if after the right of removal to the federal courts had been established in both suits, the parties proceed to trial in the state courts in

either action, the right to remove the action not tried, under the act of 1875, is waived. *Evans et al.* v. *Smith* (U. S. Cir. Ct., Col.), III, 213.

17. REMOVAL OF TAX SUITS TO FEDERAL COURTS.—The lower court did not err in refusing to approve the bond given with a petition for the removal to the federal courts of an action to recover taxes due from a corporation created under the laws of the state. *People* v. *S. P. R. R. Co.* (Cal.), III, 655.
18. REMOVAL—CONTESTED QUESTION OF LAW.—Where a case has been removed to the circuit court under the act of congress of 1875, on the ground that the suit arose under the constitution or laws of the United States, it will be remanded to the state court, unless it affirmatively appears from the facts alleged in the record that some contested question of law will arise, upon the constitution or laws of the United States. *McFadden et al.* v. *Robinson et al.* (U. S. Cir. Ct., Cal.), IV, 201.
19. REMOVAL—FACTS MUST BE STATED IN PETITION.—A petition for removal of a suit from a state to a national court, on the ground that it arises under the laws of the United States, must state the facts, and point out the contested construction or question arising thereon, which are claimed to give the national court jurisdiction, so that the court can determine for itself, from the facts stated, the question of jurisdiction. *Hambleton* v. *Duham et al.* (U. S. Cir. Ct., Cal.), IV, 589.
20. MUST BE A CONTROVERSY AS TO CONSTRUCTION.—A suit can not be removed under the second section of the act of 1875 simply because, in its progress, a construction of the law of the United States may be necessary, unless it in part, at least, arises out of a controversy in regard to the effect or operation of some provision in the law upon the facts involved, and the court should be able to determine from the facts stated that such controversy will arise upon the facts. *Id.*
21. INFORMATION AND BELIEF.—Whether facts stated on information and belief sufficient, at least doubtful. *Id.*

REMOVAL OF COUNTY SEAT.

1. REMOVAL OF COUNTY SEAT—LEGISLATIVE AUTHORITY OVER.—The act of February 11, 1881, regulating the removal of county seats, and providing that "not less than two thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state," is not in conflict with section 2, article 14, of the constitution, which declares that "no county seat shall be removed unless a majority of the electors voting on the proposition vote therefor." *Alexander* v. *People* (Col.), II, 92.

REMOVAL AND SUSPENSION FROM THE BAR.

See ATTORNEYS, 10, 11.

RENT.

See LANDLORD AND TENANT; LEASE, 5.

REPLEVIN.

1. JUDGMENT FOR THE PLAINTIFF IN AN ACTION FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY should be primarily for the very property, or its value at the date of the trial, and an amendment to the complaint showing such value, and increasing that already alleged, is permissible. *Phillips* v. *Sutherland* (Cal.), I, 350.
2. COMPLAINT IN AN ACTION OF REPLEVIN UNDER THE CODE MUST AVER the value of the property taken, and the amount of damages sustained by its detention. The truth of such allegations is admitted by a failure to deny the same, and evidence thereof is inadmissible on the part of the defendant. *Tucker* v. *Parks* (Col.), I, 264.
3. DEFENDANT IN AN ACTION OF REPLEVIN CAN NOT ATTACK THE PLAINTIFF'S TITLE on the ground that it was obtained through fraud, unless such fraud be specially pleaded. *Id.*
4. IN AN ACTION OF REPLEVIN, INTEREST ON THE VALUE OF THE PROPERTY, from the time of the wrongful taking until the time of the trial, may be recovered as general damages. *Id.*
5. ADMISSION OF AN ALLEGATION OF DAMAGES admits only that the plaintiff has sustained such damages as were consequential upon the facts alleged. *Id.*

6. REPLEVIN OF JOINT PROPERTY.—Personal property incapable of division, and owned by two or more joint owners, or tenants in common, can not be replevied by one or more of such owners from the owners who have the exclusive possession thereof. *Hill et al.* v. *Seager* (Utah), II, 673.
7. ACTION FOR CLAIM AND DELIVERY—JUDGMENT.—Under the code, a defendant who recovers judgment in an action for the claim and delivery of personal property, where the same has been delivered to the plaintiff, is entitled to a judgment for a return of the property; and if all the property can not be returned, then to a judgment for the value of the whole. In such action, the wrong-doer can not acquire the privilege of restoring to the owner a particular article of the property wrongfully detained, or of paying instead its value as found by the jury, nor can he complain that the alternative judgment is for less than the value of the property. *Wetmore* v. *Rupe* (Cal.), II, 885.
8. REPLEVIN—DEMAND—UNLAWFUL TAKING.—No demand is necessary, in an action to recover the possession of personal property, where the original taking was unlawful, although the defendant came into the possession of the property without any imputation of fraud, or intention to do a wrong. *Surles* v. *Sweeney* (Or.), III, 569.
9. REPLEVIN—DEMAND—EXECUTION—POSSESSION BY EXECUTION DEBTOR.—No demand is necessary in an action by the real owner to recover possession of personal property levied upon under an execution against another, if at the time of the levy such property was not in the possession of the execution debtor. *Stone* v. *O'Brien* (Col.), IV, 243.

See AMENDMENT, 3; CLAIM AND DELIVERY; PARTNERSHIP, 18.

REPORTER'S NOTES.

See LARCENY, 16.

RES GESTÆ.

See MURDER AND MANSLAUGHTER, 60, 62, 81; VENDOR AND VENDEE, 1.

RESIDENCE.

See CHINESE RESTRICTION ACT; CORPORATIONS, 6; HOMESTEAD, 14; SUMMONS, 21; JURISDICTION, 1, 2; VENUE, 7.

RESTRICTION ACT.

See CHINESE RESTRICTION ACT.

REVENUE ACTS.

See DUTIES.

RIGHT OF WAY.

See EASEMENTS, 1-3.

RIOT.

1. CRIMINAL LAW—RIOT—"FORCE AND VIOLENCE"—"DISTURBANCE OF PUBLIC PEACE," WHAT CONSTITUTES—DECLARATIONS OF ONE RIOTER, WHEN ADMISSIBLE.—S., a mining company, having reduced the wages of its employees, the defendants, thirteen in number, and one hundred and fifty others, miners, some employees of S. and others not, comprising a miners' union, in pursuance of a resolution by them passed in mass meeting in Miners' Union hall, and for the purpose of resisting such reduction of wages, organized in the village of Silver Reef, marched through the village to the neighboring mines, ordered therefrom all union men, and having collected a force of three hundred men, among whom were all of the defendants, marched back through the village to the mining properties of S., and there appointed from their number a committee, which, in the presence and view of the men outside and pursuant to their behests, entered the mining works of S. and demanded of the employees there in charge that they shut down all works, quit possession of the

shafts, shaft-houses, buildings, and works, and surrender the same to such committee, and not to start up the works again until ordered so to do by the union; which demands were acceded to by the employees of S., whereupon the body of men marched away, leaving their committee, one of whom was the defendant C., in charge and in possession of such works.

Held: 1. That if, by the resolution, meeting, marching, and demands of defendants and their companions, and the manner and circumstances under which the same were done and accomplished, well-grounded fear or apprehension of bodily harm or injury would be raised in the minds of reasonable men of ordinary courage and firmness, by a resistance to such demands, and that well-grounded fears existed in the minds of the residents of Silver Reef for the safety of life or security of property, the same constituted a breach of the "public peace" by "force and violence," within the meaning of the act defining riot.

2. That the terms "force" and "violence" do not necessarily mean the actual use of physical force, accompanied with turbulence or violence; but any unlawful act, however apparently peaceable and quiet, when done with such numbers, in such manner, and under such circumstances as show that the actors intend to and are capable of carrying out, and do so carry out, an unlawful purpose in an unlawful manner, rendering resistance thereto apparently, in the minds of reasonable men of ordinary courage, dangerous to life or property, is such "force" and "violence" as is contemplated by the statute.

3. That evidence of the effect upon the minds and the feelings of the residents of Silver Reef, as to fear for the security of life or property, occasioned by these unlawful acts, was admissible, as tending to show a breach of the public peace, and to show this, proof might be offered of the declarations, expressions of fear, and acts of such residents, during and while the acts of the defendants were being done and performed.

4. That the acts and declarations of defendant C., one of the committee of miners in charge of the works of S., while in possession in pursuance of the orders of the other defendants and other miners, comprising the miners' union, are admissible in evidence against all the defendants on trial. *People* v. *O'Loughlin* (Utah), I, 164.

RIPARIAN PROPRIETOR.

See WATER RIGHTS.

ROADS.

See NUISANCE, 21, 22; STREETS AND HIGHWAYS.

ROBBERY.

1. TO CONSTITUTE ROBBERY OR LARCENY THE GOODS MUST HAVE BEEN TAKEN *animo furandi*. *People* v. *Keefer* (Cal.), II, 878.
2. INSTRUCTIONS IN REGARD TO ROBBERY.—When a defendant is on trial and is convicted of the crime of robbery, erroneous instructions relating to the crime of grand larceny will not warrant a reversal, when the instructions in regard to the crime of robbery are correct. *People* v. *Riley* (Cal.), II, 364.
3. ROBBERY—STATEMENT OF PERSON ROBBED—RES GESTÆ.—On a trial for robbery, after the prosecuting witness has testified "that he thought that he had been knocked down and his watch [the property claimed to have been taken] was taken from him without his consent, but of this he was not certain," the prosecution can not give evidence of a statement of such witness, made some time after the alleged robbery occurred, and not in the presence of the defendant, to the effect that he had "been knocked down and robbed." Such statement forms no part of the *res gestæ*. *People* v. *Ehring* (Cal.), II, 590.

RULES OF COURT.

1. A COURT CAN NOT BY RULE DEPRIVE A PARTY OF A RIGHT given him by statute. *Wescoat* v. *Eccles* (Utah), II, 446.

See APPEAL, 85.

SACRAMENTO BONDS.

See BONA FIDE PURCHASER, 8; BONDS, 2-6; MANDAMUS, 2-4.

SALARY.

See ASSIGNMENT, 3, 4.

SALES.

1. SALE OF REAL ESTATE—COMMISSIONERS—TIME WHEN ESSENCE OF CONTRACT.—The respondents authorized the appellants in writing to sell certain real and personal property for them at a given price, and within a specified time. On the last day of such time the appellants produced as a purchaser one who professed to be able to pay the price agreed upon, and willing to do so if the respondents would allow him a reasonable time to examine the title to the property. This the respondents refused, but tendered him a deed for the property, which he refused to accept, for want of an opportunity to make such examination. *Held*, that the appellants were not entitled to the stipulated commission; that time was of the essence of the contract for the sale; that a reasonable time for the examination of the title could not be implied where the limit for acceptance was definitely fixed by the terms of the offer; that to entitle them to commissions, the appellants should have produced a purchaser both able and willing to consummate the purchase within the stipulated time. *Watson et al.* v. *Brooks et al.* (Or.), II, 815.
2. A SALE OF PERSONAL PROPERTY IN THE POSSESSION OF THE VENDOR carries with it a warranty of title, including a warranty against incumbrances. *Baker* v. *McAllister* (Wash.), II, 690.
3. BREACH OF WARRANTY OF TITLE—RESCISSION.—Where personal property is sold with warranty of title, and at the time of sale the same is subject to a lien not known to the vendee, by reason of which said property is taken and kept from the vendee, without negligence or fault on his part, such taking will of itself, at the option of the vendee, work a rescission of the contract of sale, and be a good defense to an action for the purchase price. *Id.*
4. THE SAME—PAYMENT OF LIEN BY VENDEE.—The vendee under such contract need not discharge the existing lien. If, however, he does so, the amount so paid should be set off against the purchase price. *Id.*
5. IMPLIED WARRANTY—SALE BY WRITTEN CONTRACT—PAROL EVIDENCE.—The vendor of personal property in his possession warrants his title to the same by implication. Whether such sale be by written bill of sale or oral, the implied warranty of title may be rebutted by parol. The law does not generally imply warranties as to quality. As to such warranties the rule is *caveat emptor*, and the purchaser has no remedy except in cases of express warranty or fraud. If the contract of sale be reduced to writing, nothing which is not found therein, except that which the law implies, forms part of the contract. When such contract contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to show the existence of a warranty in the former case, or to extend it in the latter. *Johnson* v. *Powers* (Cal.), II, 740.
6. INFORMALITY IN THE DELIVERY OF PERSONAL PROPERTY SOLD BY AN EXECUTRIX DOES NOT VITIATE the sale so as to render it impossible of subsequent ratification by the probate court. *Id.*
7. A SALE OF THE PROPERTY of an estate without an order therefor by the probate court may be subsequently ratified by such court, or by the parties interested in such estate, so far as their interest is concerned. *Brewster* v. *Baxter* (Wash.), II, 791.
8. A CONDITIONAL SALE, DEPENDENT UPON AN ACT to be done, such as the payment of the consideration within a certain time, which is not done, does not pass the title to the vendee. *Sere* v. *McGovern* (Cal.), II, 892.
9. SALE—DELIVERY—COMMON CARRIER—BILL OF LADING.—Where goods are delivered to a common carrier, and the bill of lading is made deliverable to the order of the vendor, such facts when not rebutted by evidence to the contrary, are almost decisive as showing the intention of the vendor to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. *Reynolds et al.* v. *Scott et al.* (Cal.), III, 291.
10. SALE OF FIRE-WOOD—IMPLIED WARRANTY OF QUALITY.—Fire-wood is not a manufactured article, within the meaning of the code, and the sale thereof does not imply a warranty that it is reasonably fit for the purpose for which it was sold. *Correio* v. *Lynch* (Cal.), III, 41.
11. SALE—ACCEPTANCE BY VENDEE.—A vendee of fire-wood can not avoid the payment of its real value, although not of the quality contracted to be delivered, if he accepts and uses it, after a full opportunity for examination. *Id.*

12. CONTRACT OF SALE—BREACH OF MEASURE OF DAMAGES.—In an action by a vendee to recover for the breach of a contract of sale, where the articles contracted to be sold had no market value, the measure of damages is the actual loss sustained by the vendee by reason of his not receiving an advance or profit through agreements which he himself had made in reliance upon the fulfillment of his vendor's contract. *McKay* v. *Riley et al.* (Cal.), IV, 47.
13. SALE OF REAL ESTATE BY BROKER—COMMISSIONS FOR SALE.—A broker, employed by the owner of certain real estate to sell the same at a stated price, if the sale be made within "a short time," is entitled to his commissions upon finding a purchaser within two weeks after the date of his employment, and before the property is withdrawn from the market. *Smith* v. *Fairchild et al.* (Col.), IV, 211.
14. IMPLIED WARRANTY—SALE—CONTRACT OF SALE.—A mere contract of sale or agreement to sell does not imply a warranty. No warranty can be implied except in cases of sale. *Harley et al.* v. *Golden State and Miners' Iron Works* (Cal.), IV, 696.

See CONSIDERATION, 1; CONTRACT, 8; EXECUTORS AND ADMINISTRATORS, 3, 5; FERRIES, 3; FRAUD, 20, 21; INSOLVENCY, 17; LICENSE, 1; MORTGAGE, 45; STATUTE OF FRAUDS, 3.

SALVAGE.

See ADMIRALTY, 20.

SAN FRANCISCO.

1. CITY AND COUNTY OF SAN FRANCISCO IS LIABLE FOR DAMAGES TO AN INDIVIDUAL caused by the refuse matter from the city and county hospital flowing on to his land, and injuring his business and health, although no claim for such injury has been presented to the board of supervisors for allowance. *Bloom* v. *City and County of San Francisco* (Cal.), I, 564.
2. POWER OF APPOINTING POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO, vested in the judges of certain of the district courts by the act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the state. *Heinlen* v. *Sullivan* (Cal.), I, 47.
3. SUCH POWER WAS NOT CONTINUED IN FORCE by section 11 of article 22 of the constitution of 1879, and does not now devolve upon the judges of the superior court in the city and county of San Francisco. *Id.*
4. BOARD OF NEW CITY HALL COMMISSIONERS ARE AUTHORIZED TO ALLOW THE CLAIM of a contractor for extra work done under the direction of their architect, and for losses suffered by him through the action and incompetency of their former architect. *Keating* v. *Edgar* (Cal.), I, 45.
5. SAN FRANCISCO LIABLE FOR SEWAGE DISCHARGE.—The city and county of San Francisco is liable for damages caused by the discharge of a public sewer, even if it was part of a plan adopted by the board of supervisors that such sewer should be left open at the places through which its contents flowed. *Lehn* v. *City and County of San Francisco* (Cal.), IV, 353.
6. PRESENTATION OF CLAIM AGAINST COUNTY—STATUTES REQUIRING, NOT APPLICABLE TO SAN FRANCISCO.—Section 4072 of the political code, requiring claims against counties to be presented to the board of supervisors before an action can be maintained thereon, has no application to the city and county of San Francisco. The act of 1855, requiring such presentation, even if applicable to the city and county of San Francisco, has been repealed by the political code. *Id.*
7. BOARD OF SUPERVISORS OF SAN FRANCISCO—FORMATION OF.—The consolidation act of the city and county of San Francisco regulates and determines the formation of the board of supervisors of such city and county until changed or superseded by proceedings under article 11 of the constitution of 1879. *People ex rel. Dougherty* v. *Board of Election Commissioners, etc.* (Cal.), II, 366.

See ASSIGNMENT, 1; BOARD OF HARBOR COMMISSIONERS, 1; DEDICATION, 1; INTERPRETER, 2; LAUNDRY ORDINANCE; POLICE COMMISSIONERS; STREETS AND HIGHWAYS. 9, 14, 16; STREET ASSESSMENT, 5.

SANTA BARBARA COUNTY.

See PUBLIC OFFICERS, 3; STREET ASSESSMENT, 3, 4.

SATISFACTION.

See ACCORD AND SATISFACTION.

SECRETARY OF TREASURY.

See DUTIES ON IMPORTS.

SEDUCTION.

1. STATUTE OF LIMITATIONS—SEDUCTION OF MINOR—MAJORITY.—The statute of limitations does not commence to run against the right of a minor to sue for her own seduction until she attains her majority. *Morrell, by Her Guardian*, v. *Morgan* (Cal.), III, 683.
2. SEDUCTION—STATUTE OF LIMITATIONS—PRIOR JUDGMENT.—An action by an infant suing by her guardian to recover for her seduction is not barred by a judgment in favor of the defendant in a prior action by the plaintiff, in which the complaint contained no averment as to infancy, and such judgment was entered on a demurrer thereto on the ground that the action was barred by the statute of limitations. *Id.*
3. SEDUCTION—CONSENT OF FEMALE—PERSUASION.—The right of a female to maintain an action for her seduction is not defeated by her consent procured by persuasion, inducement, or artful means. *Id.*

SELF-DEFENSE.

See MURDER AND MANSLAUGHTER.

SENATORS.

See ELECTION OF OFFICERS, 8.

SENTENCE.

See CRIMINAL LAW AND PRACTICE, 45.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 5; MARRIED WOMEN, 1–6.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

See ASSIGNMENT, 1; JUDGMENTS, 60; PLEADING AND PRACTICE, 9, 11.

SHERIFFS.

1. SHERIFF'S FEES FOR MILEAGE.—The provision of the statute of 1869–70, p. 159, authorizing the sheriff to charge for "mileage in any criminal case or proceeding," does not authorize him to charge mileage for other traveling than that which is expressly mentioned in the statute, but simply fixes the rate which may be charged when mileage is allowed by any other statute. *Boughton* v. *County of Santa Barbara* (Cal.), III, 22.

See APPEAL, 16; ATTACHMENT, 3; CONVERSION, 1–3.

SHERIFF'S SALE.

1. THE PLAINTIFF IN AN EXECUTION CAN NOT MAINTAIN AN ACTION AGAINST A BIDDER at a sheriff's sale to recover the amount of his unpaid bid. The sheriff only can maintain such action. *Burbank* v. *Dodd* (Or.), III, 338.
2. SHERIFF'S SALE—EXECUTION—LEVY—JUDGMENT—RELATION.—The title of the purchaser at a sheriff's sale does not depend on the sheriff's return to the writ, whether such return be good or bad, sufficient or insufficient. Such title relates back to the date of the judgment, and not from the date of any real or pretended levy. *Hibberd* v. *Smith* (Cal.), III, 446.

See INJUNCTION, 4, 5; PARTNERSHIP, 14.

SHIPPING.

See ADMIRALTY.

SLAUGHTERING ANIMALS.

See CONSTITUTIONAL LAW, 20.

SPECIAL ADMINISTRATOR.

See ESTATES OF DECEASED PERSONS, 13.

SPECIAL LEGISLATION.

See CONSTITUTIONAL LAW.

SPECIFIC PERFORMANCE.

1. SUPERIOR COURT HAS JURISDICTION OF AN ACTION FOR THE SPECIFIC PERFORMANCE of a contract for the sale of lands against the heirs and personal representatives of a deceased vendor, after the probate court has dismissed a petition praying that the administrator be compelled to convey such land. Such dismissal will be presumed to have been made on the ground of the dubiety of the petitioner's right, although the jurisdiction of the superior court does not depend upon the *correctness* of the action of the probate court in holding such right doubtful. *Hall* v. *Rice* (Cal.), I, 346.
2. EQUITY WILL DECREE THE SPECIFIC ENFORCEMENT OF A WRITTEN AGREEMENT FOR THE SALE OF LAND, in the absence of fraud, undue influence, or want of actual consideration, notwithstanding such agreement provides for the payment of a penalty upon the breach of the condition thereof. *Borel* v. *Mead* (N. M.), I, 614.
3. AN AMENDMENT TO A COMPLAINT FOR THE SPECIFIC PERFORMANCE OF A CONTRACT for the sale of land, alleging the adequacy of the price agreed to be paid therefor, may be allowed by the court after the trial and during the argument. *Hall* v. *Rice* (Cal.), I, 346.
4. CONSIDERATION EXPRESSED IN A CONTRACT FOR THE SALE OF LAND will be deemed adequate, in the absence of evidence to the contrary. *Id.*
5. WRITTEN AGREEMENT UNDER SEAL FOR THE SALE OF LAND IMPORTS A VALUABLE CONSIDERATION IN EQUITY, as well as at law; and in a suit for the specific performance thereof, the want of consideration can not be raised by demurrer, although it may be by answer. *Borel* v. *Mead*, 614.
6. SPECIFIC PERFORMANCE OF SUCH AGREEMENT MAY BE DECREED AGAINST THE DEFENDANT WHO HAS SIGNED THE SAME, although it has not been signed by the plaintiff. *Id.*
7. SPECIFIC PERFORMANCE—PAROL CONTRACT FOR SALE OF LAND—PART PERFORMANCE.—Possession of a lot of land under a parol contract for the sale thereof, the expenditure of money in the improvement thereof, and partial payments of the purchase price, constitute part performance of the contract, which takes it out of the statute of frauds, and entitles the vendee to specific performance of the contract, as against a subsequent purchaser from the vendor, who took with notice of the vendee's equities. *Day* v. *Cohn* (Cal.), III, 577.
8. PAYMENT OF PURCHASE PRICE—TIME ESSENCE OF CONTRACT—VENDOR'S ACQUIESCENCE.—When the purchase price of such land was to be paid from "time to time, as the vendee earned it," time is not of the essence of the agreement, and a failure to make payments as the same were earned will not defeat the vendee's right to a specific performance, when the vendor acquiesced in the delay. *Id.*
9. POSSESSION OF VENDEE—STATUTE OF LIMITATIONS—NOTICE.—The equitable right of a vendee, under an executory contract for the sale of land, to a specific performance of his contract, is not affected by the statute of limitations so long as he is in possession of the land under the contract. Such possession is notice to subsequent purchasers from the vendor of the vendee's equities. *Id.*
10. CONTRACT FOR SALE OF LAND—SPECIFIC PERFORMANCE—SUBSEQUENT PURCHASER. One in possession of government land under a written contract, by the terms of which his vendor agreed to convey to him the legal title as soon as it was obtained from the United States, upon payment by the vendee of the government price per acre, and a just proportion of the expenses incurred in procuring the patent, is entitled to priority over, and may have his agreement specially enforced against, a subsequent purchaser from such vendor. *Peasley* v. *Hart* (Cal.), III, 623.

11. THE SAME—PAYMENT—CONDITIONS PRECEDENT.—The vendor under such contract was bound, as a condition precedent to his right to demand judgment from the vendee, to notify him of the issuance of the patent, and of the amount of the purchase money to be paid by him. *Id.*
12. SPECIFIC PERFORMANCE OF A WRITTEN CONTRACT FOR THE SALE OF LAND will be refused when the description of the land, in the light of surrounding circumstances, is not sufficient to enable the court to determine the precise tract of land intended to be disposed of. *Richards* v. *Snider et al.* (Or.), II, 282.
13. CONTRACT FOR SALE OF LAND—SPECIFIC PERFORMANCE.—A written agreement for the sale of land which reserves to the vendor the privilege of foreclosing all the rights of the vendee in case of the non-payment of the purchase price may be specifically enforced by the vendor. It is not necessary for him to resort to the remedy of foreclosure. *Wood* v. *Mastick et al.* (Wash.), II, 549.

STALLION.

See EXECUTION, 6.

STARE DECISIS.

See MORTGAGE, 9; PLEADING AND PRACTICE, 48.

STATEMENT OF CASE.

See APPEAL, 69, 76, 96; FINDINGS, 4; NEW TRIAL, 16, 29, 31.

STATE INDUSTRIAL SCHOOL.

1. STATE INDUSTRIAL SCHOOL—BOARD OF CONTROL OF—HOW APPOINTED.—The board of control of the state industrial school, as established by the act of February 12, 1881, are not officers created by the constitution. The legislature has power to provide for the manner of making original appointments to such offices, the terms of office, how all vacancies shall be filled, and when the time of an incumbent appointed to fill a vacancy shall expire. *People* v. *Osborne* (Col.), IV, 457.
2. THE SAME—VACANCY IN—POWER OF GOVERNOR TO FILL.—A person who has been appointed to fill a vacancy in the board of control of the state industrial school, caused by the resignation of one of the members thereof, is entitled to hold such office in the same manner and for the same time that his predecessor might have held it, and until his successor shall be elected and qualified. While such incumbent so holds such office there is no vacancy, within the meaning of section 2 of the act of February 12, 1881, which the governor is authorized to fill without the consent of the senate. *Id.*

STATUTE.

1. PROVISIONS OF AN ACT, OR SECTIONS OF AN ACT, WHICH ARE CONSTITUTIONAL, and connected with or dependent upon other provisions which are unconstitutional, will be enforced by the courts. Such rule applied to the act granting to one person the right to use and enlarge the ditches of another: Sess. Laws, 1881, p. 164. *Trippe* v. *Overacker* (Col.), I, 352.
2. CONSTITUTIONAL LAW—TITLES OF STATUTES.—Article 5, section 20, of the constitution of Colorado—"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title," etc.—is mandatory, and contains the declaration of an essential condition to the validity of legislative enactments, and so much of any act as is not directly germane to the subject expressed in the title is without force. *People ex rel. Kellogg* v. *Fleming et al.* (Col.), II, 315.
3. THE SAME—TITLE OF AN ACT NOT EXPRESSING ITS SUBJECT.—A statute passed February 11, 1883, is entitled "An act to amend section 78 of chapter C, of the general laws of the state of Colorado, entitled, 'Towns and cities, and especially cities of the second class,'" and provides for the election of the mayor and other city officers of Leadville on certain days, prescribes their terms of office, and regulates their official duties. Chapter C of the general laws is not entitled "Towns and cities, and especially cities of the second class," nor is there any other chapter so entitled. Chapter C contains several subdivisions, and only one of them con-

tains seventy-eight sections. The section 78 only provides that the mayor of a city shall be the presiding officer of the city council, and that he may vote in case of a tie, but not otherwise. *Held*, that the subject-matter of the said act of February 11, 1883, was not expressed in its title, that no part of it was germane to the subject-matter of said section 78 to which its title referred, and which it purported to amend, and that said act was therefore wholly void. *Id.*

4. THE SAME—REPEALING CLAUSE.—Said statute being void, its repealing clause which provides that "all acts and parts of acts inconsistent with this act are hereby repealed" is also inoperative and void. *Id.*
5. THE SAME—STATUTE VOID FROM REPUGNANCY.—It seems that a statute which provides, with respect to all of the city officials of a certain city, that they "shall be elected on the first Tuesday of April *in each and every year*, and that each of them shall hold his office for the term *of two years*, and until his successor is elected and qualified," is void from uncertainty and repugnancy. *Id.*
6. CONSTRUCTION OF ACT—TITLE AND PREAMBLE.—In the construction of a statute, both the title and preamble may be considered in doubtful cases. *Kahn* v. *Salmon* (U. S. Cir. Ct., Or.), III, 383.
7. ACT TO PREVENT FRAUD AND INJUSTICE—CONSTRUCTION OF.—An act to prevent fraud and injustice, as the assignment act of 1878 (Or. Ses. L. 36), should be liberally construed to that end. *Id.*
8. SPECIAL STATUTE REFERRING TO EXISTING LAW—EFFECT OF REPEAL ON PRIOR STATUTE.—A local and special statute which adopts by reference provisions relating to procedure in an existing general law is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted. *Schwenke et al.* v. *Union Depot and Railroad Co.* (Col.), IV, 321.
9. REPEAL OF STATUTE BY IMPLICATION — LEGISLATIVE INTENT.—The law does not favor repeals of existing statutes by implication; they will not be adjudged to follow unless there is such a positive repugnancy that the two statutes can not consistently stand together; the legislative intent to substitute the new for the old law must clearly appear; this intent is never *prima facie* presumed. And a strong repugnancy or clearer indication of legislative intent is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law. *Id.*
10. PATENT ISSUED UNDER REPEALED ACT IS VOID.—A patent to land showing on its face that it was issued under and in pursuance of an act of congress, which had been repealed prior to the application therefor, is void, and may be collaterally attacked. *Id.*
11. DENVER TOWN SITE ACT NOT REPEALED.—The act of May, 1864, regarding the town site of Denver, was a local and special statute, and was not repealed by the repealing clause of the general town site act of July, 1864. Nor is there anything repugnant or inconsistent in the provisions of such acts. *Id.*
12. IT IS A CONDITION ALWAYS IMPLIED BY LAW, that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct., Cal.), I, 183.
13. ACT INCORPORATING THE NORTHERN PACIFIC, CONSTRUCTION OF.—The act of July 2, 1864 (13 Stat. 365), incorporating the Northern Pacific Railway Company, and the acts amendatory thereof, are a grant by the public to a private corporation, and must therefore be construed most strictly against the latter, so that no authority, right, or privilege can be held to pass thereby unless the same is therein plainly expressed or clearly implied. *Hughes* v. *Northern P. R'y Co.* (U. S. Cir. Ct., Or.), I, 21.

See CHINESE RESTRICTION ACT; EVIDENCE, 38; OREGON DONATION ACT.

STATUTE OF FRAUDS.

1. LEASE TO COMMENCE IN FUTURO—STATUTE OF FRAUDS.—A lease of land for a year, to commence *in futuro*, is "an agreement not to be performed within a year," within the meaning of the statute of frauds, and must be in writing; otherwise it is invalid. *White* v. *Holland et al.* (Or.), II, 671.
2. SALE OF MINING CLAIM—PAROL CONTRACT — STATUTE OF FRAUDS.—A parol contract for the sale of a mining claim is void under the statute of frauds; and the same is true as to a parol modification of a written contract. *Kelly* v. *Ruble* (Or.), III, 737.
3. STATUTE OF FRAUDS—WRITTEN ADMISSIONS OF VERBAL CONTRACT.—Written admissions of a verbal contract of sale, signed by the party sought to be charged, are

sufficient to take such contract out of the statute of frauds. *Murphy* v. *Helmrich et al.* (Cal.), IV, 301.

4. STATUTE OF FRAUDS — PROMISE TO ANSWER FOR DEBT OF ANOTHER — POSTPONEMENT OF PRIOR MORTGAGE.—A promise in writing by a prior mortgagee to a subsequent mortgagee, that, in consideration of the latter's refraining from enforcing his mortgage, the former "will be responsible for whatever he (the mortgagor) owes you (the subsequent mortgagee), and will see that the same is paid," whether valid under the statute of frauds, as a promise to answer for the debt of another, or not, has the effect, in equity, of postponing the lien of the prior mortgage to that of the second. *Held*, also, that such promise, under the Colorado statute of frauds, was binding; that forbearance to enforce the mortgage was a good consideration; that the consideration need not be named in the promise, and that the description of the debt was sufficiently definite. *Sanders* v. *Barlow et al.* (U. S. Cir. Ct., Col.), IV, 227.

5. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER.—An agreement between the treasurer of a mining company and a bank, whereby the former promised to remit to the latter the amount of all drafts drawn by the manager of the mining company on and paid by the bank, is not an agreement to answer for the debt of another, and need not be in writing. *De Walt* v. *Hartzell et al.* (Col.), IV. 572.

6. LIEN ON REAL ESTATE—AGREEMENT FOR, MUST BE IN WRITING.—An agreement for the purpose of creating a lien upon real estate is void unless the same is in writing, subscribed by the party to be charged. In an action to enforce such lien it is not necessary to allege that the agreement was in writing. *Marshall* v. *Livermore Spring Water Company et al.* (Cal.), IV, 631.

See EVIDENCE, 47; LEASE, 2; MARRIED WOMEN, 6; MORTGAGE, 26; PLEADING AND PRACTICE, 27; VESSELS, 1.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS, WHEN ACT TAKES EFFECT.—Where the statute of limitations provides that in cases where the cause of action has already accrued at the passage of the act, the party shall have the whole period prescribed by the act, after its passage, in which to commence action, and by another act of the same legislative session, it was provided that said statute should take effect at a day subsequent to its approval by the governor, the period of limitation to an existing cause of action will not begin to run until such latter date. *Schneider* v. *Hussey* (Idaho), I, 294.

2. THE WORDS "PASSAGE OF THIS ACT," used in such connection, mean the time when the act takes effect. *Id.*

3. DEBT BARRED BY THE STATUTE OF LIMITATIONS CAN ONLY BE RECOVERED UPON PROOF of a new promise sufficient to revive the debt. *Richardson* v. *Bricker* (Col.), I, 270.

4. CONTRACT CREATED BY A CONDITIONAL PROMISE TO PAY A DEBT BARRED by the statute of limitations can not be enforced, except upon the performance or happening of such condition, and the burden of proving the same rests upon the plaintiff. *Id.*

5. NEW PROMISE TO PAY SUCH DEBT "WHEN ABLE" IS CONDITIONAL, and must be construed as referring to financial ability. Such ability is not a matter left to the debtor's discretion or judgment, but is a question of fact for the jury, who may find that it existed at the very time the conditional promise was made. *Id.*

6. WHETHER A GENERAL ADMISSION OF INDEBTEDNESS IS SUFFICIENT to remove the bar of the statute of limitations is questionable, unless it be unmistakably shown to relate to the particular demand sued for, or unless, from the nature of such debt, or the particular circumstances connected therewith, a legal presumption fairly arises that it was referred to. *Id.*

7. DEBT BARRED BY THE STATUTE OF LIMITATIONS WILL BE REVIVED by a letter from the debtor to his creditor containing an unequivocal acknowledgment of the indebtedness, and a clearly implied promise to pay the same. *Morell* v. *Ferrier* (Col.), I, 277.

8. SUFFICIENCY OF A PROMISE TO TAKE SUCH DEBT OUT OF THE BAR OF THE STATUTE is a question of law for the court, while the question whether such promise refers to the debt sought to be recovered is generally to be determined by the jury. *Id.*

9. BURDEN OF PROOF IS ON THE DEFENDANT TO SHOW THAT AN ACKNOWLEDGMENT of indebtedness by him did not relate to the demand in suit, but to an entirely distinct debt. *Id.*

10. IDENTITY OF DEBT SUED ON—EVIDENCE OF.—In an action founded on a promise to pay a debt barred by the statute of limitations, evidence to identify the indebtedness with the promise is admissible. *Anthony* v. *Savage* (Utah), II, 674.

11. WHERE A WOMAN WHO HOLDS THE LEGAL TITLE TO REAL ESTATE IN HER OWN NAME mortgages the same to a *bona fide* mortgagee, without notice that she holds the same in secret trust for her son, to whom she afterwards conveys it, the right of the mortgagee to foreclose the mortgage is not barred, as against such grantee, because more than four years have elapsed since the maturity of the indebtedness secured, unless the right to foreclose is barred as against the mortgagor. *Rickards* v. *Hutchinson* (Nev.), I, 659.

12. STATUTE OF LIMITATIONS—TIME LIMITED FOR SUING ON DEATH OF PARTY.—A person in whose favor a cause of action has accrued has the same length of time to bring suit thereon, notwithstanding the death of the party against whom such cause of action has accrued, as he would have had had such latter person lived. Section 23 of the act defining the time of commencing civil actions does not limit the time in which an action can be brought to one year from the death of such party in all instances. The object of such an action is to prolong, not to curtail, the period for suing, given in other sections of the act. *Rickards* v. *Hutchinson* (Nev.), IV, 35.

13. THE STATUTE OF LIMITATIONS DOES NOT RUN AGAINST A CAUSE OF ACTION to recover money deposited in a bank. *Green* v. *Odd Fellows Savings and Commercial Bank* (Cal.), I, 877.

14. THE ASSIGNEE OF A SAVINGS BANK WHO ASSUMES ALL OF THE DEBTS OF THE SAME, including its liability to one of its depositors, and who credits such depositor with the amount of his deposit and pays him a dividend thereon, accruing partly before and partly subsequent to the transfer, can not set up the statute of limitations as a defense to an action to recover the amount of such deposit. *Id.*

15. COUPONS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS until the bonds to which they belong are barred. *Meyer* v. *Porter* (Cal.), I, 874.

16. LIMITATIONS.—A suit in equity may be maintained to enforce a security for a debt, although an action against the debtor directly upon the indebtedness is barred by lapse of time; and for such purpose the debt exists, notwithstanding the lapse of time. *Hickox* v. *Elliott* (U. S. Cir. Ct., Or.), IV, 397.

17. SUIT TO SET ASIDE A CONVEYANCE.—A suit in equity to set aside an assignment or conveyance of property, made to hinder or delay creditors, should ordinarily be brought within the same time after the right accrues as an action at law to recover possession of the same property. *Id.*

18. FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS—ABSENCE OF MORTGAGOR FROM STATE.—The absence of a mortgagor from the state does not suspend the running of the statute of limitations upon the mortgage as to creditors of the mortgagor, who have obtained attachment liens on the premises subsequent to the mortgage. *Watt* v. *Wright* (Cal.), IV, 622.

19. LOAN—TIME OF REPAYMENT—PRESUMPTION—STATUTE OF LIMITATIONS.—A loan of money is presumed to be repayable on demand, when no time for repayment is specified; and the statute of limitations commences to run against such loan from the date thereof. *Dorland* v. *Dorland* (Cal.), IV, 611.

20. PARTITION—STATUTE OF LIMITATIONS—EVIDENCE IN REBUTTAL.—The plaintiffs, in an action for partition, after proving that B. and S. were the owners of the premises in 1853, and that S. executed a deed to C., plaintiff's intestate ancestor, rested. The defendants then proved entry in 1867, by their grantor, under a deed from H., and subsequent continuous, open, notorious, exclusive, and adverse possession. Plaintiffs then offered in rebuttal a judgment against B., and an execution, sale, and sheriff's deed of B.'s interest to H., defendants' grantor. This evidence was objected to on the sole ground that it was not evidence in rebuttal, and should have been offered as part of plaintiffs' case in chief. The court sustained the objection. *Held*, error, as such evidence was competent to show that H. acquired no title from B., who had been a joint owner with plaintiff's predecessor in interest, to the end that it might be determined whether the acts of defendants and their grantors had been sufficient to bar the plaintiff's right of recovery. *Hardy et al.* v. *Sexton et al.* (Cal.), IV, 702.

21. STATUTE OF LIMITATIONS—ACTION UPON AN UNDERTAKING ON APPEAL.—The complaint alleged that on April 19, 1867, one Littlefield recovered a judgment in

the district court against Nichol and Weisse for the possession of a tract of land; that on appeal to the supreme court an undertaking was given by defendants for the purpose of staying execution on said judgment, whereby defendants jointly and severally promised on the part of the then appellants, Nichol and Weisse, that if said judgment was affirmed, the said appellants would pay the value of the use and occupation of the land recovered from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of $3,000; that said judgment was affirmed, and the *remittitur* was filed in the district court on January 30, 1872; that the said land was conveyed to the plaintiff on November 23, 1870, and that said undertaking and all rights of action thereon were also then assigned to the plaintiff; that on the same day when said judgment was affirmed, the said Nichol brought an action against said Littlefield and others, and obtained an injunction restraining the defendants therein, including this plaintiff, from enforcing said judgment, and said injunction continued in force until February 24, 1876, when it was dissolved (the court does not consider the effect of this injunction in its decision); the complaint then alleges the value of the use and occupation of said land, and the damage sustained by him therefor, and prays judgment for such amount. The action was commenced on September 7, 1876. The defendants demurred to this complaint, on the ground that the cause of action was barred by section 337 of the code of civil procedure, and that it did not accrue within four years before the commencement of the action, the period of limitation mentioned in section 337 being four years. *Held*, that the order of the court below overruling this demurrer was not error. *Clark* v. *Smith et al.* (Cal.), IV, 90.

22. THE SAME—WHEN THE CAUSE OF ACTION FOR USE AND OCCUPATION ACCRUES.—While the plaintiff might have commenced an action on such undertaking as soon as the judgment appealed from was affirmed, the cause of action for use and occupation is not complete at that time. The right of action only fully accrues when the use and occupation has been had. As against the defendants in the ejectment, each day's wrongful detention is a new cause of action, and the action for it is only barred when four years have elapsed after the right of action has become complete. If they continued in wrongful occupation they would be liable for the use and occupation during the period of four years before the action was commenced, but there could be no recovery for their use and occupation prior to that four years' period. *Id.*

23. THE SAME—SURETIES IN THE UNDERTAKING.—As the position of the sureties on the undertaking in suit is analogous to that of guarantors, the same rule determines when the cause of action on the undertaking for the use and occupation accrues against them, and when the right of action against them is barred. *Id.*

24. PLEA OF THE STATUTE OF LIMITATIONS.—In an action for the recovery of the possession of real property, the defense of the statute of limitations should be pleaded directly, as that the cause of action did not accrue within the ten years next before the commencement of the action; but the allegation that neither the plaintiff nor his grantor were seised or possessed of the premises during that period is sufficient to allow proof of adverse possession by the defendant, inconsistent with the plaintiff's right to maintain the action. *Zeilin* v. *Rogers* (U. S. Cir. Ct., Or.), III, 466.

25. AMENDMENT AFTER VERDICT.—In the furtherance of justice the defendant may and ought to be allowed to amend such a defense, after verdict, so as to make it conform to the ultimate fact proved—the action did not accrue, etc. *Id.*

26. PROOF OF POSSESSION.—The fact that the plaintiff's grantor abandoned or relinquished the possession of the premises in controversy to the defendant absolutely, for any cause or consideration, and that the latter thereupon took and held such possession to the exclusion of such grantor and his assigns, may be shown by parol in support of the defense of the statute of limitations. *Id.*

27. THE STATUTE OF LIMITATIONS MAY BE PLEADED by referring to the appropriate sections of the code. *Packard* v. *Johnson* (Cal.), III, 763; *Packard* v. *Moss* (Cal.), III, 769.

28. STATUTE OF LIMITATIONS—ANTICIPATION OF DEFENSE OF—STRIKING OUT ALLEGATIONS OF.—Averments of a complaint, in anticipation of a defense of the statute of limitations, will be stricken out on motion, if the complaint, without such averments, states a cause of action which is not barred by any existing statute. *Brooks* v. *Bates et al.* (Col.), IV, 463.

See ADVERSE POSSESSION, 12; BANKRUPTCY, 1; BONDS, 5; CONVERSION, 5, 6; CORPORATIONS, 25; COUNTER-CLAIM, 4; DECEIT, 1; ESTATE OF DECEASED PERSONS, 8, 9; GUARDIAN AND WARD, 9; MALICIOUS PROSECUTION, 8; MORTGAGE, 23; SEDUCTION, 1, 2; SURETIES, 7; TAXATION, 63.

STOCK AND STOCKHOLDERS.

1. PURCHASE OF STOLEN STOCK CERTIFICATES—RIGHTS OF BONA FIDE PURCHASER.—Judgment and order reversed on authority of *Barstow* v. *Savage Mining Company*, 1 West Coast Rep. 116. *Swim* v. *Bernhard* (Cal.), IV, 525.

See ATTACHMENT, 1; CORPORATIONS; EVIDENCE, 37; PLEDGE, 3, 4; TAXATION 2-8, 10-14.

STREAMS.

See WATER RIGHTS.

STREETS AND HIGHWAYS.

1. AN OWNER OF LAND ADJOINING A STREET IS NOT ENTITLED TO COMPENSATION UNDER A CONSTITUTIONAL GUARANTY FOR INJURIES to his property, occasioned by a reasonable improvement of the street by the proper authorities, for the greater convenience of the public, or for a temporary inconvenience resulting from a legitimate use thereof by the public; but where such injuries result from a change in or use of the street, wholly foreign to the ordinary purposes of a highway, as where the same is devoted to the purposes of a steam-railroad, such owner is entitled to compensation, although such use was authorized by the authorities having charge of the streets. And this result follows whether the fee in the street is in such owner or not. *Denver* v. *Bayer* (Col.), I, 505.
2. THE MEASURE OF DAMAGES IN AN ACTION FOR SUCH INJURIES IS THE ACTUAL DIMINUTION in the market value of the land, for any use to which it may reasonably be put; and if, by reason of the proximity of such railroad, such land has been in any way peculiarly benefited, such benefit should be deducted in determining the amount of the owner's compensation. *Id.*
3. A MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES TO LAND caused by building and operating a steam-railroad in an adjoining street, although the right so to use such street was conferred upon the railroad company by an ordinance of the city council. *Id.*
4. A MUNICIPAL CORPORATION IS LIABLE FOR INJURIES RESULTING to a private individual on account of the negligence of its agents in grading a public street. Nor is it relieved from liability by the fact that such grading is done by a contractor, working under the directions of the city surveyor. *City of Seattle* v. *Busby* (Wash.), II, 45.
5. LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLECTING TO REPAIR HIGHWAYS.—When municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement, and repair, the duty is imposed upon such corporation, from the nature of the powers granted, to keep such highways in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon them to respond in damages to those injured by a neglect to perform such duty. *City of Denver* v. *Dunsmore* (Col.), II, 481.
6. THE SAME—THE CITY OF DENVER BEING OBLIGED TO KEEP IN REPAIR the streets and bridges within its corporate limits is impliedly liable for any special damages suffered in consequence of its neglect so to do. *Id.*
7. THE SAME—TO ENTITLE A PLAINTIFF TO A RECOVERY FOR SUCH DAMAGES he must have used reasonable or ordinary care, or such care as is usually exercised, under like circumstances, by persons of ordinary prudence, to avoid the accident. If the plaintiff's own testimony shows that he brought the injury upon himself, by his own carelessness, he must be nonsuited; otherwise, the proof of contributory negligence must come from the defendant. *Id.*
8. CONTRIBUTORY NEGLIGENCE—CASE IN JUDGMENT.—The appellant had permitted a bridge in one of its principal thoroughfares to become unsafe for the ordinary use to which it was daily subjected, and with full knowledge of its unsafe condition, had failed to either repair it or give any warning of its unsafe condition. While in such condition the plaintiff attempted to cross the bridge with a load of rocks. In so doing the wheel of his wagon crushed through the floor of the bridge, going down to the hub, and while endeavoring to pry it up, by the use of levers and fulcrums, the timbers gave way and the plaintiff fell and broke his leg. According to the plaintiff's testimony, he did not know that the bridge was unsafe, although he knew that it was much worn and would shake when a load of freight was crossing: *Held*, that whether the plaintiff was guilty of contributory negligence in adopting the means used by him in attempting to extricate his wagon, was a question for the jury. *Id.*

9. ACCEPTANCE OF STREET—SIDEWALKS—ROADWAY.—Under section 21 of the act of 1866 the power of acceptance of a street by the board of supervisors of the city and county of San Francisco is not limited to the roadway, but may include the sidewalk. After the acceptance of a street, the expense of repairing the sidewalks thereof must be borne by the city and county. *Bonnet* v. *San Francisco* (Cal.), II, 832; *Parker* v. *San Francisco* (Cal.), II, 848.
10. ALL ROADS USED AS SUCH FOR A PERIOD OF MORE THAN FIVE YEARS become public highways, under section 2619 of the political code. There is no constitutional inhibition against such legislation. *Bolger* v. *Foss* (Cal.), II, 897.
11. A FINDING THAT A CERTAIN ROAD IS A PUBLIC HIGHWAY is not overcome by a further finding that the owner of the land through which it passed had placed gates at the points where it entered upon and emerged from his land. *Id.*
12. SUPERVISORS OPENING ROAD—NOTICE OF PROCEEDINGS.—The board of supervisors of a county have no power to cause the construction of a road through the lands of a private individual without giving such person notice of the proceedings to open the road. *Silva* v. *Garcia* (Cal.), III, 769.
13. COUNTY ROAD—PROCEEDINGS TO OPEN—TERM OF COUNTY COURT.—The proper time for the county court to consider the report of the viewers in proceedings to open a county road is during the regular term of the court next ensuing after the plat and survey of said road have been delivered to the county clerk, and not during a special term. A claim for damages filed during such regular term is in time. *Tompkins* v. *Clackamas Co.* (Or.), IV, 598.
14. GRADING STREET IN SAN FRANCISCO—ORDER FOR—NOTICE OF INTENTION. — The board of supervisors of San Francisco, upon the recommendation of the superintendent of streets, were authorized, under the statute of 1872, to give notice of their intention to order that Broadway, from the west line of Buchanan street to the west line of Webster street, be graded without any petition therefor, when two blocks upon each side of the said portion of Broadway had been graded. *Dyer* v. *Hydenfeldt* (Cal.), IV, 585.
15. THE SAME—RECOMMENDATION THAT WORK BE DONE—FINDINGS.—In an action to enforce the lien of an assessment for such work, a finding that the same was ordered without the recommendation of the superintendent of streets is erroneous, when no such issue is raised by the pleadings, and neither party introduced any evidence thereon. *Id.*
16. DISMISSAL OF ACTION AS TO CERTAIN DEFENDANTS—PRACTICE.—The dismissal of such actions, as to defendants not having any interest in the land assessed, is not error prejudicial to the other defendants. *Id.*
17. ACTION TO ENFORCE STREET ASSESSMENT — PARTIES DEFENDANT—HEIRS NEED NOT BE JOINED.—An action for the enforcement of the lien of a street assessment, under section 17 of the act of April 1, 1872, may be brought against an executrix without joining the heirs of a deceased person, although the latter are in fact the owners of the land assessed. Such heirs, if originally joined in the action, may be dismissed, and judgment rendered against the executrix. *Parker* v. *Bernal et al.* (Cal.), IV, 428.
18. STREET ASSESSMENT—DENIAL OF OWNERSHIP—NONSUIT—DEMURRER.—In an action to enforce a street assessment, if the answer denies the allegations of the complaint as to the defendant's ownership of the property assessed, and the plaintiff introduces no evidence in support thereof, a nonsuit should be granted. A denial of such allegation on information and belief, if not sufficiently certain, should be objected to by demurrer. *Harney* v. *McLeran et al.* (Cal.), IV, 218.
19. STREET ASSESSMENT—JUDGMENT AFFIRMED. *Dorland* v. *Bernal et al.* (Cal.), IV, 381.

See DEDICATION, 3–7; EMINENT DOMAIN, 3; FERRIES, 1, 2; NUISANCE, 13; WATER RIGHTS, 5, 12.

STREET ASSESSMENT.

1. COMPLAINT—STREET ASSESSMENT—CITY OF STOCKTON.—The complaint in this action, to enforce a street assessment as against certain lands in the city of Stockton, reviewed and held to state facts sufficient to constitute a cause of action. *City of Stockton* v. *Dahl, and Lots No. 2, etc.* (Cal.), III, 308.
2. THE SAME—ASSESSMENT LISTS—EVIDENCE—PLEADING—IMPROVEMENT OF STREETS. Under section 29 of the charter of the city of Stockton, the assessment lists for street improvements do not prove, even *prima facie*, that the city council "has caused a survey and estimates to be prepared of proposed work to be filed with the city

clerk," or "fixed a time for the hearing upon such a proposition," or "ordered work or improvements to be done." Nor are such lists evidence of a publication of notice, soliciting bids, or of the awarding of a contract, or of any of the acts of officers of the municipality which precede the doing of the work. None of these acts, separately or together, constitute the "levy" of an assessment. Yet all of them must be averred in an action to enforce such assessment, and, if denied, proved by competent evidence. *Id.*

3. SANTA BARBARA—OPENING STREETS—PETITION FOR.—The act of March 26, 1878 (Stats. 1877-78, p. 777), authorizes the common council of the city of Santa Barbara to lay out, etc., any one street between certain *termini*, upon presentation of a petition signed by the owners representing a majority of the frontage "upon the proposed improvement." The act does not contemplate the presentation in one petition of a prayer or demand for the improvement or laying out of more than one street, nor empower the council "to open, extend, widen, straighten, or close up" a great number of streets in one proceeding. Even if it does, such petition must have been signed by the owners of a majority of the frontage upon each separate street. The power of the council to act depended upon the presentation of a petition such as the law requires. *Boorman* v. *Santa Barbara* (Cal.), III, 104.
4. THE SAME—UNCONSTITUTIONALITY OF ACT.—Such act is unconstitutional and void, because it makes no provision for any process or notice to be served upon the persons whose property is to be charged with the assessments. *Id.*
5. CONTRACT FOR MACADAMIZING STREET—GRADING.—The board of supervisors of San Francisco can authorize a contract to be made for macadamizing a street, after a contract for grading it had been entered into, and before it had been graded. *Dyer* v. *Hudson* (Cal.), III, 198.

See EMINENT DOMAIN, 9.

SUBORNATION OF PERJURY.

See PERJURY, 3, 4.

SUBSTITUTION OF PARTIES.

See DEFAULT, 1, 2; PARTIES, 6, 8, 10.

SUMMONS.

1. DEFECTS IN THE SERVICE OF SUMMONS ARE WAIVED BY THE DEFENDANT'S APPEARING and answering. *New York and Brooklyn Mining Co.* v. *Gill* (Col.), I, 595.
2. TO SUSTAIN A SERVICE OF SUMMONS BY PUBLICATION AGAINST MINOR DEFENDANTS, the court will presume, unless the contrary appears, that such minors were over the age of fourteen years, in which case no service of summons on their mother, or other person having them in charge, is required. *Emeric* v. *Alvarado* (Cal.), I, 708.
3. STRICT COMPLIANCE WITH THE STATUTORY REQUIREMENTS IS NECESSARY in order to obtain a valid service of summons by publication. *Israel* v. *Arthur* (Col.), I, 286.
4. NO JURISDICTION OVER THE DEFENDANT IN AN ACTION FOR DIVORCE is acquired by a service of summons by publication where the record shows on its face that the summons was issued and returned by the sheriff on the same day, when the statute commanded the "usual exertion on the part of the sheriff to serve the summons," in actions for divorce, notwithstanding the proceedings by publication. *Id.*
5. WHERE SERVICE OF A SUMMONS BY PUBLICATION IS RELIED ON, as conferring jurisdiction on a court, the material requirements of the statute must be strictly complied with; and although the court acquires jurisdiction of the defendant at the expiration of ten days after the expiration of the time prescribed for publication, it is error to render judgment against him until after forty days after such service is complete. Such error may be taken advantage of on a direct proceeding to review the judgment, but not collaterally. *Brown* v. *Tucker* (Col.), I, 489.
6. JUDGMENT AGAINST A NON-RESIDENT DEBTOR, RENDERED ON A SERVICE OF SUMMONS BY PUBLICATION, is not void where property of the debtor was taken under attachment after the institution of the action, although the judgment is entered in form as a personal judgment against the defendant. Such judgment need not contain an order as to the application of the attached property, as the statute expressly authorizes the sheriff to subject such property to the satisfaction of the judgment lien. *Id.*

7. PUBLICATION OF A CITATION TO NON-RESIDENT DEBTORS in a proceeding by attachment, as provided by Prince's statutes, section 11, page 138, which fails to notify the defendants that their property has been attached and will be sold to satisfy whatever judgment is rendered against them, is insufficient, and confers no jurisdiction on the court. Such statute is in derogation of the common law, and must be strictly construed. *Smith* v. *Montoya* (N. M.), I, 152.
8. PERSONAL JUDGMENT CAN NOT BE RENDERED AGAINST A NON-RESIDENT DEBTOR, who has failed to appear, upon a constructive service upon him by publication. *Id.*
9. PROPERTY OF A NON-RESIDENT DEBTOR WITHIN THE JURISDICTION OF THE COURT may be attached and a judgment *in rem* recovered against it, upon publication of the notice to the non-resident debtor, as required by statute. *Id.*
10. AFFIDAVIT FOR PUBLICATION OF SUMMONS AGAINST A NON-RESIDENT DEFENDANT, the same being a California corporation, must state the facts showing what diligence had been used to obtain a personal service. An allegation that the plaintiff has used due diligence, and that the summons has been returned by the constable unserved, is not sufficient. *Victor Mill and Min. Co.* v. *Justice's Court* (Nev.), I, 299.
11. SERVICE OF SUMMONS BY PUBLICATION IS VOID WHERE THE RESIDENCE OF THE NON-RESIDENT or absent defendant is known, unless the order for publication directs a copy of the summons and complaint to be deposited in the post-office, directed to the person to be served, at his place of residence. The affidavit for such publication must show that a cause of action exists against the defendant, and state whether his residence is or is not known; and if known, such residence must be stated. *Id.*
12. DEPOSIT OF COPIES OF THE SUMMONS AND COMPLAINT IN THE POST-OFFICE, directed to a non-resident defendant at his known place of residence, has no effect on an attempted service by publication, unless done by order of the court. *Id.*
13. STATEMENT IN AN AFFIDAVIT FOR PUBLICATION OF SUMMONS, that the amount claimed was "due from defendant to plaintiff," is simply an allegation of a legal conclusion. *Id.*
14. CORPORATION—SERVICE OF SUMMONS ON.—In an action against a corporation in the United States circuit court for the district of Oregon, if the summons is served under said subdivision 1 of section 54, on any agent of the defendant other than its president, secretary, cashier, or managing agent, unless it appears that the cause of action arose in the district, such service is illegal, and will be set aside on the application of the defendant. *Lung Chung* v. *N. P. R'y Co.* (U. S. Dist. Ct., Or.), II, 88.
15. RIGHT TO APPEAR SPECIALLY.—A defendant in an action upon whom a summons has been served illegally may appear therein specially, for the purpose of having such illegal service set aside; and there is nothing in sections 61 and 520 of the Oregon code of civil procedure derogatory of such right. *Id.*
16. ACTION IN NATIONAL COURTS.—Subdivision 1 of section 54 of said code, when applied to actions in the national courts, must be construed as if the word "county" read "district." *Id.*
17. SERVICE OF SUMMONS—FOREIGN CORPORATION—MANAGING AGENT.—Service of summons on a foreign corporation may be made on its managing agent when it has never designated a person upon whom service of process can be had, under the statute of 1871-2, page 826. *Thomas* v. *Placerville G. Q. Mining Co.* (Cal.), III 777.
18. SERVICE OF SUMMONS BY PLAINTIFF—DEFAULT—JUDGMENT.—The service of a summons by plaintiff in an action, although specially deputized by the sheriff to make the same, is void, and a judgment by default entered upon such service is a nullity. *Tolnniges* v. *Drake et al.* (Cal.), IV, 253.
19. PROOF OF SERVICE OF SUMMONS—DEFAULT JUDGMENT, WHEN VOID.—Proof of service of summons in a case, by a person other than the sheriff, is a condition precedent to a judgment by default. If such proof is not made, as required by law, the court acquires no jurisdiction of the person of the defendant, and has no authority to render judgment against him. Such judgment would be null and void. *Lyons* v. *Cunningham et al.* (Cal.), IV, 294.
20. THE SAME—AFFIDAVIT MUST SHOW AGE OF PERSON SERVING.—The affidavit of service of summons, by a person other than a sheriff, must expressly state that, at the time of service, the person making the same was over the age of eighteen. It is not enough to state that such person is a "white male citizen of the United States," as that expression does not imply that he is an elector, and consequently over the age of twenty-one. *Id.*

21. AFFIDAVIT OF SERVICE OF SUMMONS—RESIDENCE OF DEFENDANT.—Where the affidavit of service of summons states that the defendant was served in a certain county, it will be presumed that he was a resident of such county. *Pellier* v. *Gillespie et al.* (Cal.), IV, 500.
22. FAILURE TO INDORSE THE NAME OF THE PLAINTIFF'S ATTORNEY ON THE BACK OF THE SUMMONS does not invalidate the same when such name is written on the face of the summons. *Shinn* v. *Cummins* (Cal.), II, 216.
23. THE PENDENCY OF A MOTION TO VACATE A PRETENDED SERVICE OF SUMMONS does not extend the time specified therein for answering. *Id.*

See EMINENT DOMAIN, 5; INFANTS, 2; JUDGMENT, 22; JUSTICES' COURTS, 2, 5; JURISDICTION, 2; PARTIES, 6.

SUPERIOR COURT.

See JURISDICTION, 3; NUISANCE, 20.

SUPERSEDEAS.

1. NEW TRIAL—WRIT OF ERROR—SUPERSEDEAS.—The pendency of a motion for a new trial operates as a postponement of the time for filing a writ of error and bond for the removal of a cause to the supreme court of the United States, until the disposition of such motion. The filing of such writ and bond within sixty days after the disposition of the motion for a new trial will operate as a *supersedeas*, although they were not filed within sixty days after the rendition of the judgment complained of. *Nevada Bank* v. *Steinmetz, Treasurer, etc.* (Cal.), II, 826.

SUPERVISORS, BOARD OF.

See CERTIORARI, 16; CORPORATIONS, 58, 60; SAN FRANCISCO, 7.

SUPPLEMENTAL PROCEEDINGS.

1. SUPPLEMENTAL PROCEEDINGS—ATTACHMENT—CHATTEL MORTGAGE—GARNISHEE.—Proceedings supplemental to execution are purely legal, and can not be used by the judgment creditor for the purpose of enforcing the lien which the judgment debtor has by virtue of a chattel mortgage on the property of the garnishee. *Knowles* v. *Herbert* (Or.), III, 230.
2. PROCEEDINGS SUPPLEMENTARY TO EXECUTION UNDER CHAPTER 35 OF THE CODE.—Prior to the adoption of the code, a judgment creditor had a vested right, within five years after the rendition of his judgment, to have execution issue thereon, and to institute supplementary proceeding at any time. A subsequent statute might limit such right to expire at the end of a reasonable time, but it could not summarily take it away. *Murne* v. *Schwabacher Bros. & Co.* (Wash.), II, 799.
3. THE SAME—TRIAL BY JURY—AMENDMENT.—The affidavit filed for the institution of such proceedings may be amended so as to make the description of the judgment conform to the facts. Such proceedings are equitable in their nature, and the defendant therein has no constitutional right to a trial by jury. If, upon a trial of the issues raised thereon, it appears that a person not a party thereto claims an interest in the property affected thereby, the court should cause him to be brought in. *Id.*
4. NEW PARTY IN SUPPLEMENTARY PROCEEDINGS.—Whether, in a proceeding supplemental to execution pending in the district court, the court can direct a new party to be brought in, *quære*. *Id.*, 563.
5. PARTIES IN SUPPLEMENTARY PROCEEDINGS.—In proceedings supplementary to execution to reach certain property in the judgment debtor's possession, the debtor denied that the property was his own, and alleged that it belonged to certain-named persons of whom he was an agent. These alleged principals had full knowledge of the proceeding, and on the trial of the issue raised by the judgment debtor they were examined as witnesses concerning the title and ownership of the property in question. *Held*, that an adjudication in such proceeding against the judgment debtor alone, determining that the property was his, and should be paid over to the judgment creditor, was proper; that he was the only necessary party defendant to the proceedings; that the alleged principals were not necessary parties, and need not be brought in as new parties. *Id.*

6. PROCEEDINGS SUPPLEMENTAL TO EXECUTION AGAINST A GARNISHEE are proceedings at law, and on an appeal from a judgment therein only those errors are reviewable that are assigned in the notice of appeal. *Williams* v. *Gallick* (Or.), II, 537.

SUPREME COURT.

1. SUPREME COURT JUDGES—POWER OF, TO ISSUE WRITS IN VACATION.—The judges of the supreme court can not, acting singly or in vacation, issue any of the writs enumerated in section 3 of article 6 of the constitution, or hear or determine the matters arising thereon. *In re Garvey* (Col.), IV, 247.
2. THE SUPREME COURT CAN NOT FIND FACTS.—It can only construe facts found by the lower court, and deduce from them the proper legal conclusions. *Hibberd* v. *Smith* (Cal.), III, 446.

See APPEAL; JURISDICTION, 4.

SURETIES.

1. SURETY TO A PROMISSORY NOTE IS DEEMED TO CONTRACT that the principal maker is in every way competent to contract in the way he has done. *Caldwell* v. *Ruddy* (Idaho), I, 295.
2. SURETIES ON AN UNDERTAKING GIVEN ON CONDITION of the further continuance of a restraining order, or in place of a former undertaking given when such order was made, only bind themselves prospectively from the date of the execution of their undertaking, and upon a breach thereof are not liable for damages sustained by the obligee before such date. *California Farmers' etc. Ins. Co.* v. *Schindler* (Cal.), I, 122.
3. SURETIES ON AN UNDERTAKING GIVEN IN PURSUANCE of section 540 of the code of civil procedure, which recites the issuance of a writ of attachment, and that the undertaking is given in order to prevent a levy of the same, are liable, although sufficient property had been seized under the writ to satisfy the plaintiff's demand, and afterwards released by the sheriff. *Preston* v. *Hood* (Cal.), I, 135.
4. SURETIES ARE DISCHARGED BY A VALID CONTRACT BETWEEN THEIR PRINCIPAL AND HIS OBLIGEE to extend the time of payment, if made without their consent. *Id.*
5. SURETIES ON AN ATTACHMENT BOND ARE NOT RELEASED FROM LIABILITY by reason of a stipulation of counsel staying execution on the judgment, to secure which their undertaking was given. *Id.*
6. A SURETY ON ONE OF SEVERAL NOTES SECURED BY THE SAME MORTGAGE on real estate, after a foreclosure of the same, can not compel the judgment creditor or his assignee to apply the proceeds arising from the sale of the mortgaged premises *pro rata* towards the payment of such notes. *Wilson* v. *Allen* (Or.), I, 687.
7. AN ACTION AGAINST SURETIES ON A BOND GIVEN TO SECURE the faithful performance by their principals of a written contract, by the terms of which the latter agreed to make stated returns to the plaintiff on account of certain sewing machines consigned to them for sale, is an action founded on a written contract, and is not barred by the statute of limitations until four years have elapsed after the cause of action accrued. *Victor Sewing Machine Co.* v. *Crockwell* (Utah), I, 428.
8. SURETIES ON A BOND GIVEN TO SECURE AN OBLIGATION OF THEIR PRINCIPAL, by which the latter agreed to pay the plaintiff all moneys which they might receive under a certain contract, "or which should arise therefrom by notes, renewals, or extensions of notes, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of protest, and diligence," are liable upon the failure of their principals to pay such notes, so received by them under such contract, when the same became due. *Id.*
9. IN AN ACTION AGAINST SURETIES ON AN INJUNCTION BOND, an allegation of damage is sufficient to the effect that by reason of said injunction plaintiff has been damaged in a certain amount, "no part of which has been paid." *Rosendorf* v. *Mandel* (Nev.), I, 384.
10. NO DEMAND FOR PAYMENT IS NECESSARY IN ORDER TO ENFORCE THE LIABILITY OF SURETIES on an injunction bond, conditioned for the payment to the plaintiff of whatever damages he might suffer by reason of the injunction. *Id.*
11. WHERE A SHERIFF IS RESTRAINED FROM APPLYING any moneys that he might realize from the sale of certain property of a judgment debtor to the satisfaction of the judgment, and upon a sale thereof he consequently refuses to credit the amount of such judgment on the judgment creditor's bid, whereby the latter was prevented

from purchasing such property, the damages resulting from such refusal of the sheriff may be recovered in an action against the sureties on the injunction bond. *Id.*

12. A CONTRACT BETWEEN TWO PARTNERS, ENTERED INTO UPON THE DISSOLUTION of the copartnership, by the terms of which one partner agreed to assume the firm indebtedness, renders the other partner, as between the partners themselves, and all others dealing with them with knowledge of the facts, the surety of the one so agreeing; and as such he has the right to protect himself by settling the indebtedness for which he is liable with the firm creditors, at any time, whether such indebtedness, as between the partners themselves or their creditors, was due or not. If, however, the partner assuming the firm indebtedness has made a prior compromise with the creditors, the surety can not recover from him the amount paid in procuring the release of his own liability. *Barber* v. *Gillson* (Nev.), I, 366.

13. IN AN ACTION BY A SURETY AGAINST HIS PRINCIPAL, A PAPER PURPORTING TO RELEASE the former from his liability to the creditor is admissible as a receipt showing the payment of the consideration for the release, although inadmissible as a release because not under seal. *Id.*

14. WHERE A SURETY HAS SURRENDERED TO THE CREDITOR CERTAIN NOTES OF HIS PRINCIPAL, payable to himself, in consideration of the creditor releasing him from liability on his contract of suretyship, the measure of damages in an action by the surety against his principal is the face value of such notes, and not their value as determined by the principal's ability to pay them. *Id.*

15. JUDGMENT AGAINST SURETIES ON APPEAL.—Where the amount of a judgment rendered against an appellant is reduced by the appellate court, on a ground that was not raised in the lower court, and the judgment is affirmed as so reduced, the sureties on the appeal bond given under section 4 of Prince's statutes, page 242, are liable thereon. *Orr et al.* v. *Hopkins* (N. M.), II, 272.

16. SURETIES ON ASSESSOR'S BOND—COLLECTION OF TAXES.—Sureties on the bond of the city assessor of San José are not liable for the amount of taxes collected and unaccounted for by such official, when the collection of such taxes was no part of the assessor's official duty, to the faithful performance of which such bond was conditioned. *City of San Jose* v. *Welch et al.* (Cal.), III, 193.

See ATTACHMENT, 17; EMINENT DOMAIN, 11; PARTIES, 11.

SURPRISE.

See JUDGMENT, 20; NEW TRIAL, 3 5.

SURVEY.

See PUBLIC LANDS.

SURVEYOR GENERAL.

See MEXICAN GRANTS, 1-4.

SURVIVORSHIP.

1. PRESUMPTION AND PROOF OF SURVIVORSHIP.—Where both the husband and wife perished in the same calamity, the survivorship of the wife is not conclusively presumed in a proceeding brought by her administrator to set aside the probate of her husband's will, from the fact that the order of the probate court granting the letters of administration recites that such deceased was "the surviving wife" of the testator. A finding that the wife survived her husband, based entirely upon such recital, is unsupported by the evidence; and a refusal of the court to admit evidence on the question of survivorship is error. *Sanders* v. *Simcich* (Cal.), I, 868.

SWAMP LANDS.

1. RECLAMATION STATUTES NOT IN CONFLICT WITH UNITED STATES CONSTITUTION.—The statutes of this state regulating the formation of reclamation districts, the levying of assessments, and the mode of collecting the same, are not in conflict with the fourteenth amendment of the United States constitution; nor are the same in violation of section 10, article 1, of said constitution, forbidding the passage of any law impairing the obligation of contracts, on the ground that the state, in accepting

the grant under the "Arkansas act," assumed the burden of reclaiming the land, and can not impose this burden upon its grantees. *Reclamation District No. 108* v. *Hagar* (Cal.), IV, 283, 288, 289; *Reclamation District* v. *Martin* (Cal.), IV, 289.

2. APPORTIONMENT OF ASSESSMENT—EQUALITY OF BURDEN OR BENEFIT.—Whether or not the mode of assessment is in accordance with proper apportionment, or equality of burden or benefit, is for the consideration of the legislature, in the absence of a palpable violation of private rights. In the present case, the court can not say that the burdens to be borne are not equal in proportion to the benefits. *Id.*

3. SUCH ASSESSMENT MAY BE MADE PAYABLE IN GOLD COIN. *Id.*

4. BY-LAW OF ASSESSMENT DISTRICT—SUBSEQUENT ASSESSMENT.—A by-law of an assessment district prohibiting an indebtedness to accrue in excess of the amount of assessment levied, can not invalidate an assessment levied in accordance with section 34 of the act of 1868. *Id.*

5. POWER OF TRUSTEES OF RECLAMATION DISTRICTS TO EMPLOY COUNSEL.—The trustees of reclamation districts are authorized to employ special counsel, other than the district attorney of their respective counties, in the prosecution of actions for the enforcement of assessments, and to provide for the payment of their services out of subsequent assessments. *Id.*

6. CONSTITUTIONALITY OF ASSESSMENT.—An assessment for the reclamation of swamp lands, although not made by a municipal corporation, is not unconstitutional. *Id.*

7. RECLAMATION DISTRICT—LANDS WITHIN OTHER COUNTY—POWER OF SUPERVISORS OVER—The legislature may confer on the board of supervisors of one county the power to include within a reclamation district any lands within another county. *Id.*

8. ACTION TO ENFORCE ASSESSMENT—REAL PARTY IN INTEREST—RECLAMATION DISTRICT AS PLAINTIFF.—In an action to enforce an assessment for the reclamation of swamp lands, brought under the act of March 28, 1868, the reclamation district is the real party in interest, and a judgment therein, rendered in favor of the plaintiff, if otherwise valid, will not be reversed because such action was not brought in the name of the people. *Id.*

9. RECLAMATION LANDS—FORECLOSURE OF LIEN OF ASSESSMENT—PLAINTIFF—RES ADJUDICATA.—In an action to foreclose the lien of an assessment on reclamation lands, when the supreme court had reversed a judgment entered in favor of the defendant, after his demurrer had been sustained, on the ground that the facts stated in the complaint did not constitute a cause of action, on a subsequent appeal in the same action, it will not hold that the action was brought in the name of the wrong plaintiff, as for example, in the name of the reclamation district instead of in the name of the people. *Reclamation District No. 3* v. *Goldman* (Cal.), IV, 97.

10. RECLAMATION DISTRICT—FORMATION OF—NOTICE OF MEETING.—The meeting for the reorganization of a reclamation district, under the act of March 28, 1868, may be called by the swamp land clerk of the board of supervisors, as by the proviso to the forty-sixth section of such act the board is authorized to employ a clerk to attend to matters pertaining to swamp lands. *Id.*

11. THE SAME—DUE PROCESS OF LAW—NOTICE—ASSESSMENT.—An assessment for the reclamation of swamp lands, which, according to the law of this state, can only be enforced by suit against the tax-payer, and in which notice must be given to and an opportunity afforded him to question the validity of the assessment, is not an infringement upon the provision of the United States constitution, which declares that no state shall deprive any person of property without due process of law. *Id.*

12. THE SAME—FINDINGS—EVIDENCE—STATEMENT.—The finding that no statement, as required by the amended section 34 of the act of 1868, was ever presented by the board of trustees of the district to the board of supervisors, reviewed, and held not sustained by the evidence. *Id.*

13. THE SAME—ASSESSMENT OF LANDS NOT BENEFITED.—Lands lying within a reclamation district, which would not be benefited by a proposed assessment, need not be assessed. *Id.*

14. THE TRUSTEES OF A RECLAMATION DISTRICT HAVE DISCRETION to make trifling deviations from the approved plans, or deviations which would result in benefit. *Id.*

15. APPROVAL OF FORMATION OF DISTRICT—ADDITIONAL ASSESSMENT.—The formation of reclamation districts previously existing, and reorganized under the act of 1868, need not be approved by the board of supervisors of the county in which the district is situated. As to such district, the board of supervisors have power, whenever the tax levied is insufficient to pay for the reclamation, or for necessary repairs, to make additional levies of assessments, upon revised estimates furnished by the trustees. *Id.*

16. RECLAMATION OF SWAMP LANDS—ACTION TO ENFORCE ASSESSMENT—EVIDENCE THAT LANDS WERE NOT BENEFITED NOT ADMISSIBLE.—The board of supervisors, in hearing the petition for the formation of a reclamation district, and in making the order, has jurisdiction to determine what lands would be benefited by the proposed system of reclamation, and to include such lands within the district, and their determination can not be inquired into; the trustees have authority to cause surveys, plans, location, and estimates of the cost of the work to be made, and the commissioners have authority to assess upon each and every acre within the district to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, it is not competent for the court below, in an action to enforce an assessment, to determine that certain lands assessed were not benefited, or that such benefit was not of the value of the assessment. *People* v. *Hagar* (Cal.), IV, 287.

See ADVERSE POSSESSION, 12; CERTIORARI, 16.

TAXATION.

1. CONSTITUTIONAL LAW—DOUBLE TAXATION.—The constitution of California does not authorize or require, but forbids, a double taxation of property. *San Francisco* v. *Mackey* (U. S. Cir. Ct., Cal.), III, 697.
2. STOCK AND PROPERTY OF CORPORATIONS.—Taxing all the property of corporations, and at the same time taxing the stock to the holder, would constitute double taxation. *Id.*
3. PROPERTY OF CORPORATION TO BE TAXED TO THE CORPORATION.—The constitution and laws of California require all the property of the corporation to be taxed to the corporation, and being taxed to the corporation, a further tax levied against the stockholders on the value of the stock held by them is void. *Id.*
4. LUMPING ASSESSMENT.—Whether an assessment in gross upon stock in a large number of corporations organized for a great variety of purposes, and upon moneys and solvent credits, the several classes of property so assessed having no relation to each other, and no common element of value, is valid, *quære*. *Id.*
5. CONSTITUTIONAL LAW—DOUBLE TAXATION.—The constitution of California does not authorize, but forbids, double taxation. *San Francisco* v. *J. W. Mackey* (U. S. Cir. Ct., Cal.), IV, 407.
6. STOCK AND PROPERTY OF CORPORATION.—Taxing all the property of corporations to the corporation, and at the same time taxing the stock which represents the property to the holder, would be double taxation. *Id.*
7. STOCK OF DOMESTIC CORPORATION—TANGIBLE PROPERTY IN ANOTHER STATE.—Shares of stock owned by a citizen and resident of the state of Nevada in a California corporation having its principal place of business in California, but whose tangible property is all situate and taxed in Nevada, are not taxable to the owner, under the constitution and laws of California, in the state of California. The *situs* of the stock in such cases for the purposes of taxation is the residence of the owner. *Id.*
8. SITUS OF MONEY CREDITS AND OTHER SOLVENT CREDITS—TAXATION.—There being no statutory provision to the contrary, the *situs* of money credits and other solvent credits for the purposes of taxation is the residence of the owner or creditor. *Id.*
9. TAXATION OF RESIDENT OF NEVADA ON SOLVENT CREDITS.—A citizen and resident of Nevada is not taxable in California, under its constitution and laws, upon money credits and other solvent credits not secured by mortgage, trust deeds, etc., due from citizens and residents of California. *Id.*
10. ASSESSMENT OF MINING STOCK, DESCRIPTION OF.—The rule as to the degree of certainty required in describing personal property in assessments for taxation is that the property must be so described that tax-payers may know for what they are to be taxed. Tested by such rule, an assessment which describes the property assessed as "mining stock" is sufficiently definite. Such description is also sufficient for the purpose of equalization. *San Francisco* v. *Flood* (Cal.), I, 567; *San Francisco* v. *Sharon* (Cal.), I, 583; *San Francisco* v. *Phelan* (Cal.), I, 583; *San Francisco* v. *Flood* (Cal.), I, 583; *San Francisco* v. *Baldwin* (Cal.), I, 584.
11. A TAX-PAYER OUGHT NOT TO BE HEARD TO COMPLAIN OF THE INSUFFICIENCY OF THE DESCRIPTION OF PERSONAL PROPERTY assessed by him when such description was taken from a list furnished by himself, or by some one on his behalf and by his authority, or when made by the assessor without the aid of such list, if the description is as certain as could reasonably be required of the assessor under the circumstances. *Id.*

12. SHARES IN THE CAPITAL STOCK OF CORPORATIONS ARE TAXABLE PROPERTY under the constitution of 1849 and the revenue laws in force during the fiscal year 1876–7. *Id.*

13. SECTIONS 3640 AND 3641 OF THE POLITICAL CODE DO NOT APPLY TO SHARES IN MINING CORPORATIONS constituted under the laws of California, but whose tangible property is situated in another state. The former section by its express terms only exempted shares in corporations from assessment where the entire capital or property of the corporation in which the shares were owned was assessed. *Id.*

14. TO SUSTAIN AN ASSESSMENT OF SHARES IN A MINING CORPORATION, IT WILL BE PRESUMED that the assessor, in making the assessment, acted in accordance with law, and that the circumstances existed which authorized such assessment; and in an action to enforce the same it is incumbent on the defendant to show that the action of the assessor was unauthorized. *Id.*

15. TAX-PAYERS SHOULD FURNISH A TRUE AND CORRECT LIST OF THEIR TAXABLE PROPERTY to the assessor, and if they fail so to do, and any loss results to them in consequence of such failure, their complaints on such score should meet with no favor from the courts. *Id.*

16. IMPAIRING THE OBLIGATION OF A CONTRACT.—At the date of the execution of a note and mortgage, the law of the state required the mortgaged premises to be assessed at their full cash value for taxation; and afterwards an act was passed requiring the note and mortgage to be assessed at its par value for taxation, and exempting so much of the land from taxation. *Held*, that the latter act did not impair the obligation of the contract between the creditor and the debtor. *Dundee Mortgage etc. Co.* v. *School District* (U. S. Cir. Ct., Or.), II, 241.

17. STATE POWER OF TAXATION.—The state has power, so long as it does not trench upon the constitution of the United States, to tax all persons, property, and business within its jurisdiction or reach; and whether any person, property, or business is so within its jurisdiction is not a federal question, and must be determined by the state for itself. *Id.*

18. UNIFORM AND EQUAL TAXATION.—An act of the legislature providing for the taxation of mortgages as land, which in effect exempts all such mortgages from such taxation upon land in more than one county, violates section 1 of article 9 of the constitution of the state, which requires that taxation shall be uniform and imposed according to its value upon "all property" not specially exempt therefrom, and is therefore void and of no effect; and *semble*, that such act is also a "special" one for "the assessment and collection of taxes," and therefore in violation of subdivision 10 of section 23 of article 4 of the constitution of the state. *Id.*

19. DUE PROCESS OF LAW.—The enforcement by the state of a tax levied under a void law is a deprivation of property without due process of law, contrary to section 1 of the fourteenth amendment to the constitution of the United States. *Id.*

20. UNIFORMITY OF ASSESSMENT AND TAXATION—SPECIAL LAW ON SUCH SUBJECT.—An act which provides for the taxation of mortgages on land in no more than one county, there being mortgages on land in more than one county, is void for want of the uniformity required by section 1 of article 9 of the constitution of the state; and also because it is contrary to section 23 of article 4 of said constitution, which forbids special legislation on that subject. *Id.*, III, 606.

21. TAXATION OF MORTGAGES.—The act of 1882, session legislature 1864, is the first and only act providing for the taxation of mortgages as things or property; but prior to that time a solvent debt, whether secured by mortgage or not, was taxable as personal property. *Id.*

22. UNCONSTITUTIONAL PROVISION IN ACT.—When an act contains an unconstitutional provision which renders it void, and the act can stand and be executed without it, according to the general purpose of the legislature, such clause may be stricken out by the court, and the act considered as if it had never been inserted, but not otherwise. *Id.*

23. TAX—ILLEGAL FOR WANT OF UNIFORMITY.—A tax may be illegal for want of uniformity that is the necessary consequence of the law providing for it, or the misconduct of those charged with its administration; but so long as such uniformity is not the direct result of the law, it can not be held invalid on account of it, and the remedy, if any, must be confined to the illegal proceeding under it. *Id.*

24. ACT—WHEN SPECIAL.—A "special" act affects a part only of the subject to which it relates; and whether an act is considered "public" or "private," is not relevant to the question of whether it is "special" or "general." *Id.*

25. MORTGAGE—TAXATION—NON-RESIDENT.—A mortgage as such is incorporeal property, and may be taxed, under the act of October 26, 1882, although the mortgagee

is a non-resident of the state, and at the time of the execution of the mortgage the same was exempt from taxation. *Mumford* v. *Sewell* (Or.), III, 712.

26. REVENUE LAWS—TAXATION—CONSTRUCTION OF CONSTITUTION.—Whether a law which merely declares that certain property theretofore exempt from taxation shall hereafter be subject to taxation is a law for raising revenue, within the meaning of the constitution requiring such laws to originate in the lower branch of the legislature, *quære*. *Id.*

27. MORTGAGE TAX—PAYMENT OF, BY MORTGAGOR—CREDIT ON MORTGAGE.—The amount of taxes paid by a mortgagor upon the interest of a mortgagee in the mortgaged premises, after the adoption of the present constitution, must be credited by the mortgagee on the mortgage, notwithstanding the same was executed prior to the adoption of such constitution, if there were no provisions in the contract between the mortgagor and mortgagee by which the former agreed to pay such taxes. *Hay* v. *Hill* (Cal.), III, 352.

28. STATE BOARD OF EQUALIZATION—ASSESSMENT OF MORTGAGES—EQUALIZATION OF.—Under section 9, article 13, of the constitution, the state board of equalization, in raising the assessment roll of a county, has power to increase the valuation of mortgages as already assessed. *Schroeder* v. *Grady, Tax Collector, etc.* (Cal.), IV, 627.

29. IN ORDER THAT A COUNTY ASSESSOR MAY HAVE JURISDICTION to assess property for taxation, he must follow the statute. An assessment made in a manner not authorized by statute, and not in substantial compliance with its provisions, is void and equivalent to no assessment at all. *N. P. R. R. Co.* v. *Carland* (Mont.), II, 326.

30. AN ASSESSMENT THAT VALUES REAL AND PERSONAL PROPERTY IN A MASS IS VOID. *Id.*

31. AN ASSESSMENT SHOULD SHOW A PROPER DESCRIPTION OF THE PROPERTY, and the real estate and personal property should be separately and distinctly assessed and valued. *Id.*

32. AN ASSESSMENT THAT IS IN SUCH A CONDITION THAT IT CAN NOT BE EQUALIZED by the board of commissioners, sitting as a board of equalization, is void. *Id.*

33. IN ASSESSING RAILROADS FOR TAXATION, the assessor must follow the provisions of the statute. *Id.*

34. A TAX WILL NOT BE RESTRAINED UPON THE GROUND THAT IT IS IRREGULAR OR ERRONEOUS. *Id.*

35. TO ENTITLE A PARTY TO RELIEF IN EQUITY AGAINST AN ILLEGAL TAX he must bring his case under some acknowledged head of equity jurisdiction. *Id.*

36. COURTS OF EQUITY WILL ENJOIN THE CASTING OF A CLOUD UPON A TITLE, in cases wherein the cloud itself, when cast, would be removed. *Id.*

37. IF THE RECORD SHOWING THE VALUATION AND LEVY OF TAX IS COMPLETE on its face, such record creates a lien upon the real estate against which the tax is assessed, and is a cloud upon the title of the owner. *Id.*

38. IF A TAX DEED IS MADE PRIMA FACIE EVIDENCE OF THE PURCHASER'S TITLE, and may be introduced in evidence, without showing the regularity of the proceedings up to the delivery of the deed, such deed is a cloud upon the title of the owner, and equity would interfere, when by the averments of the bill it appears that the property is exempt from taxation, or that the assessment was void. *Id.*

39. IF THE ILLEGALITY OF THE TAX APPEARS UPON THE FACE of the proceedings, no cloud is cast upon the title. *Id.*

40. EQUITY WILL ENJOIN THE COLLECTION OF A TAX LEVIED upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy. *Id.*

41. THE ACT OF CONGRESS INCORPORATING THE NORTHERN PACIFIC RAILROAD IS A CONTRACT between the government and the incorporators and their successors, and it is not within the constitutional power of congress or of a territorial legislature to impair the obligations of this contract, by the imposition of a tax upon such railroad's right of way. *Id.*

42. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS A LIMITATION upon the sovereignty of the states, and was adopted by the people of the United States to secure to the inhabitants of each state equal laws and equal protection of the laws without regard to race, color, or previous condition. *Id.*

43. THIS LIMITATION APPLIES TO THE SUBJECT OF TAXATION, and forbids the states or territories from exempting property from taxation, except in those cases wherein the property is devoted to public uses in which all the people are equally benefited. *Id.*

44. CONGRESS MAY EXEMPT THE PROPERTY OF THE UNITED STATES FROM TAXATION. The government may dispose of its own property upon such terms and conditions as it deems proper, and congress is the sole judge as to how this property shall be disposed of. *Id.*

45. CONGRESS HAD POWER TO CHARTER THE NORTHERN PACIFIC RAILROAD COMPANY, to grant to it public lands, and exempt its right of way through such lands from taxation. *Id.*

46. RAILROAD EXEMPTION FROM TAXATION.—The act of February 2, 1878, providing for the general incorporation of railroads, and exempting all the property of the same from taxation of every kind until after the expiration of six years from the completion of their roads; and the act of February 12, 1878, extending such exemption to railroads already incorporated; and the act of February 15, 1878, defining when such railroads shall be deemed to be completed—should be construed as *in pari materia* and as parts of one act. So construed, such exemption applies to a railroad incorporated prior to the time the act of February 2, 1878, went into effect. *Board of County Commissioners of Santa Fé Co.* v. *New Mexico & S. P. R. R. Co.* (N. M.), I, 812.

47. SUCH EXEMPTION OF ALL RAILROAD CORPORATIONS FROM TAXATION IS NOT VOID, as being in conflict with the act of congress of March 2, 1867, prohibiting the legislative assemblies of the several territories from granting private charters and special privileges. *Id.*

48. AFTER THE INCORPORATION OF A RAILROAD and the completion of its lines, under the provisions of such act, the exemption from taxation therein contained is not a mere gratuity. It becomes a part of the contract between the railroad and the territory, the obligation of which the latter can not impair. *Id.*

49. AN EXEMPTION FROM TAXATION AS TO ALL THE PROPERTY OF A RAILROAD EXEMPTS THE SAME from taxation upon its capital stock. *Id.*

50. ASSESSMENT OF PROPERTY IN THE POSSESSION OF A WAREHOUSEMAN.—Where a warehouseman has in his possession property liable to taxation, and on demand refuses to furnish the assessor with the names of the owners, or a description of such property, as required by section 3629 of the political code, it is the duty of the assessor to note such refusal on the assessment book, and to make an estimate of the value of the property. *Bode et al.* v. *Holtz, Assessor, etc.* (Cal.), II, 366.

51. MONEY OF AN ESTATE ON GENERAL DEPOSIT AT A BANK IS IN LEGAL EFFECT A LOAN, and is taxable in the county in which the decedent formerly resided, and not in the county where such money is deposited. *City and County of San Francisco* v. *Lux*, (Cal.), I, 555.

52. THE ENUMERATION OF THE PROPERTY ASSESSED IN A COMPLAINT IN AN ACTION FOR THE COLLECTION OF DELINQUENT TAXES, sufficiently complies with the requirement of the statute, Stat. 1877–8, p. 338, when the same is made in words identical with those used by the assessing officer, and set down in the assessment book. *San Francisco* v. *Flood* (Cal.), I, 567.

53. DISTRICT COURT HAS JURISDICTION OF AN ACTION TO RECOVER BACK money paid under protest in satisfaction of an illegal tax, although the amount in controversy is less than three hundred dollars. *Robinson* v. *Longley* (Nev.), I, 306.

54. PROPERTY BELONGING TO A CIRCUS WHICH IS PASSING THROUGH THE STATE, although it remains there for a few days in the ordinary course of its business, is not subject to taxation. *Id.*

55. DISTRICT ATTORNEYS CAN NOT COMMENCE AND PROSECUTE ACTIONS for the recovery of delinquent taxes, unless authorized so to do by the boards of supervisors of their respective counties. In such actions commenced and prosecuted by district attorneys without authority of the boards of supervisors, no attorney's fees can be recovered against the defendants, nor costs against the plaintiffs. *County of San Diego* v. *California Southern Railroad Company* (Cal.), I, 341.

56. A TAX CERTIFICATE OF SALE WHICH RECITES THAT THE PROPERTY WAS ASSESSED TO G. A. H., "and to all owners and claimants known and unknown," is void. *Daley* v. *Ah Goon* (Cal.), I, 584.

57. A TAX DEED WHICH FAILS TO RECITE THE RECITAL IN THE CERTIFICATE OF SALE, with reference to the time when the purchaser would be entitled to a deed, is void. *Anderson* v. *Hancock* (Cal.), I, 349.

58. A VOID TAX CERTIFICATE IS ADMISSIBLE IN EVIDENCE FOR THE PURPOSE OF DEFEATING A TAX DEED founded thereon, which is valid on its face by reason of the omission of an invalidating recital. *Daley* v. *Ah Goon* (Cal.), I, 584.

59. REVENUE ACTS—DISTRIBUTION OF POLL TAX.—The revenue act of 1872, in so far as the same provides for the distribution of the poll tax, was not repealed by the reve-

nue act of 1882. Poll taxes should be paid into the county school fund, and not into the territorial treasury. *Territory etc.* v. *Luna, Sheriff, etc.* (N. M.), II, 418.

60. MUNICIPAL CORPORATION, LIABILITY OF, FOR GALLON TAX ON DISTILLED SPIRITS. A municipal corporation is liable to the United States for the amount of the gallon tax upon spirits distilled with its funds, by its officers and legally constituted agents, acting for and in its name, when such spirits are sold and disposed of without paying the duties thereon, and the proceeds thereof are paid to, received, and appropriated by the city, although all of such acts were unauthorized by the city's charter, and a part of them were in violation of acts of congress. *Salt Lake City* v. *Hollister* (Utah), II, 441.

61. MONEY PAID UNDER PROTEST BY SUCH CITY IN SATISFACTION OF SUCH DUTIES can not be recovered back. *Id.*

62. NOTES ISSUED FOR CIRCULATION—WHAT ARE.—Orders drawn by a mercantile corporation to pay to certain persons or bearer a certain number of dollars, in merchandise, at retail, issued to those who were willing to take their pay in merchandise, and as a means of convenience in exchange for produce, do not perform the office of money, and are not notes in the sense in which that word is used in the United States statutes providing "that every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes issued for circulation and paid out by them:" Supplement to R. S., vol. 1, 1874–1881, p. 133, sec. 19. *Zion Co-operative Mercantile Institute* v. *Hollister* (Utah), II, 202.

63. DELINQUENT TAXES—ACTION AND LIEN FOR, WHEN BARRED—The statute of limitations of California is applicable to an action brought by the city and county of San Francisco, under the acts of 1878, to recover delinquent city and county and state taxes. Such action is barred, under section 338, subdivision 1, of the code of civil procedure, upon the expiration of three years after the cause of action accrues. When an action to collect such tax is barred, an action to enforce the lien thereof, created by sections 3716 and 3717 of the political code, is also barred. *San Francisco* v. *Jones* (U. S. Cir. Ct., Cal.), II, 772.

64. TAX DEED—EFFECT OF, AS EVIDENCE.—Notwithstanding the act of 1865, Oregon laws, section 90, making a tax deed conclusive evidence of the regularity and validity of the prior proceedings in an action by the owner of the property to recover the possession from the grantee in such deed or his assignee, it may be shown that no warrant issued for the collection of the tax levied on the property, or that there was no sale thereon on that account. *Kelly* v. *Herrall, Executor, etc.* (U. S. Cir. Ct., Or.), III, 19.

65. WARRANT FOR THE COLLECTION OF A DELINQUENT TAX.—A warrant for the collection of a delinquent tax was received by the sheriff on May 5th, and on Friday, July 6th, sixty-two days thereafter, he sold the same. *Held*, that the warrant was dead and the sale void; and that the sale could not be made after the return-day of the writ, which was either the first Monday in July, or the sixtieth day after its receipt by the sheriff, and possibly thirty days in addition in case a prior appointed sale was postponed to some day within that period for sufficient cause, with the approval of the county court. *Id.*

66. ASSESSMENT ROLL, DESCRIPTION OF PROPERTY THEREIN.—In 1876 there was only one place in Multnomah county laid out and recorded as the "Portland Homestead," containing a lot 3 in block B, of which Mary Kelly was the owner; the assessor entered the same on the assessment roll for taxation in her name, and described it as "lot 3 in block B, Port. Homstd. Ass.," and valued it for taxation at one hundred dollars. *Held*, that the description was sufficiently certain. *Id.*

67. REVENUE LAWS, CONSTRUCTION OF.—Laws for raising revenue for the support of the state are remedial in their character, and proceedings taken under them for the purpose of ascertaining the amount a citizen ought to contribute for the common weal ought not to be considered as taken *in invitum* or hostile to him or his interests, but rather as proceedings in his behalf, in which it is his duty to co-operate with the state, so as to enable it to reach a correct and just result. *Id.*

68. FRUIT TREES—GROWING CROPS—TAXATION.—Fruit trees are not growing crops, within the meaning of article 13, section 1, of the constitution, so as to be exempt from taxation. *Cottle* v. *Spitzer, Assessor, etc.* (Cal.), III, 416.

69. MULTIPLICITY OF SUITS.—Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits. *Dundee Mortgage etc. Co.* v. *School District* (U. S. Cir. Ct., Or.), II, 241.

70. DISTRICT ATTORNEYS ARE NOT AUTHORIZED TO INSTITUTE ACTIONS FOR THE COLLECTION of delinquent taxes before the certification of the delinquent list. Whether

they can so do without the direction of the board of supervisors not decided. *County of San Diego* v. *California Southern Pacific R. R. Co.* (Cal.), III, 44.

71. FEES FOR COLLECTING TAXES are recoverable only when the other taxes are collected. *Boggs* v. *Placer County* (Cal.), III, 656.

72. SAME.—Fees for collecting taxes can not be recovered from one who did not prevent their collection. *Id.*

73. ASSESSMENT ROLL.—The fact that a parcel of land does not appear on the assessment roll of the county, in a given year, as the property of the defendant in an action for the recovery of the same, does not tend to contradict the testimony of such defendant to the effect that he paid the taxes thereon, as owner, in such year; nor is it competent evidence in such action, for or against either party thereto, of the ownership of such land. *Zellin* v. *Rogers* (U. S. Cir. Ct., Or.), III, 466.

74. ASSESSMENT OF REAL PROPERTY—MISTAKE IN NAME OF OWNER.—In a suit against the owner of real property to recover the tax levied on it, a mistake in the name of the owner, in the assessment of the land upon which the tax is based, does not render the assessment thereof invalid, nor furnish any defense to the suit. *Lake County* v. *Sulphur Bank Quicksilver Mining Company* (Cal.), IV, 186.

75. ASSESSMENT OF PERSONAL PROPERTY—MISTAKE IN NAME OF OWNER.—But a mistake in the name of the owner in the assessment of personal property upon which a tax is based, unless the mistaken name is legally equivalent to the true name, does invalidate the assessment, and constitute a defense to a suit brought against the owner to recover such tax. *Id.*

76. THE SAME.—Tax proceedings must be in strict accordance with the statute. Without an assessment all subsequent proceedings are nullities. An assessment of personal property to a named person other than the owner is absolutely void. *Id.*

77. THE SAME.—An assessment of personal property was made to "Sulphur Bank Q. M. Co., F. Fiedler, agent." *Held*, that this was not equivalent to or the same thing as "Sulphur Bank Quicksilver Mining Company," the true name of the owner, and the assessment and tax based thereon were void. *Id.*

78. ASSESSMENT OF REAL PROPERTY—DESCRIPTION OF THE LAND.—Under sections 3650, 3658, of the political code, it would seem to be a sufficient assessment of a tract, where such tract does not contain more than six hundred and forty acres, to describe it by stating the congressional subdivisions contained in it where it has been sectionized. The description, "a tract of land entered by Frazier in section 13, township 13, range 7," is fatally defective. *Id.*

79. LEVY OF TAXES BY BOARD OF SUPERVISORS.—When a board of supervisors duly adopted an order "that they have this day fixed the rate of county and district tax to be levied and collected upon each one hundred dollars of the assessed valuation of the county, etc., * * * as follows, to wit: state fund, 0.64; general county fund, 0.40; county school fund, 0.37, etc. * * * Total state, county, and district tax, 1880–1, $2.75." *Held*, that the omission of the words "cents" from the various items of the levy did not invalidate the order levying the tax nor render the levy ineffectual. Taking all the order together, these various items plainly mean so many "cents" upon each one hundred dollars. *Id.*

80. ORIGINAL ASSESSMENT ROLL—EVIDENCE.—Where a board of supervisors have dispensed with a duplicate assessment roll, the original assessment roll is *prima facie* evidence in the same manner that the duplicate would have been. *Id.*

81. IN AN ASSESSMENT FOR TAXES THE ABBREVIATION "DOLLS." is equivalent to dollars. *Salisbury* v. *Shirley* (Cal.), IV, 688.

82. CONSTITUTIONALITY OF A STATUTE IMPOSING A TAX.—The following amendment of chapter 88 of the general laws of Colorado was enacted by the legislature in 1879: "The board of county commissioners of the respective counties of the state may levy a property tax for road purposes, which shall not exceed one dollar on each one hundred dollars, to be levied and collected in the same manner and at the same time as other property taxes are levied and collected in each year; but all property included within the limits of incorporated towns or cities shall not be subject to the tax. *Held*, that the last clause of this statute, purporting to exempt property within incorporated towns and cities, is unconstitutional and void, being in conflict with provisions of the state constitution, which declares that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax," and that "all laws exempting from taxation property other than hereinbefore mentioned shall be void." And such statute must be construed and enforced as though such final clause had never been enacted. *Board of County Commissioners* v. *Owen et al.* (Col.), IV, 157.

83. TAXATION—ASSESSMENT FOR SEWER—NOTICE OF APPORTIONMENT—DUE PROCESS OF LAW.—The legislature, under the constitution of Colorado, has power to provide for an assessment of a tax for a sewer upon the property within a given district according to the area, and not according to the value of the property. In such case the apportionment of the tax is a mere mathematical calculation, and a failure to give the tax-payer notice thereof, when an opportunity to be heard concerning all other steps in the tax proceeding is given, is not a denial of due process of law. *Gillette et al.* v. *City of Denver* (U. S. Cir. Ct., Col.), IV, 206; *Brown* v. *Denver* (U. S. Cir. Ct., Col.), IV, 210.

84. ENFORCEMENT OF TAX, WHEN ENJOINED—IRREGULARITIES IN TAX.—Equity will not enjoin the enforcement of a tax for mere irregularities in the exercise of a constitutional taxing power, or for excess in the amount of the tax, unless it be alleged and shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered, without demanding a receipt in full. *Id.*

See ADVERSE POSSESSION, 5, 7; APPEAL, 20, 77; BONDS, 3, 4; EASEMENTS, 3; INDIANS, 10; JUSTICES' COURTS, 3; LICENSE COLLECTOR; SURETIES, 16.

TAX COLLECTOR.

See PROHIBITION, 2.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—MEASURE OF DAMAGES AGAINST.—A telegraph company is liable for whatever loss naturally and in the usual course of things follows from its failure to transmit a message promptly and correctly, although such message was written in cipher or was otherwise unintelligible to the company. *Hart* v. *Western Union Telegraph Co.* (Cal.), IV, 37.

2. THE SAME—STIPULATION LIMITING LIABILITY—NEGLIGENCE.—A stipulation printed on a blank upon which a telegraph message is sent, purporting to exempt the telegraph company from all liability for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of consideration. Such company can not stipulate against or limit its liability for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments. Such company is exempt only from errors arising from causes beyond its control, and the burden of showing such exemption rests upon it, in an action to recover for an alleged loss. *Id.*

3. THE SAME—EXEMPTION FROM LIABILITY—ATMOSPHERIC INFLUENCES.—A telegraph company is not liable for a loss arising from a mistake in the transmission of a message when such mistake was occasioned by a break in the electric current, produced by atmospheric influences beyond the company's control. *Id.*

TENANCY FROM YEAR TO YEAR.

See LANDLORD AND TENANT, 14.

TENANTS IN COMMON.

1. TENANTS IN COMMON WHO ARE JOINED AS PLAINTIFFS IN AN ACTION OF EJECTMENT are presumed to have consented to such joinder. *Weise* v. *Barker* (Col.), II, 108.

2. ONE TENANT IN COMMON MAY RECOVER POSSESSION OF THE WHOLE of common property, in an action of ejectment, as against an adverse possessor. *Id.*

3. AMENDMENT — JOINDER OF CO-TENANTS. — A complaint in an action of ejectment brought by a tenant in common to recover possession of his undivided share in certain mining claims, as against an adverse possessor holding under an entirely different source of title, may be amended by joining as plaintiffs the other tenants in common, and seeking the recovery of the entire property. Such an amendment does not change the nature of the original cause of action. *Id.*

4. THE POSSESSION OF ONE TENANT IN COMMON IS PRESUMED TO BE FOR THE BENEFIT of all. *McNeil* v. *First Congregational Soc.* (Cal.), IV, 421.

See DEEDS, 7; EJECTMENT 2-7; PARTITION, 7, PARTNERSHIP, 19; REDEMPTION, 1, 2; REPLEVIN, 8.

TENDER.

1. TENDER—OBJECTIONS TO SUFFICIENCY OF—WAIVER.—Objections to the sufficiency of the amount tendered must be made at the time of tender, or the same are waived. *Oakland Bank of Savings* v. *Applegarth* (Cal.), IV, 605.
2. ACTION FOR PART RESCISSION OF CONTRACT—OFFER TO REFUND AMOUNT DECREED, WHEN DISPENSES WITH TENDER.—Where a plaintiff comes into a court of equity asking for a rescission, in whole or in part, of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication, based on evidence of facts independent of the terms of the contract, an offer to refund such sum as shall be decreed, is a sufficient offer to do equity. In such case the plaintiff can not determine in advance of the suit the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action. *Sutter Street R. R.* v. *Baum* (Cal.), IV, 291.

TIDE LANDS.

1. TIDE LANDS—GRADUAL SUBMERGING OR ACCRETION.—When land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered with water; conversely, the riparian owner is entitled to whatever is gained from the sea by alluvian dereliction. *Wilson et al.* v. *Shiveley* (Or.), III, 336.
2. TIDE LANDS BELONG TO THE STATE, as sovereign, and it has the absolute right to dispose of them. *Id.*
3. TIDE LANDS—ABUTTING OWNER—RIGHT TO PURCHASE.—Under the act of 1872, and the acts amendatory thereof, the abutting owner on tide lands, or his grantee, has the right to purchase such tide lands. *Id.*

See PUBLIC LANDS, 10.

TIMBER AND MINERAL LANDS.

See MINES AND MINING, 48.

TIME CHECK.

1. TIME CHECKS, ACTION ON BY ASSIGNEE.—A written acknowledgment of indebtedness in the form of a time check, as follows:

COLORADO SPRINGS, COL., July 17, 1880.

[Time check. Not negotiable. Payable on regular pay day.]

Paymaster Rio Grande Extension Company:

Due Thomas Flinn, for labor in month of July, 188–, as laborer, twelve days at $1.25 per day $15 00

Deduct for board 3 05

Balance due $11 95

Approved, T. S. BLACKBURN,
F. T. GRISWOLD. Foreman.

Is an assignable chose in action, on which an action may be maintained by the assignee, against the company, without an acceptance thereof by it, after proof of the agency of the maker. *Rio Grande Extension Co.* v. *Coby* (Col.), II, 613.

TOLL ROADS.

1. APPEAL—TOLL ROAD—USURPATION OF FRANCHISE.—An appeal lies from a judgment adjudging the defendants guilty of usurping a franchise, when the case involves the right of the defendants to possess certain lands claimed to constitute a toll road, as against all who shall not pay toll for passing over them. *People ex rel. Williams* v. *Horsely et al.* (Cal.), III, 351.
2. THE SAME—AMADOR AND NEVADA TOLL ROAD—GRANT OF FRANCHISE.—The act of April 1, 1878, authorizing the board of supervisors of Amador county to declare the portion of the Amador and Nevada wagon road which lies in Amador county a toll road, does not authorize such board to grant any franchise to collect tolls over such road to other persons. *Id.*

TORTS.

See ARREST AND BAIL, 1, 3; ATTACHMENT, 24; CORPORATIONS, 12-16; ESTRAY, 4.

TRADE-MARKS.

1. TRADE-MARK, EXCLUSIVE USE OF—RECORDING WITH SECRETARY OF STATE.—Subsequent to the adoption of the code, a right to the exclusive use of a trade-mark or name, in this state, can not be acquired, unless it be filed for record with the secretary of state. *Whittier et al.* v. *Dietz* (Cal.), IV, 356.

TRANSCRIPT ON APPEAL.

See APPEAL, 78, 94, 95; NEW TRIAL, 16.

TREATY.

See CHINESE RESTRICTION ACT.

TRESPASS.

1. AN ACTION, THE MAIN PURPOSE OF WHICH IS TO OBTAIN A DECREE RESTRAINING the commission of continuing trespasses, of a character to produce irreparable injury, is an equitable action, and issues of fact raised therein should be tried by the court, unless it saw fit to order any or all of them to be submitted to a jury. *McLaughlin* v. *Del Re* (Cal.), I, 486.
2. CUTTING TIMBER ON THE PUBLIC LANDS.—Section 4 of the act of June 3, 1878 (20 Stat. 89), prohibits the cutting of any timber on the public lands with intent to dispose of the same; but the proviso thereto permits a settler under the pre-emption and homestead acts to clear his claim as fast as the same is put under cultivation, and the timber cut in the course of such clearing may be disposed of by the settler to the best advantage. *United States* v. *Williams* (U. S. Dist. Ct., Or.), I, 100.
3. IDEM.—But if such settler cuts timber on his claim with the intent to dispose of the same, and not merely as a means of preparing the land for tillage, he is a willful trespasser and is liable accordingly. *Id.*
4. DAMAGE BY TRESPASSING SHEEP.—A complaint in an action brought under the act of March 7, 1878, which alleges that the plaintiff was at stated times the owner and in possession of a certain piece of land; that at such time the defendant was the owner, in the possession, and chargeable with the care of certain sheep, which then entered and trespassed upon such land and injured the grain, grass, and hay thereon, to the plaintiff's damage, is sufficient; and if such averments are true, the defendant is liable. *Faber* v. *Cathrin* (Cal.), I, 871.
5. ALLOWING THE PLAINTIFF IN SUCH ACTION TO TESTIFY THAT BY REASON OF THE DAMAGE done by such sheep she was compelled to feed her own stock with hay, is not error, when such fact was first drawn out by the defendant on cross-examination. *Id.*
6. OWNER'S LIABILITY FOR DAMAGE FROM TRESPASSING SHEEP.—When a flock of sheep is in the charge of herders upon a range, ordinary care should be exercised in preventing a trespass thereby upon the crop of another. When the crop is of such a nature as to be readily recognized, or is surrounded by a fence of any kind, so that the herder may know when he reaches its vicinity, he should use ordinary care to prevent the sheep from going upon the same and doing injury thereto. If such ordinary care be not exercised and a trespass and injury result, the owner of the sheep is liable for such damage. *Willard* v. *Mathesus* (Col.), I, 355.
7. DISTINCTION BETWEEN THE LIABILITY OF AN OWNER FOR DAMAGES RESULTING FROM TRESPASSING CATTLE and those resulting from trespassing sheep, stated, and shown to depend upon the difference in the customary manner of herding such animals. *Id.*
8. TRESPASS BY CATTLE.—Under the act of March 20, 1878, one who willfully enters with cattle and horses upon land belonging to and in the possession of another, and depastures them thereon, is liable for the damage suffered by the latter. *Martin* v. *Jacobs* (Cal.), II, 135.

See CORPORATIONS, 14-16, DAMAGES, 6, 7; EJECTMENT, 13; EXECUTIONS, 4; INJUNCTIONS, 17, 18; PUBLIC LANDS, 14; WATER RIGHTS, 37, 50.

TRIAL.

See CONTINUANCE.

TRUST DEED.

1. JUDGMENT AND ORDER AFFIRMED upon authority of *Savings and Loan Society* v. *Bateman*, 10 Pac. C. L. J. 795. *Savings and Loan Soc.* v. *Durkin et al.* (Cal.), IV, 534.

TRUSTS.

1. PROPERTY PURCHASED FROM A PRIVATE CORPORATION, in good faith and for an adequate consideration, is not subject to a trust in the hands of a purchaser for the satisfaction of unpaid debts of the corporation, although the purchaser had notice of such debts at the time of the purchase. And the rule is the same whether the purchase includes all the property of the corporation or only a part of it. *Branson* v. *Oregonian R'y Co.* (Or.), I, 624.
2. A DEED BY A TRUSTEE, PURPORTING TO CONVEY TO THE GRANTEES THE LEGAL TITLE to their shares in the land, may be admitted in evidence, notwithstanding an objection thereto which goes merely to the effect of such conveyance. The operation of such conveyance was a matter for the consideration of the court when it rendered judgment. *Emeric* v. *Alvarado* (Cal.), I, 708.
3. ACTION TO ENFORCE A TRUST, NECESSARY PARTIES TO.—Where the owners of several mining claims enter into an agreement for the consolidation of their respective claims and the formation of a corporation to which such claims are to be deeded, the stock of which is to be divided among them in certain proportions, in an action by one owner to enforce the delivery of the stock to which he is entitled, or for an accounting of the same, the corporation formed in pursuance of such agreement is properly joined as a defendant. *Reich* v. *Rebellion S. Mining Co.* (Utah), II, 451.
4. RESULTING TRUST—MASTER AND SERVANT—PATENT—RECONVEYANCE BY TRUSTEE. Where the servants and employees of one in the actual occupation of public land fraudulently conspire together, and with others who have notice of their fiduciary relation, and obtain a patent to the land in their own names, the title so obtained is held in trust by them for the benefit of their employer, or his successor in interest. But where it appears that the main object of such employees in so obtaining a patent in their own names was to secure themselves for wages due them for their work on the patented premises, a court of equity will require such employer, or his successor in interest, to pay such wages and the expenses attending the obtainment of the patent, as a condition to a reconveyance. *Wells* v. *Francis* (Col.), III, 217.
5. TRUSTS—FINDINGS—JUDGMENT.—From the facts found, *held*, that the defendant was a trustee for the plaintiff as to an undivided half of the property in controversy; that the findings sustain the judgment, and are sufficient under the issue made by the pleadings. *Roberts* v. *Haley* (Cal.) III, 310.
6. PARTIES TO A SUIT.—Where a trustee sues to recover possession of the trust property for the benefit of the *cestui que trust*, merely or simply to enforce his right thereto against third persons, such *cestui que trust* is not a necessary party thereto; and in a suit to set aside an assignment or conveyance made to hinder or delay creditors, the grantor or assignor therein, if he has parted with all his right in the property, is not a necessary party either. *Hickox* v. *Elliott* (U. S. Cir. Ct., Or.), IV, 397.

See CONSIDERATION, 1; CORPORATIONS, 10; EQUITY, 1; ESTOPPEL, 8; EXECUTORS AND ADMINISTRATORS, 2; FRAUD, 9; JUDGMENT, 39; PARTIES, 12; PUBLIC LANDS, 13, 20; VENUE, 6; WILLS, 10, 11.

ULTRA VIRES.

See CORPORATIONS, 11, 15, 43.

UNDERTAKING ON APPEAL.

See APPEAL. 24, 47, 48, 77, 92; MORTGAGE, 21; STATUTE OF LIMITATIONS, 21.

UNDERTAKING ON ATTACHMENT.

See ATTACHMENT, 4–6.

UNITED STATES.

1. POWERS OF THE UNITED STATES OVER PUBLIC LANDS WITHIN A STATE.—Over the public lands within a state the United States has only the rights of a proprietor, and it has no power to authorize its grantees of such lands to invade the private rights of other proprietors. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct. (Cal.), I, 183.

See APPEAL, 46; CANCELLATION, 1; CHINESE RESTRICTION ACT; CONSTITUTIONAL LAW, 6, 7, 9; ESTATES OF DECEASED PERSONS, 3, 5; ESTOPPEL, 6; LACHES, 3; WATER RIGHTS, 1-14.

UNITED STATES COURTS.

1. BILL TO PRESERVE PROPERTY PENDING ACTION IN STATE COURTS.—A bill in equity can not be maintained in the federal courts to preserve the property in controversy, pending an action at law in the state court, when the jurisdiction of the state court has already been invoked for the same end. *Evans* v. *Smith* (U. S. Cir. Ct., Col.), III, 213.
2. DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ARE BINDING upon the territorial courts. *Alexander* v. *Tennessee etc. Min. Co.* (N. M.), III, 71.

See ABATEMENT, 2; INSTRUCTIONS, 48; JURISDICTION, 2; MANDAMUS, 3.

USE AND OCCUPATION.

1. ACTION ON AN IMPLIED CONTRACT FOR THE USE AND OCCUPATION of a saw-mill lies against a vendee who has been in possession under a written contract for the sale of the same, the conditions of which he has failed to perform. *Jones* v. *Nathrop* (Col.), I, 279.
2. TENANT IN POSSESSION—USE AND OCCUPATION—ATTACHMENT.—The liability of the tenant in possession to the purchaser under a foreclosure sale, for the use and occupation of the premises sold, from the day of sale to the expiration of the time for redemption, is a statutory liability merely, and exists without the assent of the person in possession. Such liability is not founded on a contract, express or implied, within the meaning of section 537 of the code of civil procedure, authorizing the issuance of an attachment. *Walker* v. *McCusker* (Cal.), III, 196.

See ADVERSE POSSESSION, 6; STATUTE OF LIMITATIONS, 21, 22.

USURPATION OF OFFICE.

1. THERE IS NO SUCH OFFICE AS POLICE JUSTICE OF THE CITY OF SAN JOSÉ, and consequently the same can not be usurped, intruded into, or unlawfully held or exercised. *People* v. *Veuve* (Cal.), II, 894.
2. JUSTICE OF THE PEACE—EXERCISE OF UNAUTHORIZED JURISDICTION.—The exercise by a justice of the peace of a jurisdiction unauthorized by the constitution is not the exercise of an office. The result of such attempted jurisdiction is to render the acts done in the exercise thereof void. *Id.*

VALUE.

See EVIDENCE, 37; LARCENY, 12.

VARIANCE.

1. WHERE NO OBJECTION TO A VARIANCE BETWEEN THE COMPLAINT AND THE PROOF was made in the court below, which, under sections 77 and 78 of the code, might have been cured by an amendment, and where the appellant was not misled by such variance, an objection thereto is too late when made for the first time in the appellate court. *Smith* v. *Roe* (Col.), I, 502.
2. ASSIGNMENT OF ERROR ON THE GROUND OF VARIANCE between the facts alleged and those proved must specify the grounds of objection. *Davidson* v. *Oregon & California R. R. Co.* (Or.), I, 421.
3. EVERY MATTER WHICH WOULD HAVE BEEN ADMISSIBLE IN EVIDENCE BY WAY OF AMENDMENT to the complaint will be deemed to have been added, or its absence waived or cured, after verdict. *Id.*

4. ALLEGATIONS AND PROOF—VARIANCE—DIFFERENCE IN AMOUNT.—A difference between the allegations and proof in mere matters of quantity or extent does not constitute a legal variance. *Peasley* v. *Hart* (Cal.), III, 623.

See BURGLARY, 8; GOODS SOLD AND DELIVERED; LIBEL; NEGLIGENCE, 22; NEW TRIAL, 36.

VENDOR AND VENDEE.

1. STATEMENTS OF A VENDOR OF PERSONAL PROPERTY, MADE AFTER A SALE thereof, are not part of the *res gestæ*, and are inadmissible in an action against a vendee. *Garlick* v. *Bowers* (Cal.), IV, 501.
2. DECLARATIONS OF A VENDOR MADE AFTER A SALE BY HIM, and after he has parted with the possession to his vendee, can not be received in evidence against the vendee for the purpose of affecting or impeaching the *bona fides* of such sale, or of defeating the vendee's title, on the ground that the sale was in fraud of the vendor's creditors. Nor are such declarations admissible as being part of the *res gestæ*. *Hirschfeld* v. *Williamson* (Nev.), I, 150.
3. CREDITOR OF A VENDOR IN ATTACKING THE VALIDITY OF A SALE by him, on the alleged ground of fraud, can not question the authority of the vendor's agent by whom such sale was made. *Id.*
4. CONTRACT FOR SALE OF LAND—FORFEITURE—VENDOR AND VENDEE.—The right of a vendor to enforce a stipulation in a contract for the sale of land, providing for a forfeiture of the contract upon the non-payment of the purchase price, is not waived nor lost by mere delay, nor by the death of the vendee. *Kerns* v. *McKean* (Cal.), III, 359; *Kerns* v. *Dean* (Cal.), III, 363.
5. JUDGMENT REVERSED on account of contradiction in the findings. *Id.*
6. ACTION FOR VENDOR'S LIEN—PARTIES.—In an action to enforce a vendor's lien upon an equitable interest of the vendee, parties who claim an interest in the property, adverse to that of both the vendor and purchaser, need not be joined. *Wells* v. *Francis et al.* (Col.), III, 217.
7. VENDOR AND VENDEE—STIPULATION AVOIDING CONTRACT.—The vendor under a contract for the sale of land may maintain an action for the recovery of the unpaid purchase price, although such contract contains a stipulation to the effect that in the event of the failure of the vendee to comply with all the terms and conditions of the contract, the vendor should be released from his obligation to convey, and the contract should be void. *Wilcoxson* v. *Stitt* (Cal.), III, 771.

See CONSIDERATION, 1; EJECTMENT, 9; EVIDENCE, 19, 20; FRAUD, 20; LACHES, 5; SALES; SPECIFIC PERFORMANCE; USE AND OCCUPATION, 1; WATER RIGHTS, 49.

VENDOR'S LIEN.

See LIENS, 1.

VENUE.

1. PLACE OF TRIAL.—All actions for the causes mentioned in section 48, laws of Washington territory (1877), must be commenced in the county or district in which the subject of the action lies. The court of no other county or district has jurisdiction thereof. *Wood* v. *Mastick* (Wash.), II, 549.
2. FOREIGN CORPORATION—PLACE OF RESIDENCE OF—VENUE.—A foreign corporation, doing business in this state, exists in and by virtue of the law of a foreign country, and no statute of this state has ever given a local county residence to such a corporation, where alone it can be sued. Its liability to be sued in the courts of this state no more confers a county residence upon it than does the comity which permits it to apply to our courts for the enforcement of a contract or the redress of a wrong. *Thomas* v. *Placerville G. Q. Min. Co.* (Cal.), III, 777.
3. ACTIONS AGAINST CORPORATIONS—VENUE—CONSTITUTIONAL LAW.—Section 16 of article 12 of the constitution, providing that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases," is applicable to actions arising from torts as well as from contracts. Such provision is not in conflict with the fourteenth amendment to the constitution of the United States. *Lewis et al.* v. *S. P. C. R. R. Co.* (Cal.), IV, 615.

4. PLACE OF TRIAL OF REAL ACTIONS—CONSTRUCTION OF CONSTITUTION.—Section 5, article 6, of the constitution of 1879, requiring "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated," is not retrospective in its operation. Consequently, the superior court of the city and county of San Francisco, as the successor of the district court, has jurisdiction to hear and determine an action for the foreclosure of a mortgage, pending in such latter court at the adoption of the present constitution, although the land affected thereby is situated in another county. *Watt et al.* v. *Wright et al.* (Cal.), IV, 622.
5. ACTION TO SET ASIDE FRAUDULENT CONVEYANCE—PLACE OF TRIAL OF.—An action by an execution creditor to set aside a deed made by his execution debtor, upon the ground that the same was fraudulently executed, is not an action to enforce a lien upon real property, and need not be commenced in the county where the land is situated. *Beach* v. *Hodgdon et al.* (Cal.), IV, 610.
6. ACTION TO ENFORCE TRUST ON REAL AND PERSONAL ESTATE—PLACE OF TRIAL.—An action to enforce a trust on both real and personal estate is not based on a lien, nor is it a suit to enforce a lien. Such action may be brought and prosecuted in the county in which the trustee resides, although the real estate subject to the trust is situated in another county. *Le Breton, Adm'r, etc.*, v. *Superior Court* (Cal.), IV, 142.
7. AN ACTION FOR THE DIVERSION OF WATER FROM THE PLAINTIFF'S DITCH may be brought in either of the counties in which such ditch is situated, although the defendant's place of business is in the other county, where the act complained of is committed. *People's Ditch Co.* v. *King's River and Fresno Canal Co.* (Cal.), I, 473.
8. A DEFENDANT HAS A STATUTORY RIGHT TO HAVE THE PLACE OF TRIAL CHANGED to the county of his residence, where the county designated in the complaint is not the proper county for the trial of the action. *Bailey* v. *Sloan* (Cal.), I, 472.
9. A MOTION FOR A CHANGE OF VENUE IS ADDRESSED TO THE SOUND DISCRETION of the trial court, and the action of such court thereon will not be reversed unless it appears that such discretion has been grossly abused. *Territory of New Mexico* v. *Kinney* (N. M.), I, 801.
10. CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.—The ruling of the trial court on a motion for a change of venue on account of the convenience of witnesses, when the motion is contested on the same ground, will not be interfered with unless there has been an abuse of discretion. *Bean* v. *Gregg* (Col.), IV, 241.
11. CHANGE OF VENUE—TIME FOR FILING AFFIDAVIT OF MERITS AND DEMAND—In an application for a change of venue the affidavit of merits and demand that the trial be had in the proper manner, filed by the defendant before he answers or demurs, are of no avail. Such affidavit and demand must be filed when the defendant appears and answers or demurs. *Nicoll* v. *Nicoll* (Cal.), IV, 219.
12. THE SAME—AFFIDAVITS OF MERITS MADE BY ATTORNEY.—Such affidavit may be made by the attorney for the defendant if it states a sufficient reason for the defendant's not making it. *Id.*
13. CHANGE OF VENUE WHEN DEFENDANTS RESIDE IN DIFFERENT COUNTIES.—A change of the place of trial of an action, to the county in which most of the defendants reside, may be had, when all of the defendants who were served or have appeared unite in a demand for a change. *Rathgeb* v. *Tiscornia et al.* (Cal.), IV, 375.
14. THE SAME—DISQUALIFICATION OF JUDGE AS AFFECTING RIGHT TO CHANGE.—The disqualification of the judge of the county to which such change is demanded, to try the case, does not affect the right of the defendants to have it transferred to such county for trial. *Id.*
15. DEMAND FOR CHANGE OF VENUE—AUTHORITY OF ATTORNEY TO MAKE.—An attorney has authority, at the time he appears for the defendants, to sign a demand for a change of the place of trial. *People ex rel. etc.* v. *Larue et al.* (Cal.), IV, 697.
16. CHANGE OF VENUE—AFFIDAVIT OF MERITS, WHAT MUST STATE.—An affidavit of merits, for use on a motion for a change of the place of trial, must aver that the affiant has fully stated *the case* to his counsel. An averment that he had fully stated *his case* and the facts constituting *his defense* in the action is not sufficient. *Id.*
17. CHANGE OF VENUE—PREJUDICE OF JUDGE—AFFIDAVIT OF.—An affidavit for a change of venue on the ground of prejudice of the judge and of the inhabitants of

the county must state the facts showing such prejudice. A mere averment of prejudice is not enough. *De Walt* v. *Hartzell* (Col.), IV, 572.

18. CHANGE OF VENUE—THE HEARING OF A MOTION FOR A CHANGE OF VENUE to the county of defendant's residence, made at the time of defendant's appearance and demurring, can not be postponed by the court until the defendant's answer is filed, and leave granted to the plaintiff to make a cross-motion to retain the case on the ground of convenience of witnesses. *Heald* v. *Hendy* (Cal.), III, 102.

19. CHANGE OF VENUE—ORDER REFUSING.—An order overruling an application for a change of the place of trial to the district in which the cause of action arose will not be reversed when the complaint fails to state a cause of action. *Felt* v. *Judd* (Utah), III, 276.

20. CHANGE OF VENUE—CONVENIENCE OF WITNESSES—ANSWER.—Neither a plaintiff nor a defendant can move for a change of the place of trial because of the convenience of witnesses until after answer. *Thomas* v. *Placerville G. Q. Min. Co.* (Cal.), III, 777.

21. MOTION FOR CHANGE OF VENUE—COUNTER-AFFIDAVITS.—On an application by a defendant in a criminal prosecution for a change of the place of trial, the prosecution may file counter-affidavits contesting the grounds for which the removal is asked. *People* v. *Majors* (Cal.), II, 580.

22. ORDERS OF THE LOWER COURT OVERRULING A MOTION FOR A CHANGE OF VENUE, and for a continuance, will not be reversed unless the record discloses an abuse of discretion. *Territory of New Mexico* v. *Lopez* (N. M.), I, 821.

See EMINENT DOMAIN, 16, 17; PARTITION, 8; PLEADING AND PRACTICE, 33.

VERDICT.

1. VERDICT, GENERAL AND SPECIAL—INSUFFICIENCY OF EVIDENCE.—An appellate court will not set aside a general or a special verdict for insufficiency of evidence when they were both rendered upon substantially conflicting testimony as to the nature of the transaction, and the conduct of the parties which were in issue. Conclusions rendered as to the weight of the testimony of each witness, and inferences drawn by the jury from the facts proved by their testimony, are not reviewable on appeal. *Heath and Boody* v. *Scott* (Cal.), III, 644.

2. INSTRUCTIONS—VERDICT—SPECIAL FINDINGS.—By section 625 of the code of civil procedure, the court is authorized to instruct the jury, if they render a general verdict, to find upon particular questions of fact. *Learned* v. *Castle* (Cal.), III, 154.

See ACCOUNTING, 4; APPEAL, 54; ASSAULT WITH DEADLY WEAPON, 2, 4, 6; CRIMINAL LAW AND PRACTICE, 29; EMINENT DOMAIN, 12; MURDER AND MANSLAUGHTER, 50, 51; NEW TRIAL, 38; STATUTE OF LIMITATIONS, 25.

VERIFICATION.

1. VERIFICATION OF BILL IN EQUITY.—A bill in equity, even for an injunction, need not be verified unless it is intended to be used as evidence on an application for a provisional injunction. *Hughes* v. *Northern Pacific Railway Co.* (U. S. Cir. Ct., Or.), I, 21.

2. VERIFICATION OF ANSWER BY FOREIGN INSURANCE COMPANY.—A foreign insurance company that has appointed an agent here upon whom process may be served for it, as provided in sections 7 and 8 of the foreign corporation act (Or. Laws, 617), is not absent from the state, so that any agent or attorney thereof may verify its answer to a complaint, but such answer must be verified by the agent appointed under the statute to stand for the corporation, or by some other agent or attorney who has personal knowledge of the facts involved in the allegations therein. *West* v. *Home Insurance Co.* (U. S. Cir. Ct., Or.), I, 243.

3. VERIFICATION BY AN AGENT HAVING KNOWLEDGE OF THE FACTS.—Where an agent verifies an answer on the ground that the allegations thereof are within his personal knowledge, for the purpose of this verification the allegations in the answer are to be taken as part of his statement, and it must appear therefrom that the truth or falsity of such allegations is within his personal knowledge. *Id.*

4. WHERE AN ANSWER CONTROVERTS SUNDRY ALLEGATIONS IN THE COMPLAINT by simply denying any knowledge or information thereof sufficient to form a belief, and such answer is verified by an agent of the defendant, who states in the verification that the facts contained in the answer are within his knowledge, it does not appear that such agent was authorized to verify the same because of his personal knowledge of the material allegations therein, but the contrary. *Id.*

5. PERSONAL KNOWLEDGE OF AN ALLEGATION IN AN ANSWER, within the purview of section 79, is a personal knowledge of its truth or falsity; and if the allegation is a negative one, this necessarily includes a knowledge of the truth or falsity of the allegation denied. *Id.*
6. VERIFICATION OF A COMPLAINT IN WHICH NOTHING IS STATED ON INFORMATION OR belief need not contain the statutory words, "except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true." *Kelly* v. *Kelly* (Nev.), I, 143.
7. THE VERIFICATION OF AN ANSWER BY THE DEFENDANT IS SUFFICIENT when the affidavit states "that the matters set forth in the foregoing answer are true, except as to those matters therein stated on information or belief, and as to those matters that he believes them to be true." *Fleming* v. *Wells* (Cal.), III, 159.

See CONTEMPT, 12; MECHANICS' LIENS, 18; PATENT, 1; PROBATE COURTS, 1; RECEIVER, 3.

VESSELS.

1. AN INCHOATE HULL IS NOT A VESSEL within the meaning of section 733 of the Oregon code, so as to require the sale or transfer thereof to be in writing. *Yarnberg* v. *Watson* (Or.), III, 340.

VIGILANCE COMMITTEE.

See DAMAGES, 3.

WAIVER.

See INSURANCE, 6; TENDER, 1.

WARD.

See GUARDIAN AND WARD.

WAREHOUSEMAN.

1. WAREHOUSEMAN'S RECEIPT, TRANSFER OF.—In the absence of statutory enactment, a warehouseman's receipt is not a negotiable instrument, and an assignment thereof operates merely as a transfer of the property deposited, and passes no better title to the purchaser than the vendor had. *Solomon* v. *Bushnell* (Or.), II, 818.

See TAXATION, 50.

WARRANTS.

1. BONA FIDE PURCHASER OF WARRANT.—Where a warrant is issued by the auditor of the city and county of San Francisco, in pursuance of the mandate of the court, payable to the plaintiff in the proceeding for *mandamus* or his attorney, a *bona fide* purchaser thereof from such attorney acquires a good title as against such plaintiff. Such warrant is not a negotiable instrument. *Sweeney* v. *Sutro* (Cal.), I, 557.
2. COUNTY WARRANTS—WHO MAY SUE.—County warrants payable to bearer are not negotiable as bills of exchange and promissory notes. All holders take them subject to any defense that may be made against the original payee. Nevertheless, the property therein passes by delivery when they are payable to the holder. Hence, when the holder is a citizen of another state he may maintain action thereon in the federal court, even when the payee can not maintain such action. *Jerome* v. *Comm'rs Rio Grande Co.* (U. S. Cir. Ct., Col.), I, 540.
3. SAME—DUE AS UPON DIRECT PROMISE.—Such instruments are not assignable within the meaning of the act of congress of 1875, regulating the jurisdiction of federal courts (18 Stat. 470). They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the first holder. *Id.*
4. SAME—REMEDY.—In such case the remedy (in the United States courts) of the holder in the first instance is by action at law prosecuted to judgment, as a foundation for *mandamus* to compel the levy and collection of a tax for their payment. *Id.*
5. UPON WARRANTS issued for interest on a judgment, an action will not lie. *Id.*

WARRANTY.

1. BREACH OF WARRANT OF TITLE—MEASURE OF DAMAGES.—The measure of damages in an action for breach of warranty of title to real estate is the value of the property at the time of sale, to be ascertained by the purchase price, with interest thereon and reasonable costs, if any were expended in defense of the title by plaintiff. *Hoffman* v. *Bosch* (Nev.), IV, 36.

See SALE.

WASTE.

See INJUNCTION, 17; LANDLORD AND TENANT, 7, 8; PUBLIC LANDS, 16.

WATER RIGHTS.

1. NAVIGABLE STREAMS.
2. RIGHTS ACQUIRED BY APPROPRIATION.
3. RIPARIAN PROPRIETORS.

1. NAVIGABLE STREAMS.

1 POWERS OF CONGRESS OVER NAVIGABLE STREAMS.—Congress has no power, even by express statute, to authorize a public nuisance destroying or materially obstructing the navigability and navigation of navigable streams within a state, for purposes wholly unconnected with commerce or post-roads. Its power over such streams is limited to the regulation of commerce and establishing post-roads, and it can not authorize the navigability of a navigable stream to be totally or partially destroyed for purposes having no connection with or tendency to benefit the operations of commerce or the carrying of the mails. *Woodruff* v. *North Bloomfield G. M. Co.* (U. S. Cir. Ct., Cal.), I, 183.

2. POWERS OF THE STATE OVER NAVIGABLE STREAMS.—A state can not, except under its power of eminent domain, and upon making just compensation, interfere with the navigable streams within its territory, in any manner, or for any purpose, other than that of regulating, preserving, and protecting the public easement of navigation therein. *Id.*

3. ACT ADMITTING CALIFORNIA INTO THE UNION.—The provision of the act admitting California into the Union "upon the express condition * * * that all the navigable rivers within said state shall be common highways, and forever free as well to the inhabitants of said state as to the citizens of the United States," is valid as a law under the authority of congress to regulate commerce, which the state has no authority to violate, and with which it can not interfere. *Id.*

4. THE STATE HAS THE RIGHT TO CONTROL AND REGULATE THE PUBLIC USE OF THE NAVIGABLE WATERS within its boundaries, subject only to restraints upon such right arising out of the power of congress over commerce. *People* v. *Williams* (Cal.), I, 572.

5. THE WALLAMET RIVER A NAVIGABLE WATER OF THE UNITED STATES.—The Wallamet river, though wholly within the state of Oregon, by means of its connection with the Columbia river, forms a highway for interstate and foreign commerce, and is therefore a navigable water of the United States, and subject, as such, to the control of congress. *Wallamet Iron Bridge Co.* v. *Hatch* (U. S. Cir. Ct., Or.), II, 230.

6. NAVIGABLE WATERS IN OREGON ARE COMMON HIGHWAYS.—The act of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that the navigable waters therein shall be "common highways, and forever free" to the citizens of the United States, is not a compact made with or condition imposed upon the state in consideration of its admission into the Union, but is, so far, an absolute and valid regulation, made by congress in pursuance of its power over the navigable waters of the United States, as a means of interstate and foreign commerce, which it might as well have enacted before or after as at the time of such admission. *Id.*

7. OBSTRUCTION TO "COMMON HIGHWAY."—Congress, by the act of 1859, having declared the Wallamet river "a common highway," the state can not authorize any one to build a bridge across the same, which, under the circumstances of the case, will needlessly impede or obstruct the navigation thereof. *Id.*

8. JURISDICTION OF THE UNITED STATES CIRCUIT COURT.—The Wallamet river being declared "a common highway" by congress, the question of what constitutes a needless, and therefore unlawful, obstruction thereto, arises under a law of the

United States, and therefore the United States circuit court has jurisdiction to hear and determine a suit involving the same. *Id.*

9. THE ORDINANCE OF 1787.—*Semble*, that the clause in the fourth article of the compact in the ordinance of 1787, concerning the navigable waters of the north-west territory, was not abrogated or superseded by the formation of states therein and their admission into the Union. *Id.*

10. INTERNAL NAVIGABLE WATERS—POWER OF CONGRESS OVER.—Congress has power, under its authority to regulate commerce and establish post-roads, to control for those purposes the internal navigable waters of the various states. As soon as congress legislates in regard to any such navigable waters, its power becomes exclusive, and the states can not afterward authorize any material obstruction to their navigation; but till congress acts, the legislature of any state has the power to authorize the obstruction of any navigable waters within its borders by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse. *Cardwell* v. *American River Bridge Company* (U. S. Cir. Ct., Cal.), II, 759.

11. THE ACT OF CONGRESS ADMITTING CALIFORNIA INTO THE UNION, which provides that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor, it would seem, should be regarded as a valid regulation by congress of the navigable waters of California, which would withdraw them from the operation of state legislation authorizing the construction of a bridge over a navigable stream, such as the American river, that would utterly destroy its navigability. *Id.*

12. THE CASE OF ESCANABA CO. *v.* CHICAGO, 107 U. S. 679, COMMENTED ON, and the points supposed to distinguish it from that case pointed out. *Id.*

13. THE RIGHT OF THE STATE TO CONTROL AND REGULATE THAT PORTION OF CHANNEL STREET, between Fourth and Fifth streets, in the city and county of San Francisco, which is covered by the waters of the bay of San Francisco, and navigable by vessels engaged in commerce, was not surrendered by the statute of March 26, 1851, granting to the city of San Francisco the tide-lands known as the beach-and-water lots, and establishing a permanent water-front for such city, nor by the statute dedicating certain streets in such city to public use as streets: Stat. 1858, p. 324; nor by the statute of March 20, 1868, dedicating a certain portion of Channel street to be an open channel, and authorizing such city to extend streets across it by arched or draw bridges; nor by the statute of March 30, 1868, establishing a board of tide-land commissioners; nor by the statute of April 1, 1872, offering to dedicate such portion of Channel street to the city and county of San Francisco on certain conditions, which have never been complied with. *Id.*

14. NORTHERN PACIFIC AUTHORIZED TO BRIDGE A NAVIGABLE WATER ON THE LINE OF ITS ROAD.—The Northern Pacific Railway Company was authorized by said acts "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railway" from Lake Superior to Portland, Or., "with all the powers, privileges, and immunities necessary to carry into effect the purpose" of said acts; the same "to be constructed in a substantial and workmanlike manner, with all the necessary draws, * * * bridges, etc., * * * equal in all respects to railways of the first class;" and it is necessary to cross the Wallamet river with such road in order to reach Portland from the eastward. *Held*, that the right of the Northern Pacific Railway Company to build and maintain a draw-bridge across said river or other navigable water on the line of its road to Portland without causing any unnecessary injury or obstruction to the usefulness thereof, is clearly implied in said acts; but that congress not having prescribed the exact location or particular character of said bridge, the right of the corporation to construct it is subject to the judgment of the proper court, as to whether it is being constructed without unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby, or likely to be. *Hughes* v. *Northern Pacific Railway Company* (U. S. Cir. Ct., Or.), I, 21.

2. RIGHTS ACQUIRED BY APPROPRIATION.

15. RIGHTS OF A PRIOR APPROPRIATOR OF WATER MAY BE LOST BY AN ADVERSE USE thereof by another, for a sufficient length of time, and the prior appropriator's acquiescence therein. *Smith* v. *Logan* (Nev.) I, 391.

16. PRIOR APPROPRIATOR OF WATER WHO FOR MANY YEARS MAKES NO USE thereof, but allows another to construct a ditch and divert such water without notifying the latter of his prior appropriation, will be presumed to have abandoned the same. *Dorr* v. *Hammond* (Col.), I, 357.

17. RIGHTS TO THE USE OF WATER ACQUIRED BY APPROPRIATION, and used by the appropriator for the purpose of irrigating certain lands on which he was trespassing, did not become appurtenant to such lands, and pass to one in the possession under a contract for the sale thereof with the owner. *Smith* v. *Logan* (Nev.), I, 391.
18. ANY RIGHTS ACQUIRED BY A SETTLER ON PUBLIC LANDS BORDERING UPON A STREAM, the waters of which had been previously appropriated, are taken subject to such appropriation. *Lytle Creek Water Co.* v. *Perdew* (Cal.), I, 866.
19. WHEN THERE IS NOTHING IN THE RECORD TO INDICATE THAT WHEN ALL THE WATERS of a certain stream were appropriated any of the lands by or through which such stream flowed had passed into private ownership, it will be presumed that such lands were public lands of the United States. *Id.*
20. IN AN ACTION BY AN APPROPRIATOR OF THE WATER OF A CERTAIN STREAM TO RESTRAIN A DEFENDANT FROM DIVERTING the same, when the court finds that the plaintiff has a separate title to the use of all the water for a certain length of time out of a longer period, and that other appropriators had a right to the use thereof, but fails to find as to the order in which the persons interested in the appropriation used it, or as to the times when the periods during which the plaintiff would be entitled to the exclusive use would recur, no decree fixing the rights of the plaintiff or prohibiting the defendant from interfering therewith can be entered, unless the other persons entitled to the use of such water are made parties to the action. *Id.*
21. LEGISLATURE HAS POWER TO PROVIDE THAT THE OWNER OF AN EXISTING WATER DITCH upon or across his own land, or the land of another, shall not prohibit a third person from using and enlarging the same; but it can not limit or direct the compensation to be paid for the property so taken, or the damages occasioned by enlarging the ditch, or otherwise. *Trippe* v. *Overacker* (Col.), I, 352.
22. PROPRIETOR OF AN IRRIGATING DITCH, WHETHER UPON HIS OWN LAND or that of another, has a property ownership both in the ditch and the right of way therefor, and a third person can not use or enlarge the same without the owner's consent, except upon payment of just compensation as provided by the constitution. *Id.*
23. COVENANTS IN RELATION TO THE USE OF WATER, WHEN RUN WITH THE LAND.—Where the owners of two adjoining tracts of land, separated by a stream, covenant and agree between themselves as such owners, that the waters of such stream should be taken and conveyed to a reservoir on the land of one owner, by ditches and flumes constructed at their joint expense, and that from such reservoir the other owner might construct ditches across such land and convey one half of the water to his own premises, such covenants run with the land; and the successor in interest of the owner on whose land the reservoir is situated can not, by going to a point higher up on the stream, and taking water therefrom and conveying it to his land, claim the whole of it for his own use. Nor will such exclusive right be created by the statute of limitations in the absence of an adverse use. *Weill* v. *Baldwin* (Cal.), I, 551.
24. GRANTEE OF LAND BY DEED, WHICH GIVES HIM THE RIGHT TO TAKE SUFFICIENT WATER from certain ditches "to irrigate the land conveyed and for domestic purposes, to an amount not exceeding two hundred inches," upon condition that he should "pay *pro rata* as the amount of water he uses on the land conveyed shall bear to the whole amount of water that is conveyed in said ditches, for any needed repairs of said ditches," has the option of using whatever amount of water he deems sufficient for these purposes, and is not liable for the expenses incurred in repairing the ditches beyond a *pro rata* proportion, based upon the quantity of water actually used or demanded by him. *Brown* v. *Evans* (Nev.), I, 387.
25. WHERE, HOWEVER, SUCH GRANTEE SERVES THE GRANTOR WITH NOTICE THAT HE REQUIRES a specific quantity of water, and the same is furnished him, he is estopped from denying that he did not need the same and did not use it. And in an action against him to recover his proportionate share of such expenses, such notices, so long as they remain unrevoked, are admissible in evidence to show the amount of water used by him. *Id.*
26. JUDGMENT REVERSED ON THE AUTHORITY OF ANAHEIM WATER CO. *v.* SEMI-TROPIC WATER CO., 12 Pac. C. L. J. 158. *Santa Ana Valley Irrigating Co.* v. *Anaheim Water Co.* (Cal.), I, 487.
27. ACTION BY PRIOR APPROPRIATOR—ESSENTIAL AVERMENTS.—A complaint by a prior appropriator of water, which alleges the ultimate fact of the legal right in the subject-mater of the action as being in the plaintiff, need not allege the subordinate facts tending to prove such ultimate fact, such as the date of the plaintiff's location, or the location, size, grade, or capacity to carry water, of any of his ditches. *Lorenz et al.* v. *Jacobs et al.* (Cal.), II, 722.

28. WRONGFUL DIVERSION OF WATER—INJUNCTION.—Where any one of two or more co-owners in the use of the waters of a stream, which has been appropriated by them for a beneficial purpose, diverts for use a greater quantity of the water than of right belongs to him, so as to perceptibly reduce the volume of water flowing in the stream and to materially diminish the quantity to which the others are entitled, in consequence of which they are damaged and their rights violated, such parties are entitled to an injunction enjoining the wrong-doers from diverting the water to their injury. *Id.*

29. RECORD OF FORMER JUDGMENT—ADMISSIBILITY OF.—In an action where the question at issue is the quantitative interest of the parties in the natural flow of a certain stream, the record of a former action of partition, wherein certain of the present plaintiffs and defendants were parties, and where issue was joined as to their respective interests, is admissible as against such parties. *Id.*

30. SUBSEQUENT APPROPRIATION OF THE WATERS OF A RAVINE, which had been prior appropriated, only extends to the waters suffered to go to waste by the prior appropriator. *Brown* v. *Mullin* (Cal.), II, 133.

31. A FINDING THAT THE PLAINTIFF WAS ENTITLED TO WATERS of a certain ravine held unsupported by the evidence. *Id.*

32. ABANDONMENT, EVIDENCE OF.—A failure to use water appropriated for a time is competent evidence on the question of abandonment, and if such non-user continues for an unreasonable period, it may create a presumption of intention to abandon. Such presumption is not conclusive, but may be overcome by other satisfactory evidence. *Sieber* v. *Frink* (Cal.), II, 98.

33. CHANGE OF POINT OF DIVERSION, EFFECT OF.—An appropriator's rights of priority are not affected by a change of eighty feet in the point of diversion, when both points of appropriation were upon the same stream, and no change was made in the quantity of water diverted, and no one was injured by the removal, and the use and the points of application of such use remained the same. *Id.*

34. APPLICATION OF THE WATER TO SOME USEFUL INDUSTRY is essential to a valid appropriation. Such application must be made within a reasonable time to the business for which the appropriation was made. What constitutes such reasonable time is a question of fact, depending upon the circumstances of each case. *Id.*

35. INCREASE IN THE AMOUNT OF WATER APPROPRIATED.—Where a prior appropriator of water subsequently enlarges his ditches, and diverts a larger amount of water than that originally appropriated, his right to the increased flow is taken subject to the rights of other appropriators which attached prior to time of enlargement. *Id.*

36. AN APPROPRIATION OF WATER IS NOT COMPLETE UNTIL THE ACTUAL DIVERSION or the use of the water; but if the appropriator prosecutes his work with reasonable diligence his right of appropriation relates to the time when the first step was taken to secure it. *Id.*

37. APPROPRIATION AND DIVERSION OF WATER—TRESPASS—INJUNCTION.—One of several appropriators of the entire waters of a stream is entitled to have the unlawful diversion thereof by a mere trespasser enjoined, although the plaintiff's co-appropriators are not before the court, and the time when the plaintiff is entitled to use such waters has not, as between him and his co-appropriators, been fixed in any way. *Lytle Creek Water Co.* v. *Perdew et al.* (Cal.), III, 410.

38. APPROPRIATION OF WATER—RIGHTS OF APPROPRIATORS.—As between two appropriators of the waters of the same stream, the one whose appropriation was first made has the prior right to the use of such water. *Simpson* v. *Williams* (Nev.), IV, 580.

39. THE SAME—AMOUNT OF WATER TO WHICH APPROPRIATOR IS ENTITLED.—The amount of water to which a prior appropriator is entitled is limited to the amount actually applied to the purpose for which the appropriation was made. *Id.*

40. APPROPRIATION OF WATER—RIGHT OF, WHEN BEGINS—RELATION.—In determining the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water. The right to the use of the water relates back to the time when the appropriator begins his dam, ditch, flume, or other appliance, by means of which the appropriation is effected; provided the enterprise is prosecuted with reasonable diligence. Under the circumstances of this case, a delay for one season, in using the water, was not unreasonable. *Irwin* v. *Strait et al.* (Nev.), IV, 582.

3. RIPARIAN PROPRIETORS.

42. RIGHTS OF GRANTEE IN NATURAL STREAMS AT COMMON LAW IN CALIFORNIA.—Whatever limitations there may be upon the right which the grantee of a parcel of

land acquires in a natural stream of water running over it, it is well settled, both by the common law and in this state, that the right itself is incident to the property in the land, and passes by a grant thereof, an incorporeal hereditament. *Lux et al.* v. *Haggin et al.* (Cal.), IV, 256, 275.

43. THE SAME—APPROPRIATION OF WATER—CONSTRUCTION OF CODE AND UNITED STATES STATUTES.—One who purchases land from the United States, or from this state, after the whole or some part of the water of a natural watercourse, running through such land, has been appropriated by some one else, under the act of congress of July 26, 1866, or under the provisions of title 8 of the civil code of this state, takes such land subject to the rights acquired by such prior appropriator. Such provisions of the civil code only affect water flowing over lands owned by this state or by the United States. They do not affect the rights of riparian proprietors: 1. Because it is expressly declared that they shall not; and 2. Because an owner of land can not be divested of any interest which he has acquired therein, except for a public use, and not then until just compensation has been made. *Id.*

44. THE SAME—APPROPRIATION OF WATER ON PUBLIC LAND AFTER DATE OF PURCHASE.—The right of a purchaser of public lands of this state to have a natural stream of water flowing thereon, at the date of his purchase, continue to flow *currere solebat*, is not affected by an appropriation of the waters of such stream, made subsequent to the date of his purchase, but prior to the date of his patent. *Id.*

45. RIGHTS OF RIPARIAN PROPRIETORS, AS BETWEEN THEMSELVES AND OTHERS.—A riparian proprietor has a right to the reasonable use of water, flowing in a natural stream over his land. What is a reasonable use, in any given case, depends upon the facts and circumstances of that case. But it is only as between riparian proprietors that the question can ever arise. One not a riparian proprietor has no right to interfere in any way with the natural flow of a stream of water over a riparian proprietor's land. *Id.*

46. THE SAME—ESTOPPEL IN PAIS—WHAT AMOUNTS TO.—A riparian proprietor is not estopped from disputing the validity of an appropriation of the waters of a stream flowing through his land, by the mere fact that he knew of the intention of the appropriator to divert such water before any was diverted, and of the construction of works for such purpose, but made no objection thereto before bringing an action to prevent the same. *Id.*

47. A RIPARIAN PROPRIETOR IS NOT ENTITLED TO DIVERT AND USE ALL THE WATERS OF A STREAM for purposes of irrigation, without regard to the wants and necessities of other riparian proprietors, although the amount so diverted and used was no more than necessary for the irrigation of his land. *Learned* v. *Tangeman et al.* (Cal.), III, 153.

48. A RIPARIAN PROPRIETOR MAY RESTRAIN THE DIVERSION OF ANY WATER FROM HIS STREAM on the part of one who has conducted water into it by artificial means, unless the latter show that he has not taken from the stream more water than he led into it. *Wilcox* v. *Hausch* (Cal.), I, 481.

49. ONE IN THE POSSESSION OF LAND UNDER AN UNEXECUTED CONTRACT FOR THE SALE THEREOF can not assert the rights of a riparian proprietor in an adjoining stream. *Smith* v. *Logan* (Nev.), I, 391.

50. DIVERSION OF WATER—REMOVAL OF DAM—PRELIMINARY INJUNCTION.—The superior court has jurisdiction to grant a preliminary injunction restraining an alleged trespasser from diverting the waters of a stream during the litigation, and to require him to remove the means by which the diversion is made. *Johnson* v. *Superior Court of Tulare County* (Cal.), III, 677.

See BOARD OF HARBOR COMMISSIONERS, 1; CORPORATIONS, 54; DEDICATION, 5; EASEMENTS, 5; EXECUTIONS, 1; INJUNCTION, 21; LARCENY, 17; NUISANCE, 4.

WHARVES.

See BOARD OF HARBOR COMMISSIONERS,

WIFE.

See HUSBAND AND WIFE.

WILLS.

1. WRITING PROPOSED AS AN OLOGRAPHIC WILL CAN NOT BE ADMITTED TO PROBATE, where any part of the date, such as the year, is not written by the deceased,

although the rest of the writing complies with the statutory requirements in reference to such wills. *Estate of Billings* (Cal.), I, 140.

2. WHERE AN UNMARRIED PERSON HAS MADE A WILL, AND AFTERWARDS MARRIES, the marriage, whether followed by the birth of issue or not, operates by presumption of law, in case of the survival of the wife or children, as a revocation of the will, unless some specific provision has been made by the will itself, or by marriage contract for the wife, or by some settlement or provision for any surviving children. Such presumption of revocation depends upon the question of survivorship, and does not admit of evidence to the contrary unless provision has been made for the wife or children surviving. *Sanders* v. *Simcich* (Cal.), I, 868.

3. IN DETERMINING THE SPECIAL ISSUES SUBMITTED TO THEM, IN PROCEEDINGS FOR THE PROBATE of a will, the jury should not take into consideration family difficulties, except as bearing on the testamentary capacity of the deceased. *Estate of Lang* (Cal.), I, 773.

4. COURTS WILL NOT PRESUME, BECAUSE A TESTATOR IS A DRUNKARD, that therefore he is of unsound mind. *Id.*

5. THE INTENT WITH WHICH A TESTATOR TORE HIS SIGNATURE FROM HIS WILL, while of unsound mind, does not constitute an element of revocation. *Id.*

6. A LEGACY WHICH THE TESTATOR DIRECTS TO BE PAID OUT OF THE FIRST MONEYS realized from his estate, after the payment of debts and funeral expenses, does not become due and payable, and consequently does not bear interest, until after such debts and funeral expenses are paid. *Estate of James* (Cal.), I, 775.

7. A DEVISE OF CERTAIN REAL ESTATE IS NOT VOID FOR RESTRAINING THE POWER OF ALIENATION beyond the time authorized by statute, where a testatrix gives the same to her two daughters "in common, for the term of their natural lives, and after their death, or the death of either of them, the share of the one dying to her children in fee simple, the children of each daughter to take one half thereof; or in case of the death of either of said daughters without issue, then the children of the other daughter to take all of the same;" provided that neither of such daughters could sell the same; and provided that no one of their children should have the power to sell his interest until after all of the children taking shall attain majority; "and if any of said children shall die during minority, then the brothers or sisters, by my said daughters, of the child or children so dying, shall take all of the said property in the same manner as though the child or children dying had never been born; and upon the death of all the children of either of my daughters, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee; and that all of the children of both my daughters who shall attain the age of majority, and none other, shall be and become, at such time as all living children of my said daughters shall attain to the age of majority, sole and absolute owners in fee simple of said property." *Buchanan* v. *Schulderman* (Or.), I, 685.

8. TESTATOR'S MENTAL UNSOUNDNESS, HOW ALLEGED.—A testator's mental unsoundness is sufficiently averred by an allegation that at the time of signing the supposed will he was not of sound and disposing mind, but on the contrary he was at such time of unsound mind. *Estate of Crozier* (Cal.), III, 377.

9. DEVISE—LEGACY CHARGED ON LAND—ELECTION.—A devisee, by accepting a devise charged with the payment of a legacy, becomes personally liable therefor; and although the will gives the devisee the option of discharging the legacy by conveying to the legatee land equal in value to the amount of the legacy, he will be presumed to have elected to pay the same in money, notwithstanding the estate has not been fully distributed, if for a long number of years he receives the rents and profits of the devise, without directly manifesting his election, and it appears that such devise is amply sufficient to discharge such legacy. *Dunne et al.* v. *Dunne* (Cal.), III, 426; *Id.*, IV, 523.

10. WILL CONSTRUED—TRUSTS—RECOMMENDATION AND REQUEST.—The will of David D. Colton contains this provision: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seised or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." *Held*, that this provision is not an absolute gift or bequest in trust for the mother and sister of the testator; that is, not an imperative command to make the provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of his surviving wife. *Colton* v. *Colton* (U. S. Cir. Ct., Cal.), IV, 11, 18.

11. TRUSTS ARISING FROM PRECATORY WORDS IN WILLS.—The conditions necessary to raise a trust from words of recommendation and request in a will discussed. *Id.*
12. RULES FOR CONSTRUCTION ON WILLS under the civil code of California stated and applied. *Id.*
13. DEVISE—CONSTRUCTION OF—SALE AND REPURCHASE OF LAND DEVISED.—A testator devises to his son "all that portion of real estate he has inclosed and now has in his possession, supposed to contain one hundred and forty acres, more or less." By other provisions of the will an intention was manifested to dispose of all the property the testator possessed. Subsequent to the date of the will he sold a portion of the land devised, and afterward bought the same back. *Held*, that the portion so sold and bought back passed to the son under the foregoing devise. *In re Estate of Hopper* (Cal.), IV, 368.
14. IDENTIFICATION OF LAND DEVISED—EVIDENCE TO SHOW.—In an action by a devisee to recover the value of a tract of land distributed to him, but which had been lost to the estate of the testator by the inexcusable negligence of an executor, extrinsic evidence is admissible to identify the land described in the complaint by metes and bounds with that described in the inventory and decree of distribution. *Wheeler* v. *Bolton* (Cal.), IV, 370.

See ESTATES OF DECEASED PERSONS, 7; EVIDENCE, 28; FINDINGS, 26; MEXICAN GRANTS, 6.

WITNESSES.

1. CHINESE WITNESSES.—Chinese persons are, under the constitution and laws of the United States guaranteeing to them "the equal protection of the laws," competent witnesses. *In re Tung Yeong* (U. S. Dist. Ct., Cal.), I, 647.
2. A CHINESE PERSON IS NOT INCOMPETENT AS A WITNESS WHO TESTIFIES ON HIS EXAMINATION, before being sworn, that he believed in the Chinese religion, and knew that he was to tell the truth, although the record does not show what such religion teaches in regard to the existence of a supreme being, or in regard to future rewards and punishment. *Territory of New Mexico* v. *Yee Shun* (N. M.), I, 666.
3. THE PARTY OBJECTING TO THE COMPETENCY OF A WITNESS for a want of religious belief must show such want by evidence *aliunde*. *Id.*
4. DEAF AND DUMB WITNESS—COMPETENCY OF.—A deaf and dumb child about nine years of age, who has no idea of the nature or sanctity of an oath, and who can not be made to understand questions asked him, is not competent as a witness. *Territory etc.* v. *Duran et al.* (N. M.), II, 274.
5. IMPEACHMENT OF WITNESS—FORM OF QUESTION.—For the purpose of impeaching a witness on account of his general reputation, the inquiry is not confined to the general reputation for truth and veracity, but may extend to his general reputation for truth, honesty, and integrity. *Heath* v. *Scott* (Cal.), III, 644.
6. SAME—RESIDENCE OF IMPEACHING WITNESS.—If an impeaching witness has knowledge of the general reputation of the person impeached in the community, the residence of such witness is matter for the jury to consider, and not the court. If he had any knowledge, he is entitled to speak, and it is for the jury to determine the value of his testimony. *Id.*
7. IMPEACHMENT OF WITNESS—LAYING FOUNDATION—HOSTILITY.—The same foundation must be laid for the impeachment of a witness, in showing his declarations hostile to the prisoner, as in showing his contradictory statements. *State* v. *Stewart* (Or.), III, 229.
8. IMPEACHMENT OF WITNESS—CONVICTION, HOW PROVED.—Under section 2051 of the code of civil procedure a witness may be impeached by asking him if he has been convicted of a felony. The conviction of a misdemeanor, however, must be proved by the record of conviction. *People* v. *Schenick* (Cal.), IV, 77.
9. MURDER—IMPEACHMENT OF WITNESS.—On a trial for murder a witness for the defense was asked in substance whether the prisoner had ever informed her that he intended to kill the deceased. She answered no. Subsequently the prosecution called a witness, who was asked whether the former witness had ever said anything to her about the defendant going to kill the deceased. The defendant objected to the inquiry: 1. Because the matter upon which it was sought to impeach the former witness was immaterial to the issues; and 2. Because a proper foundation had not been laid for the impeachment. The court overruled the objection. *Held*, that the evidence should have been excluded. *People* v. *Bush* (Cal.), II, 575.

10. EVIDENCE OF THE GOOD CHARACTER OF A WITNESS CAN NOT BE GIVEN UNTIL after such witness's character has been attacked by evidence that his reputation for truth, honesty, and integrity is bad. *Id.*

11. AMENDED COMPLAINT—IMPEACHMENT OF WITNESS.—By the verification of an original complaint the plaintiff makes its statements his own. After the filing of an amended complaint the original ceases to perform any office as a pleading, and its averments can not be used to disprove those of the amended complaint. But where the plaintiff testifies as a witness in his own behalf, the original complaint is admissible in evidence, for the purpose of impeaching him, when the statements contained therein are inconsistent with his statements as a witness. *Johnson* v. *Powers* (Cal.), II, 740.

12. COMPELLING THE ATTENDANCE OF WITNESSES.—Judgment will not be reversed for the refusal of the trial court to compel the attendance of witnesses who had been subpœnaed and had come to the place of trial, but who had afterwards refused to appear in court and testify unless their fees were first paid, especially where the affidavit used on the motion to compel such attendance failed to set forth what was expected to be proved, or even aver that their testimony would be necessary, pertinent, or in any way material in the case. *People ex rel. Dean* v. *Comm'rs of Grand Co.* (Col.), II, 112.

13. EXCLUSION OF WITNESSES ON TRIAL.—The exclusion of witnesses from the courtroom during the progress of a criminal trial is within the discretion of the court. It is not error for the trial court to permit the prosecution to call a witness who has inadvertently violated its order excluding witnesses. *People* v. *O'Loughlin* (Utah), I, 164.

See CONTINUANCE, 3–6; COSTS, 1; CRIMINAL LAW AND PRACTICE, 15; EVIDENCE; LACHES, 4; MURDER AND MANSLAUGHTER, 82; NEW TRIAL, 8.

WRIT OF ASSISTANCE.

1. TENANT FOR YEARS—PRIORITY OF, OVER SUBSEQUENT MORTGAGEE.—The assignee of an estate for years, claiming under a duly recorded lease, is entitled to priority over a mortgage executed subsequent to the date of the lease, although the assignment of the lease was made after a decree foreclosing such mortgage. If a writ of assistance is asked for under such decree, and if, after the assignee of such estate for years had appeared and opposed such issuance, the court had nevertheless directed the writ to issue, and the assignee had been amoved thereunder, such facts would not have constituted an adjudication of his rights, which would have estopped his assertion of them in a subsequent action. Courts will not undertake to settle the conflicting legal or equitable rights of persons not parties to a foreclosure suit, upon an application for a writ of assistance. *Enos* v. *Cook* (Cal.), II, 733.

WRIT OF ERROR.

1. WRIT OF ERROR WILL BE DISMISSED WHEN THE RECORD FAILS TO DISCLOSE that a final judgment has been rendered. *Stevens* v. *Solid Muldoon Printing Co.* (Col.), I, 498.

WRIT OF REVIEW.

See CERTIORARI.

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